BRB No. 13-0591 BLA

BEULAH MATNEY (Widow of DELFORD MATNEY) Claimant-Respondent v. S & M COAL COMPANY, INCORPORATED and SUN COAL Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/30/2014 DECISION and ORDER

Appeal of the Decision and Order on Remand of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2009-BLA-5605) of Administrative Law Judge Pamela J. Lakes (the administrative law judge) awarding

benefits on a survivor's claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited the miner with 16.5 years in underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. Although the administrative law judge found that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), she found that the evidence established total respiratory disability pursuant to 20 C.F.R. §§718.204(b)(2)(iv) and 718.204(b) overall. The administrative law judge therefore found that claimant was entitled to invocation of the presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board vacated the administrative law judge's length of coal mine employment finding and her finding that claimant was entitled to invocation of the presumption of death due to pneumoconiosis at amended Section 411(c)(4). *Matney v. S & M Coal Co.*, BRB No. 12-0175 BLA, slip op. at 6 (Jan. 22, 2013)(unpub.). Further, in interest of judicial economy, the Board affirmed the administrative law judge's finding that the miner's usual coal mine employment required heavy manual labor. *Matney*, BRB No. 12-0175 BLA, slip op. at 8 n.6. The Board also affirmed the administrative law judge's determination that Dr. Perper's opinion is supportive of a finding of total disability, in light of the exertional requirements of the miner's usual coal mine work, which required him to perform heavy manual labor. *Matney*, BRB No. 12-0175 BLA, slip op. at 8. However, the Board held that the administrative law judge erred in concluding that Dr. Oesterling's opinion did not squarely address the issue of total disability. *Matney*, BRB No. 12-0175 BLA, slip op. at 9. Consequently, because she did not weigh Dr. Oesterling's opinion prior to concluding that the miner was totally disabled, the Board vacated the administrative law judge's finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) and remanded the case for further consideration. *Id*. The Board instructed the administrative law judge to consider whether Dr. Tuteur's opinion weighed against a finding that the miner's respiratory impairment was, in fact, totally disabling. *Id*. The Board also instructed the administrative law judge to address whether Dr. Caffrey's belief that the miner's chronic obstructive pulmonary disease (COPD) was not a significant medical problem weighed against a finding of total disability. *Matney*, BRB No. 12-0175 BLA, slip op. at 9 n.7.

[1] Claimant is the widow of the miner, who died on December 29, 2007. Director's Exhibits 6, 8.

On remand, the administrative law judge credited the miner with 16.5 years in underground coal mine employment and found that the evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge therefore found that claimant was entitled to invocation of the presumption of death due to pneumoconiosis at amended Section 411(c)(4). Further, the administrative law judge found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant was entitled to invocation of the presumption of death due to pneumoconiosis at amended Section 411(c)(4). Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the presumption by establishing that the miner's death was not caused by pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

In 2010, Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this survivor's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where a survivor establishes that the miner had 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012).

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[2] Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.

[3] The record indicates that the miner was employed in the coal mining industry in Virginia. Director's Exhibit 4. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Initially, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. 30 U.S.C. §921(c)(4) (2012).

Next, we will address employer's contention that the administrative law judge erred in finding that the miner had at least 15 years of qualifying coal mine employment for the purpose of invoking the presumption of death due to pneumoconiosis at amended Section 411(c)(4). Employer asserts that the administrative law judge erred in calculating the miner's length of coal mine employment because "[she] did not validly explain how [the $50.00 per quarter] standard would establish 16.5 years of actual coal mine employment under the mandates of Section 725.101(a)(32) in light of all of the evidence in the record." Employer's Brief at 10. Further, employer argues that the standard set forth at Section 725.101(a)(32) is the correct legal standard to determine the length of a miner's coal mine employment. Employer maintains that the miner's vague and confusing testimony cannot carry claimant's burden of establishing the beginning and ending dates of his employment, except to the extent that it establishes that he was last employed in 1979. We hold that employer's assertions lack merit.

In determining the length of coal mine employment, an administrative law judge may apply any reasonable method of calculation. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). Contrary to employer's contention, the administrative law judge was not required to use the calculation method set forth in 20 C.F.R. §725.101(a)(32). The regulation provides only that an administrative law judge "may" use such method. *See* 20 C.F.R. §725.101(a)(32)(iii); *Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). Moreover, the regulatory formula may be used where the miner's employment lasted less than one year, or where the beginning and ending dates of the miner's coal mine employment cannot be established. *See* 20 C.F.R. §725.101(a)(32)(iii). Here, the administrative law judge reasonably found, based on the Social Security Administration (SSA) earnings record and the miner's testimony, that "the [m]iner's qualifying coal mine employment began in the last quarter of 1962 and extended through September 1979."[4] Decision and Order on Remand at 5; *see Daniels Co. v. Mitchell*, 479 F.3d 321, 335, 24 BLR 2-1, 2-24-25 (4th Cir. 2007). Thus, we reject employer's assertion that the administrative law judge erred in declining to apply the formula set forth at 20 C.F.R. §725.101(a)(32).

We also reject employer's assertion that the administrative law judge erred in failing to adequately explain how the $50.00 per quarter standard established that the

[4] The administrative law judge noted that the Social Security Administration earnings record showed that the last quarter of 1962 extended from October to December. Decision and Order on Remand at 5.

miner had 16.5 years of coal mine employment. The administrative law judge identified the number of quarters in each year in which the miner's SSA earnings record indicated that he earned at least $50.00 from coal mine employment, and credited the miner with a total of 59 quarters, or 14.75 years of coal mine employment for the years 1962 through 1977. In addition, based on the miner's testimony, the administrative law judge credited the miner with 1.75 years of coal mine employment for the years of 1978 and 1979, as the miner's earnings were not broken down by quarter during this time period. Adding these terms of employment together, the administrative law judge found that the miner had a total of 16.5 years of coal mine employment. The Board has held that this is a reasonable method of calculation. *See Clark*, 22 BLR at 1-280-81; *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Thus, the administrative law judge acted within her discretion in relying on the SSA earnings record to credit the miner for each calendar quarter from 1962 through 1977 in which he earned $50.00 or more from a coal company,[5] irrespective of the amount of the miner's earnings from quarter to quarter or year to year, for a total of 59 quarters or 14.75 years. *See Tackett*, 6 BLR at 1-841; *see also Muncy*, 25 BLR at 1-27. Further, because the administrative law judge acted within her discretion in finding that the miner's testimony regarding the length of his coal mine employment was credible, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), she permissibly credited the miner with an additional 1.75 years of coal mine employment from 1978 to 1979. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-92 (1988); *Tackett*, 6 BLR at 1-841.

In addition, the administrative law judge permissibly found that the record established that all of the miner's coal mine employment was underground,[6] based on the testimony of the miner and claimant regarding the nature of the miner's coal mine employment, and the employment history forms that supported it.[7] *Mabe*, 9 BLR at 1-68.

[5] Employer does not point to any specific quarter that was credited by the administrative law judge in which the miner earned less than $50.00 from a coal company.

[6] The administrative law judge stated that "the only employment that was **not** "inside" (i.e., underground) was the underage, nonqualifying employment," which she did not include in calculating the length of the miner's coal mine employment. Decision and Order on Remand at 9 (emphasis in original).

[7] The administrative law judge stated: "That the [m]iner's employment with Goff was underground is also supported by the [m]iner's written statements, in which he described his work with Goff as 'motorman' or 'run motor,' the same description he gave to his work with other employers, including Cartwood Coal. (DX 1, *Employment History Form* dated August 30, 1984; *see also* DX 4 [*Employment History Form* dated May 27, 2008, filled out by Claimant])." Decision and Order on Remand at 8 (emphasis in

The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Because the administrative law judge's determination in this case is based on a reasonable method of computation, and is supported by substantial evidence, we affirm her finding that the miner had 16.5 years of qualifying coal mine employment. *See Clark*, 22 BLR at 1-280-81.

Employer also contends that the administrative law judge erred in finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b). Specifically, employer asserts that the administrative law judge erred in finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Perper, Oesterling, Caffrey, and Tuteur.[8] The administrative law judge found that Dr. Perper's opinion was reasoned and documented, and that it supported a finding of total respiratory disability. By

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original).

[8] Dr. Perper, in a report dated March 13, 2010, found that the miner had a symptomatic inability to perform because of shortness of breath, cough, other respiratory symptoms and requirement of supplemental oxygen, as well as his worsening objective pulmonary findings with hypoxemia, which resulted in end-stage pulmonary failure. Claimant's Exhibit 6. Conversely, Dr. Oesterling, in a report dated January 17, 2011, found that the interstitial macular changes of coal workers' pneumoconiosis on the miner's autopsy slides were insufficient to alter function because of their limited structural change, and that this disease should not have produced lifetime respiratory symptomology, without alterations. Employer's Exhibit 3. Dr. Oesterling also found that the miner's emphysema was insufficient to have produced significant alterations in pulmonary function. *Id*. Dr. Caffrey, in a report dated December 3, 2008, diagnosed moderate to severe simple coal workers' pneumoconiosis (CWP) and moderate to severe centrilobular emphysema, and opined that the miner's mild degree of chronic obstructive pulmonary disease (COPD) was not his major problem. Director's Exhibit 21. Rather, Dr. Caffrey opined that "[the miner's] major medical problem was his renal artery stenosis, his severe hypertension, and his cardiomegaly and congestive heart failure. *Id*. In a report dated January 22, 2010, Dr. Tuteur observed that the pulmonary function studies did not demonstrate impairment of pulmonary function and that "there was no impairment of oxygen gas exchange either at rest, or during exercise." Employer's Exhibit 1. Dr. Tuteur concluded that "[w]hat developed later was intermittent impairment of oxygen gas exchange attributable to fluid overload, congestive heart failure, and pulmonary edema all associated with acute on (sic) chronic renal functional insufficiency." *Id*. In a supplemental report dated February 18, 2011, Dr. Tuteur found that, from a pulmonary standpoint, the miner did not clearly have respiratory symptomatology. Employer's Exhibit 4.

contrast, the administrative law judge found that Dr. Oesterling did not squarely address the issue of total respiratory disability. Nevertheless, the administrative law judge alternatively found that, to the extent that the Board has held otherwise, Dr. Oesterling's opinion was "poorly" reasoned and entitled to little weight. In addition, the administrative law judge found that Dr. Caffrey's opinion, that both the emphysema and coal workers' pneumoconiosis (CWP) were moderate to severe, did not support a finding that they were not disabling. The administrative law judge additionally found that Dr. Caffrey's statement that the miner's COPD was not a major problem was related to whether it was symptomatic as reported in the treatment records, but was not related to whether it would have affected the miner's ability to work. Lastly, although the administrative law judge found that Dr. Tuteur's opinion, considered as a whole, weighs against a finding that the miner's impairment was totally disabling, she found that it was not well-reasoned and documented. Hence, based on her finding that Dr. Perper's reasoned and documented opinion outweighed the contrary opinions of Drs. Oesterling, Caffrey, and Tuteur, the administrative law judge found that the medical opinion evidence established total respiratory disability.

Employer asserts that Dr. Perper's diagnosis of "severe" coal workers' pneumoconiosis does not establish any degree of functional impairment, as required under Section 718.204(b)(2)(iv), and thus that it cannot carry claimant's burden of proof. As discussed, *supra*, the Board previously held that the miner's usual coal mine employment involved heavy labor. *Matney*, BRB No. 12-0175 BLA, slip op. at 8. Based on the respiratory symptoms and limitations described by Dr. Perper, and the exertional requirements of the miner's usual coal mine work, the Board affirmed the administrative law judge's finding that Dr. Perper's opinion is supportive of a finding of total disability as a rational determination. *Id*. The Board's previous disposition of this issue constitutes the law of the case. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Employer does not argue that an exception to the law of the case doctrine applies in this case. Because we are not persuaded that the law of the case doctrine is inapplicable, or that an exception has been demonstrated, we will not revisit whether Dr. Perper's opinion is sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *Brinkley*, 14 BLR at 1-150-51; *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J. dissenting); *Bridges*, 6 BLR at 1-989-90. Thus, we reject employer's assertion that Dr. Perper's opinion cannot carry claimant's burden of proof under Section 718.204(b)(2)(iv).

Employer also asserts that the administrative law judge erred in finding that Dr. Perper's opinion was reasoned and documented, because she did not explain why Dr. Perper's failure to take into account the fact that his opinion was contradicted by the non-qualifying objective evidence and the pathology findings offered by Drs. Caffrey and Oesterling did not weigh against Dr. Perper's conclusions. It is the province of the

administrative law judge to assess the evidence of record and determine if a medical opinion is sufficiently documented and reasoned to satisfy claimant's burden of proof. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In this case, the administrative law judge reasonably found that Dr. Perper's opinion was reasoned and documented, based on both her prior determination that Dr. Perper's remarks supported a finding of total disability and the Board's prior holding that her determination was rational. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Thus, we reject employer's assertion that the administrative law judge erred in crediting Dr. Perper's opinion. The Board cannot substitute its conclusions for the rational inferences made by the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Employer additionally asserts that the administrative law judge erred in failing to take into account the fact that Dr. Perper relied on an exaggerated coal mine employment history of 30 years. Contrary to employer's assertion, Dr. Perper's findings regarding the miner's pulmonary impairment were not based on his coal mine employment history. Claimant's Exhibit 6. Thus, we reject employer's assertion that the administrative law judge erred in her consideration of Dr. Perper's opinion on this basis.

Employer further asserts that the administrative law judge erred in failing to apply the same standard to the opinions of Drs. Oesterling, Caffrey and Tuteur that she applied to that of Dr. Perper. Employer also asserts that the administrative law judge erred by failing to give valid reasons for discounting the opinions of Drs. Oesterling, Caffrey and Tuteur. Specifically, employer argues that the administrative law judge erred in failing to adequately explain why Dr. Oesterling's opinion was not credible. Employer maintains that Dr. Oesterling's opinion weighs against a finding of total respiratory disability under Section 718.204(b)(2)(iv), as Dr. Oesterling concluded that "the emphysema appears insufficient to have produced significant alterations in pulmonary function" and that "without alteration in function this disease should not have produced lifetime respiratory symptomatology." Employer's Brief at 32-33.

The Board previously held that the administrative law judge erred in concluding that Dr. Oesterling did not squarely address the issue of total disability. *Matney*, BRB No. 12-0175 BLA, slip op. at 9. Consequently, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) because it determined that the administrative law judge did not weigh Dr. Oesterling's opinion prior to concluding that the miner was totally disabled. *Id*. On remand, however, the administrative law judge asked the parties to address whether Dr. Oesterling squarely addressed the issue of total disability. The administrative law judge noted that employer pointed to language in Dr.

Oesterling's report that indicated that Dr. Oesterling squarely addressed the issue of total disability. The administrative law judge also noted that "[c]laimant points to the same findings and apparently concedes that Dr. Oesterling squarely addressed the issue of total disability but argues that his opinion was poorly reasoned." Decision and Order on Remand at 14.

Despite the Board's prior holding, the administrative law judge determined that Dr. Oesterling did not squarely address the issue of total disability. Nevertheless, the administrative law judge reasonably found that, "[e]ven if Dr. Oesterling were deemed to have 'squarely' addressed the total disability issue, I agree with [c]laimant that [Dr. Oesterling's] opinion is not well-reasoned because Dr. Oesterling did not discuss or explain how the [m]iner's bronchiolitis, edema, passive pulmonary congestion, and other findings that Dr. Oesterling did not attribute to coal mine dust exposure may have affected his pulmonary function or respiratory status."[9] *Id*. at 15 (emphasis in original). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. Thus, we reject employer's assertion that the administrative law judge erred by failing to give a valid reason for discounting Dr. Oesterling's opinion.

Employer also asserts that the administrative law judge erred in discounting Dr. Caffrey's opinion as flawed and incomplete. Employer argues that Dr. Caffrey's opinion weighs against a finding of total respiratory disability under Section 718.204(b)(2)(iv), as Dr. Caffrey concluded that the medical records did not reflect that the miner's COPD was a significant medical problem. As discussed, *supra*, Dr. Caffrey diagnosed moderate to severe simple CWP and moderate to severe centrilobular emphysema, and opined that the miner's mild degree of COPD was not his major problem. Director's Exhibit 21. In its prior decision, the Board instructed the administrative law judge, on remand, to address whether Dr. Caffrey's belief that the miner's COPD was not a significant medical problem weighed against a finding of total disability. *Matney*, BRB No. 12-0175 BLA, slip op. at 9 n.7. It is within the administrative law judge's discretion, as the trier-of-fact,

[9] The administrative law judge stated, "[f]or the purposes of determining whether the [m]iner was totally disabled on a pulmonary or respiratory basis, respiratory impairments that are attributable to causes other than coal mine dust exposure must also be included." Decision and Order on Remand at 15. The administrative law judge then determined that, "[i]f indeed Dr. Oesterling's opinion can be interpreted as standing for the proposition that these other factors had no effect on the [m]iner's respiratory condition (which is, to me, a leap of faith), he has certainly done a poor job of explaining why." *Id*. The administrative law judge further noted that, "[w]ithout examining the clinical records, [Dr. Oesterling] was not aware of the fact that the [m]iner was on oxygen so he did not provide an explanation for why he needed oxygen if, in fact, he was not disabled on a respiratory basis." *Id*.

to determine the weight and credibility to be accorded the medical experts, *Mabe*, 9 BLR at 1-68; *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw her own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Based on the particular facts in this case, the administrative law judge reasonably found that Dr. Caffrey's conclusion that both the emphysema and CWP were moderate to severe does not support a finding that they were not disabling.[10] *Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192; *Stark*, 9 BLR 1-37. In addition, the administrative law judge reasonably found that, "[i]n context, [Dr. Caffrey's] statements concerning the [m]iner's COPD not being a major problem, which the Board found to be of significance, appears to relate to whether it was symptomatic as reported in the treatment records, not whether it would have affected the [m]iner's ability to work."[11] Decision and Order on Remand at 17; *see Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192; *Stark*, 9 BLR 1-37. Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Caffrey's opinion.

Employer additionally asserts that the administrative law judge erred in discounting Dr. Tuteur's opinion. Employer argues that the administrative law judge improperly substituted her opinion for that of the medical expert, as she questioned the "relevance" of pulmonary function testing on the miner's medical condition with regard to Dr. Tuteur's opinion. Employer also argues that the administrative law judge

[10] In considering Dr. Caffrey's report, the administrative law judge noted that Dr. Caffrey characterized the miner's emphysema and CWP as moderate to severe in the summary of the report, but that the doctor stated that they were moderate in the body of the report. Decision and Order on Remand at 17. In addition, the administrative law judge noted that Dr. Caffrey characterized the miner's COPD, which includes emphysema, as mild in the body of the report. *Id.* The administrative law judge concluded that "[Dr. Caffrey's] inconsistent use of the words 'severe,' 'moderate,' and 'mild' to describe CWP, COPD and emphysema, without reference to functional impairment, make his opinion difficult to interpret." *Id.*

[11] In finding that Dr. Caffrey's opinion falls short of directly addressing the issue of total disability, the administrative law judge stated: "Dr. Caffrey did not address the issue of whether the other problems that he identified, such as hypertension or congestive heart failure, were disabling from a pulmonary or respiratory standpoint. Likewise, his report does not address the issue of whether the [m]iner would have been capable of performing his last or usual coal mine employment before his death from a pulmonary or respiratory standpoint. Dr. Caffrey did not discuss why the [m]iner was prescribed oxygen." Decision and Order on Remand at 17 (footnote omitted).

mischaracterized Dr. Tuteur's reference to the "waxing and waning" related to hospitalizations in 2001 through 2007.

As discussed, *supra*, Dr. Tuteur, in a report dated January 22, 2010, observed that the pulmonary function studies did not demonstrate impairment of pulmonary function and that that "there was no impairment of oxygen gas exchange either at rest, or during exercise." Employer's Exhibit 1. Dr. Tuteur concluded that "[w]hat developed later was intermittent impairment of oxygen gas exchange attributable to fluid overload, congestive heart failure, and pulmonary edema all associated with acute on (sic) chronic renal functional insufficiency." *Id*. In a supplemental report dated February 18, 2011, Dr. Tuteur found that, from a pulmonary standpoint, the miner did not clearly have respiratory symptomatology. Employer's Exhibit 4. In her prior consideration of Dr. Tuteur's opinion, the administrative law judge concluded that "[w]hat Dr. Tuteur was actually saying is not that the [m]iner did not have a respiratory impairment; rather, he was saying that it was not pulmonary in origin." Decision and Order at 8. The Board held that employer's assertion that the administrative law judge misconstrued Dr. Tuteur's opinion and substituted her opinion for that of the medical expert had merit, in part. *Matney*, BRB No. 12-0175 BLA, slip op. at 9. Specifically, the Board held that, contrary to employer's assertion, the administrative law judge, as trier-of-fact, had discretion to determine the weight and credibility of the medical experts, and to assess the evidence of record and draw her own conclusions and inferences from it. *Id*. However, the Board also instructed the administrative law judge, on remand, to reconsider whether Dr. Tuteur's opinion weighed against a finding that the miner's respiratory impairment was, in fact, totally disabling, based on Dr. Tuteur's description of the miner's "*intermittent* impairment of gas exchange." *Id*. Based on her reconsideration of Dr. Tuteur's opinion and the parties' arguments, the administrative law judge determined that Dr. Tuteur's opinion, considered as a whole, weighed against a finding that the miner's respiratory impairment was totally disabling. Further, contrary to employer's assertion, the administrative law judge properly found that Dr. Tuteur's opinion was not well-reasoned and documented.[12] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131

[12] In considering Dr. Tuteur's opinion, the administrative law judge initially found that "it significantly relies on pulmonary function testing and arterial blood gases taken in 1987 and 1989, which are of questionable relevance on the issue of the miner's ability to perform his last or usual coal mine job from a pulmonary or respiratory standpoint at the time of his death in December 2007." Decision and Order on Remand at 19. The administrative law judge next found that "it does not adequately address the significant respiratory problems that the [m]iner experienced during the months prior to his death." *Id*. Specifically, the administrative law judge stated that "Dr. Tuteur's reference to waxing and waning related to hospitalizations beginning in 2001 and extending through July 2007" and permissibly interpreted his statements as including a "suggestion that the [m]iner's oxygen impairment resolved during the months prior to his death," which is

F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Tuteur's opinion.

Furthermore, we reject employer's assertion that the administrative law judge erred in failing to apply the same standard to the opinions of Drs. Oesterling, Caffrey and Tuteur that she applied to that of Dr. Perper. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

Employer also asserts that the administrative law judge erred in failing to weigh together all of the contrary probative evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv). Contrary to employer's assertion, however, the administrative law judge reasonably found that, "[a]fter reviewing all of the evidence again, I reach the same conclusion: Prior to his death, the [m]iner was incapable of performing his last or usual coal mine job (working underground doing heavy manual labor while operating a joy or motor or working on the belt) from a pulmonary or respiratory standpoint." Decision and Order on Remand at 22; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc). In considering the issue of total respiratory disability, the administrative law judge noted that "[t]he Board did not disturb my findings that total disability was not established under subsections (b)(2)(i) (pulmonary function tests), (b)(2)(ii) (arterial blood gases) or (b)(2)(iii) (cor pulmonale with right-sided congestive heart failure)." Decision and Order on Remand at 13. The administrative law judge stated, "It is worth noting that the pulmonary function studies (PFTs) and arterial blood gases (ABGs) designated by the [e]mployer were from February 1987 and April 1989 and are of limited probative value with respect to the [m]iner's respiratory sufficiency at the time of his death in December 2007, almost two decades later." *Id*. at 13 n.10; *see Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc). Further, after the administrative law judge properly determined that Dr. Perper's opinion was entitled to more weight than the opinions of

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simply not borne out by the hospital records. *Id*. Lastly, the administrative law judge found that Dr. Tuteur mischaracterized the hospital records, "[t]o the extent that Dr. Tuteur's reports may be deemed to suggest that the [m]iner was capable of returning to his last coal mine employment, despite hypoxemia that required the administration of home oxygen." *Id*. at 19-20.

Drs. Oesterling, Caffrey and Tuteur because it was better reasoned and documented, *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47, she considered medical records and a death certificate signed by Dr. Patel. While the administrative law judge determined that both the medical records and death certificate were supportive of a finding of total respiratory disability, she properly discounted the death certificate because it was conclusory in nature. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. Thus, we reject employer's assertion that the administrative law judge erred on this basis.

We, therefore, affirm the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b), as supported by substantial evidence. Furthermore, because claimant established that the miner had 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant is entitled to invocation of the presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as supported by substantial evidence.

Because claimant invoked the presumption of death due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that no part of the miner's death was caused by pneumoconiosis. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(d). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) by establishing that the miner's death was not caused by pneumoconiosis.[13] Specifically, employer asserts that the administrative law judge erred in discounting the opinions of Drs. Caffrey, Oesterling, and Tuteur. In finding that employer failed to prove that pneumoconiosis was excluded as a contributing or hastening factor to the miner's death, the administrative law judge stated that she reviewed the record and her prior analysis again, and that she continued to reach the same conclusion, that employer did not establish rebuttal of the presumption.[14] In her prior decision, the administrative law judge considered the

[13] Employer concedes that "[t]he autopsy evidence in this case supports simple pneumoconiosis" and that its failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. Employer Brief at 42 n.4; *see* 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(d).

[14] The administrative law judge stated, "Accordingly, I incorporate by reference my discussion at pages 8 through 12 of my previous [Decision and Order], and I again find that the presumption has not been rebutted." Decision and Order on Remand at 22.

opinions of four pathologists, Drs. Dennis, Perper, Caffrey and Oesterling, and one pulmonologist, Dr. Tuteur. Dr. Dennis opined that "[the miner] died as a result of progressive massive fibrosis and pulmonary congestion, along with an overwhelming burden of anthracosilicotic pigment deposition associated with a fibro-nodular infiltrative pattern, fibrosis and emphysematous changes compatible with progressive massive fibrosis." Director's Exhibit 9. Dr. Perper opined that the miner's CWP was a major cause and hastening factor of his death. Claimant's Exhibit 6. By contrast, Dr. Oesterling opined that coal dust inhalation in no way caused, contributed to, or hastened the miner's death. Employer's Exhibit 3. Similarly, Dr. Caffrey opined that the miner's CWP did not cause or hasten his death. Director's Exhibit 21. Further, Dr. Tuteur opined that the miner's CWP did not play a role, in whole or in part, to hasten his death, cause his death, or in any way contribute to his death. Employer's Exhibit 1.

Although the administrative law judge determined that Dr. Dennis's death causation opinion, apart from his diagnosis of progressive massive fibrosis, was reasoned and documented, she found that the doctor's opinion was based on an autopsy report in which "he did not purport to have reviewed all of the clinical records." Decision and Order at 10. Further, while the administrative law judge found that Dr. Perper's opinion was generally reasoned and documented, she gave it less weight because "[Dr. Perper] considered an inflated employment history (of 30 years) and his discussion of the mechanism of death is sketchy." *Id*. at 11. Additionally, the administrative law judge found that, "[a]lthough [Dr. Oesterling's opinion] is limited in that [Dr. Oesterling] confined his analysis to the slides (and did not consider the specifics of the [m]iner's cigarette and cigar smoking and coal mine employment history), his opinion is otherwise reasoned and documented." *Id*. Regarding Dr. Caffrey, the administrative law judge found that Dr. Caffrey's opinion was reasoned and documented. Lastly, while the administrative law judge found that Dr. Tuteur's opinion was generally reasoned and documented, she gave it less weight because "[i]t is difficult to understand exactly what happened based upon Dr. Tuteur's explanation" with respect to the cause of the miner's death. *Id*. The administrative law judge determined that "[Dr. Tuteur's] exclusion of coal mine dust as a factor in the [m]iner's demise is not persuasive, particularly as it is premised upon his assumption that the emphysema was totally unrelated to coal mine dust exposure, which in turn was based upon an inaccurate smoking history and is at odds with the opinions of the pathologists." *Id*. Based on her weighing of these conflicting medical opinions, the administrative law judge found that "the medical opinion evidence is in equipoise on the issue of whether either clinical pneumoconiosis (CWP) or legal pneumoconiosis (emphysema or COPD caused in part by coal mine dust exposure) contributed to or hastened the [m]iner's death." Decision and Order at 12. The administrative law judge also found that "[t]he medical records do not resolve the death causation issue" and that "[t]he death certificate, even when coupled with the medical

records, does not constitute a reasoned medical opinion."[15] *Id*. Hence, the administrative law judge found that employer failed to rebut the presumption of death due to pneumoconiosis.

Employer asserts that the administrative law judge erred in finding that it failed to carry its burden of proving that pneumoconiosis did not cause or contribute to the miner's death. Specifically, employer argues that the administrative law judge erred in failing to give a valid reason for discounting the opinions of Drs. Caffrey, Oesterling, and Tuteur. Employer also argues that the administrative law judge should have given greater weight to Dr. Tuteur's opinion because he is a highly qualified pulmonologist. Further, employer argues that the administrative law judge should have considered the suspension of Dr. Dennis's license to practice medicine by the Kentucky Board of Medical Licensure in weighing Dr. Dennis's opinion against the opinions of Drs. Tuteur, Oesterling, and Caffrey. Employer asserts that Dr. Dennis's pathology report is entitled to no probative weight.

As discussed, *supra*, in the administrative law judge's original Decision and Order awarding benefits, she weighed the medical opinion evidence and found that employer did not establish rebuttal of the presumption of death due to pneumoconiosis. The Board vacated the administrative law judge's award of benefits, based on her coal mine employment determination. The Board also addressed employer's contentions regarding the administrative law judge's finding that the evidence established total respiratory disability. However, the Board did not address the administrative law judge's finding that employer did not establish rebuttal of the presumption. Those arguments are now ripe for resolution. We agree with employer that the administrative law judge failed to explain her determination that the medical evidence failed to establish rebuttal of the presumption of death causation. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In particular, the administrative law judge failed to explain why she found that the opinions of Drs. Caffrey and Oesterling were insufficient to establish rebuttal, although she determined that they were reasoned and documented. *See Wojtowicz*, 12 BLR at 1-165. Accordingly, we vacate the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by proving that no part of the miner's death was caused by pneumoconiosis. We, therefore, vacate the administrative law judge's award of benefits and remand the case for further consideration.

Furthermore, subsequent to the issuance of the Board's Decision and Order, employer filed a Brief in Response to ALJ Order, arguing that the opinion of Dr. Dennis

[15] Employer does not challenge the administrative law judge's consideration of the death certificate.

was not credible because Dr. Dennis's medical license had been suspended, based on allegations of misconduct against the doctor.[16] On remand, however, the administrative law judge did not consider the fact that Dr. Dennis's medical license had been suspended. Rather, the administrative law judge incorporated her prior analysis of the medical opinion evidence in finding that employer did not establish rebuttal of the presumption of death due to pneumoconiosis.

On remand, the administrative law judge must consider whether the evidence regarding the suspension of Dr. Dennis's medical license should be admitted into the record. *See* 20 C.F.R. §§725.455(c), 802.404(a), 802.405(a); *Troup v. Reading Anthracite Coal Co*., 22 BLR 1-11, 1-21 (1999)(en banc); *Lynn v. Island Creek Coal Co*., 12 BLR 1-46, 1-48 (1989)(en banc). If the administrative law judge admits the evidence regarding Dr. Dennis's suspension, she must determine whether it alters the weight to which Dr. Dennis's opinion is entitled, and its comparative weight to the weight accorded to the other relevant medical opinions.

Moreover, on remand, when considering all the relevant medical opinion evidence of record, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their opinions. *See generally Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In so doing, the administrative law judge should set forth her findings on remand in detail, including the underlying rationale of her decision as required by the Administrative Procedure Act.[17] *See Wojtowicz*, 12 BLR at 1-165.

We now address claimant's counsel's fee petition filed in connection with services performed before the Board from December 27, 2011 to January 31, 2013 in the prior appeal, BRB No. 12-0175 BLA. Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed before the Board, pursuant to 20 C.F.R.

[16] In association with its Brief in Response to ALJ Order dated June 13, 2013, employer submitted the Emergency Order of Suspension of the medical license of Dr. James A. Dennis, which was issued by the Kentucky Board of Medical Licensure on August 17, 2012, and the Agreed Order of Surrender of the medical license of Dr. James A. Dennis to practice medicine within the Commonwealth of Kentucky, which was filed by the Kentucky Board of Medical Licensure on January 17, 2013.

[17] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

§802.203. Claimant's counsel requests a fee of $2,631.25 for 4.25 hours of legal services at an hourly rate of $300.00, 3.25 hours of legal services at an hourly rate of $200.00, and 6.25 hours of legal services at an hourly rate of $100.00. No objections to the fee petition have been received. Upon review of the fee petition, the Board finds the requested fee to be reasonable in light of the services performed and approves a fee of $2,631.25, to be paid directly to claimant's counsel by employer.[18] 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203; *see Clark v. Director, OWCP*, 9 BLR 1-211 (1986).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[18] This fee award is neither enforceable nor payable until such time as an award of benefits is final. *See* 33 U.S.C. §928; *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986).