U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0628 BLA

JAMES D. ISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY LLC	)	
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	DATE ISSUED: 10/23/2018
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-5173) of Administrative Law Judge Christopher Larsen awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed this claim on March 12, 2012.

The administrative law judge found that claimant established at least forty years of coal mine employment,[1] with at least fifteen years of underground coal mine employment, and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2). He therefore determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in excluding from the record a pulmonary function study and medical report submitted by employer. Employer further asserts that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it failed to rebut the presumption and in determining the commencement date for benefits.

Claimant responds in support of the award of benefits.[3] The Director, Office of Workers' Compensation Programs, has filed a limited response brief, arguing that the

[1] Claimant's most recent coal mine employment was in Kentucky. Director's Exhibit 23 at 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least forty years of coal mine employment, with at least fifteen years in underground coal

administrative law judge did not err in excluding Dr. Westerfield's pulmonary function study and medical report. Employer filed a reply brief,[4] reiterating its contentions on appeal.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

I. Evidentiary Issue

Employer initially argues that the administrative law judge abused his discretion in excluding a May 13, 2015 pulmonary function study and May 13, 2015 medical report

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mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15.

[4] In its reply, employer argues that it was not served with the Director's response brief. Employer's Reply Brief at 1-2. Thus, employer moves to strike the Director's response. *Id*. The record reflects that a copy of the Director's response was mailed to employer's counsel. Further, the Director's response brief was available to employer electronically. In light of the foregoing, we deny employer's request to strike the Director's response brief.

[5] On July 13, 2018, employer filed a motion requesting that the Board remand this case to the Office of Administrative Law Judges (OALJ) for a new hearing before a different administrative law judge, based on the United States Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. By Order dated April 24, 2018, the Board denied employer's motion to hold the case in abeyance pending a decision from the Supreme Court in *Lucia*. *Ison v. ICG Knott Cnty. LLC*, BRB No. 17-0628 BLA (April 24, 2018) (unpub.) (Order). The Board held that employer waived the issue by not raising the Appointments Clause argument in its opening brief. *Id., citing Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). For the reasons set forth in the Board's April 24, 2018 Order, we deny employer's motion to remand to the OALJ. *See Lucia*, 585 U.S. at , 138 S.Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case").

from Dr. Westerfield, on the grounds that this evidence exceeded the evidentiary limitations at 20 C.F.R. §725.414. We disagree.

The regulations at 20 C.F.R. §725.414, in conjunction with 20 C.F.R. §725.456(b)(1), set limits on the amount of specific types of medical evidence that the parties can submit into the record. Medical evidence that exceeds those limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). The applicable provisions of 20 C.F.R. §725.414 permit claimant and employer to submit, in support of their affirmative cases, "the results of no more than two pulmonary function tests" and "no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (3)(i). The regulations further provide that "[n]otwithstanding the limitations" of 20 C.F.R. §725.414(a)(2), (3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4).

Dr. Westerfield examined claimant on May 13, 2015 at the request of claimant's counsel. Employer's Exhibit 4. As part of that evaluation, claimant underwent a pulmonary function study and an arterial blood gas study. *Id*. Because these studies were non-qualifying,[6] Dr. Westerfield issued a medical report in which he opined that claimant is not totally disabled. *Id*.

On their respective evidence summary forms, neither claimant nor employer designated the May 13, 2015 pulmonary function study as one of its/his two affirmative pulmonary function studies, nor did either party designate Dr. Westerfield's medical report as one of its two affirmative medical reports.[7] *See* Claimant's Evidence Summary Form; Employer's Evidence Summary Form. Employer designated pulmonary function studies conducted on December 19, 2012 and October 22, 2013 as its two affirmative pulmonary function studies, and designated the medical reports of Drs. Dahhan and Jarboe as its two affirmative medical reports. Employer's Evidence Summary Form. Employer, however, listed Dr. Westerfield's evaluation, including the May 13, 2015 pulmonary function study

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] Employer designated the May 13, 2015 arterial blood gas study conducted by Dr. Westerfield as one of its two affirmative arterial blood gas studies. Employer's Evidence Summary Form

and medical report, under "[h]ospitalization and treatment notes."[8] Employer's Evidence Summary Form at 16.

The administrative law judge found that Dr. Westerfield's evaluation did not constitute a "hospitalization record and treatment note" because "Dr. Westerfield evaluated [claimant] at the request of his attorney" and, thus, "he is not [claimant's] treating physician." Decision and Order at 7. Because employer had already designated its full complement of affirmative pulmonary function studies and medical reports, and did not argue good cause for exceeding the evidentiary limitations, the administrative law judge excluded this evidence. *Id*.

Employer argues that claimant did not object to this evidence being admitted during the August 12, 2016 hearing and, thus, waived this issue. Employer's Brief at 7, 14. Contrary to employer's argument, claimant objected to this evidence being admitted in his post-hearing brief. *See* Claimant's Post-Hearing Brief at 8-9. Further, the administrative law judge is obligated to enforce the evidentiary limitations even if no party objects to the evidence. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (holding that the evidentiary limitations in 20 C.F.R. §725.414 are mandatory and thus, are not subject to waiver).

Employer also argues that the administrative law judge's basis for excluding this evidence is inadequately explained and constitutes an abuse of discretion. Employer's Brief at 7-10. Employer contends that under 20 C.F.R. §725.414(a)(3)(i), its affirmative evidence is evidence it "obtained and submitted." *Id*. Because claimant, rather than employer, obtained Dr. Westerfield's evaluation, employer argues that the underlying pulmonary function study and medical report do not constitute employer's affirmative evidence and are, therefore, not subject to the limitations under 20 C.F.R. §725.414(a)(3)(i). *Id*. Employer asserts that the "logical spot" for evidence that claimant obtained, but which employer seeks to submit, is under 20 C.F.R. §725.414(a)(4), as a "hospital and treatment note" on the evidence form.[9] *Id*.

[8] In its post-hearing brief, employer characterized this evidence as "Other Medical Evidence" under 20 C.F.R. §718.107(b). Employer's Post-Hearing Brief at 14. 20 C.F.R. §718.107(b) provides parameters for the submission of other medical tests not addressed by 20 C.F.R. §718.414. *See Webber v. Peabody Coal Co*., 23 BLR 1-123, 1-133 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1, 1-7-8 (2007) (en banc).

[9] Notwithstanding employer's characterization of this evidence as "other evidence" in its post-hearing brief, the administrative law judge found that there was no "other evidence," such as CT scans, in the evaluation. Decision and Order at 7. In this appeal,

Contrary to employer's argument, the regulation at 20 C.F.R. §725.414(a)(3)(i) restricts both the evidence that employer may "obtain" and the evidence that employer may "submit." In *McClanahan*, 25 BLR at 175-77, the petitioner argued that the regulations allow employers to "obtain" as many pulmonary evaluations as necessary, but that employers are restricted from "submit[ting]" no more than two evaluations. Thus the petitioner asserted that it could subject the miner to a third pulmonary evaluation. *Id*. In rejecting this argument, the Board explained that the word "'obtain' . . . clearly has a different meaning than 'submit.'" *Id*. The Board explained that "[a]llowing an employer to obtain more than two pulmonary evaluations of [the miner], as long as it ultimately submits no more than two medical reports, would effectively read the word 'obtain' out of the regulation." *Id*.

In this case, employer seeks to read the word "submit" out of the regulation at 20 C.F.R. §725.414(a)(3)(i) by arguing that it can "submit" as many pulmonary evaluations as it chooses, so long is it "obtain[s]" only two pulmonary evaluations. Employer's Brief at 7-10. We agree with the Director that "to interpret the rule as [e]mployer suggests would wholly undermine its purpose of limiting evidence to equal amounts for each side." Director's Brief at 2; *see City of Fredericksburg, Va. v. Fed. Energy Regulatory Comm'n*, 876 F.2d 1109, 1112 n.3 (4th Cir. 1989) (recognizing that a regulation should be given an interpretation that gives effect to all of its words).

We see no abuse of discretion in the administrative law judge's finding that Dr. Westerfield's report does not constitute a "hospitalization record and treatment note" under 20 C.F.R. §725.414(a)(4). Decision and Order at 7. The plain language of the regulation sets forth that the record must have been developed from "a miner's hospitalization" or from "medical treatment" to fit in this evidence slot. Employer does not allege that the miner was hospitalized or underwent medical treatment with Dr. Westerfield. Further, the Board has explained that in the context of medical treatment notes and hospital records the quality standards at 20 C.F.R. §718.101(b) "apply only to evidence that is developed in connection with a claim for benefits" and not medical records developed in the course of the miner's treatment. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89 (2008); *see also* 64 Fed. Reg. 54,965, 54,975 (Oct. 8, 1999) (explaining that the quality standards are inapplicable to evidence, such as hospitalization reports or treatment records, that is not developed for the purpose of establishing, or defeating, entitlement to black lung benefits). Thus, the administrative law judge rationally found that, because Dr. Westerfield's report was developed by claimant for the purposes of establishing entitlement to benefits, it did not constitute a "hospitalization record and treatment note" and was subject to the

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employer does not allege that Dr. Westerfield's evaluation included other evidence that the administrative law judge should have considered pursuant to 20 C.F.R. §718.107(b).

limitations at 20 C.F.R. §725.414(a)(3)(i). Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Employer next argues that the administrative law judge erred in failing to address whether there was good cause to admit this evidence in excess of the evidentiary limitations. Employer's Brief at 10-13. We agree with the Director that employer forfeited this argument, having failed to raise it before the administrative law judge. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003); Director's Brief at 3. While an administrative law judge may find good cause for admitting additional evidence into the record in accordance with 20 C.F.R. §725.456(b)(1), he or she is not obligated to conduct, sua sponte, an independent assessment as to whether or not good cause justifies the admission of evidence in excess of the evidentiary limitations. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-141 (2006). Further, employer argues in this appeal that good cause exists for admitting the pulmonary function study and medical report of Dr. Westerfield because the evidence if "relevant" and "highly probative." Employer's Brief at 10-13. Contrary to employer's argument, a mere assertion that evidence is relevant does not establish good cause to exceed the evidentiary limitations set forth at 20 C.F.R. §725.414. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 n.18 (4th Cir. 2007); *accord McClanahan*, 25 BLR at 177-78.

Because employer submitted its full complement of affirmative pulmonary function study and medical opinion evidence at 20 C.F.R. §725.414(a)(3)(i), and did not argue good cause, we affirm the administrative law judge's decision to exclude the May 13, 2015 pulmonary function study and medical report developed as part of Dr. Westerfield's evaluation.[10] *McClanahan*, 25 BLR at 1-175; *Keener*, 23 BLR at 1-236.

[10] In addition, we hold that there is no merit in employer's assertion that it was prejudiced by the fact that the administrative law judge rendered his evidentiary ruling in his Decision and Order. Employer's Brief at 14, *citing L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008) (en banc). Although the administrative law judge waited until he issued his Decision and Order to notify the parties that Dr. Westerfield's pulmonary function study and medical report had been excluded, we decline to remand this case, as requested by employer, because the facts of this case satisfy the standard for fairness and administrative efficiency outlined in *Preston*. *See Preston*, 24 BLR at 1-63. Employer received notice from claimant in claimant's post-hearing brief that he challenged the admissibility of this evidence. Claimant's Post-Hearing Brief at 8-9. Employer had the opportunity to respond to claimant at his stage and argue that good cause existed for this evidence to be admitted, but chose not to do so. Employer bore the risk by designating Dr. Westerfield's report and pulmonary function study as a hospital and treatment record in its evidence summary form, rather than affirmatively arguing that good cause existed for the

II. Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Employer argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[11] We disagree.

A. Pulmonary Function Study Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of five pulmonary function studies, dated March 28, 2012, December 19, 2012, October 22, 2013, February 19, 2014, and April 27, 2016. Decision and Order at 8; Director's Exhibit 11; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2. Before determining whether the studies were qualifying for total disability, he noted a discrepancy in the measurements of claimant's height, which ranged from sixty-six to sixty-eight inches.[12] *Id*. at 15. The administrative law judge resolved the evidentiary conflict by averaging the various heights, finding that claimant's correct height is 67.3 inches. *Id*.

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admission of this evidence during the hearing or in post-hearing pleadings. Remanding this case to allow employer to now argue good cause or to re-designate its evidence would not promote fairness and administrative efficiency. *See Preston*, 24 BLR at 1-63.

[11] The administrative law judge found that the arterial blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 16. Further, because there is no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*.

[12] Claimant's height was measured as sixty-six inches for the March 28, 2012 pulmonary function study, as sixty-six and one-half inches for the December 19, 2012 study, and as sixty-eight inches for the October 22, 2013, February 19, 2014, and April 27, 2016 studies. Director's Exhibit 11; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2.

Using the Appendix B tables for a man of 67.3 inches in height, the administrative law judge found that the December 19, 2012 and October 22, 2013 pulmonary function studies were non-qualifying, but that the March 28, 2012, February 19, 2014, and April 27, 2016 were qualifying. *Id*. at 15-16. Finding that the "preponderance of the pulmonary function studies, including the most recent studies, produced qualifying values," the administrative law judge concluded that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*.

Employer contends that the administrative law judge erred in finding that the February 19, 2014 and April 27, 2016 pulmonary function studies supported a finding of total disability because the studies do not conform to the quality standards set forth at 20 C.F.R. §718.103(b). Employer's Brief at 18-21. The record reflects, however, that they were submitted as part of claimant's hospitalization and treatment records. Claimant's Exhibits 1, 2 They are not subject to the quality standards set forth in 20 C.F.R. Part 718, as they were not generated in connection with a claim for benefits. *See* 20 C.F.R. §718.101(b); *Stowers*, 24 BLR at 1-89, 1-92. Further, to the extent employer argues that these pulmonary function studies were not sufficiently reliable to support a finding of total disability despite the inapplicability of the quality standards, employer cites no medical evidence to support this argument.[13] *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987); *Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984). Thus, we affirm the administrative law judge's finding that the February 19, 2014 and April 27, 2016 pulmonary function studies supported a finding of total disability.

Employer next argues that the administrative law judge erred in conducting a "head count" when finding that the preponderance of the pulmonary function studies established total disability. Employer's Brief at 21. Contrary to employer's argument, the administrative law judge permissibly found that the preponderance of the pulmonary function studies established total disability at 20 C.F.R. §718.204(b)(2)(i) because three studies were qualifying for total disability and two were non-qualifying, and the most recent studies taken on February 19, 2014 and April 27, 2016 were qualifying. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738; *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982); Decision and Order at 15-16. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

[13] The administrative law judge noted that "[e]mployer requested additional time to have the more recent medical evidence reviewed, [but employer] did not provide any review by Dr. Jarboe of the results of the more recent [February 19, 2014, and April 27, 2016] tests, which produced qualifying results." Decision and Order at 16-17.

B. Medical Opinion Evidence

Employer next argues that the administrative law judge erred in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Baker opined that claimant is totally disabled; and Drs. Jarboe and Dahhan opined that he is not. Decision and Order at 16-17; Director's Exhibits 11-12; Employer's Exhibits 1, 3. The administrative law judge found that Dr. Baker's opinion is well-reasoned and documented and entitled to significant weight. Decision and Order at 16. He found that the opinions of Drs. Jarboe and Dahhan are not credible because the physicians failed to address the more recent, qualifying pulmonary function testing and because their opinions were based on evidence outside of the record. *Id*. at 16-17. The administrative law judge also found that Dr. Jarboe's opinion was inadequately explained. *Id*.

Employer argues that the administrative law judge erred in discrediting Dr. Jarboe's opinion. Employer's argument lacks merit.

Dr. Jarboe reviewed the results of the March 28, 2012 and December 19, 2012 pulmonary function studies. Employer's Exhibit 1 at 3. He opined that these studies revealed a moderate restrictive ventilatory impairment. *Id*. Because claimant's lung volumes on these tests were normal, however, he stated that claimant did not have a true restrictive defect, as the impairment could be attributable to reversible asthma. *Id*. at 4. He noted that the FEV1/FVC value on both studies was above disability standards, and, therefore, he opined that the testing revealed no obstructive respiratory impairment. *Id*. at 3. He concluded that claimant is not totally disabled because he "retains the functional respiratory capacity to perform" his usual coal mine employment. *Id*. In his deposition, Dr. Jarboe noted that he reviewed the results of a January 10, 2013 pulmonary function study conducted by Dr. Dahhan. Employer's Exhibit 3 at 11-13. He opined that this test produced results "practically identical" to the December 19, 2012 study and, thus, indicated that it buttressed his opinion. *Id*. He disagreed with Dr. Baker that claimant's pulmonary function studies evidenced an obstructive respiratory impairment, because the FEV1/FVC ratio was normal on pulmonary function testing. *Id*. at 13-15. Therefore, he reiterated his opinion that claimant is not totally disabled. *Id*.

As discussed above, we have affirmed the administrative law judge's finding that the most recent February 19, 2014 and April 27, 2016 qualifying pulmonary function studies are the most credible studies of record. Therefore, insofar as Dr. Jarboe failed to review these studies and address their significance in his medical opinion, the administrative law judge rationally discounted it. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); Decision and Order at 16.

The administrative law judge also found that "Dr. Jarboe's testimony is confusing because there is no evidence [that] Dr. Dahhan administered any tests to [claimant] on January 10, 2013." Decision and Order at 12 n. 3. The administrative law judge further noted that "Dr. Dahhan's testing of [claimant], which appears at Director's Exhibit 12, occurred on February 8, 2013."[14] *Id*. The administrative law judge compared the "results as described in Dr. Jarboe's testimony to the results reported in Director's Exhibit 12," and found that "the test Dr. Jarboe discussed at his deposition was not the test Dr. Dahhan performed on [claimant]." *Id*. Thus, the administrative law judge concluded that the "only rational inference is that these test results belong to someone else." *Id*. The administrative law judge permissibly discredited Dr. Jarboe's opinion because it "appear[s] to be based on testing done on some else, or at the very least, tests that appear nowhere" in the record.[15] Decision and Order at 16-17; *see Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring & dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring & dissenting).

We also affirm the administrative law judge's decision to discredit Dr. Dahhan's opinion. Dr. Dahhan reviewed the results of a February 8, 2013 pulmonary function study which he indicated was "invalid due to premature termination of airflow and lack of plateau formation." Director's Exhibit 12. He opined that the "[e]ffort independent measurements were normal," and thus opined that claimant is not totally disabled because he had "normal effort independent pulmonary function studies including lung volumes and diffusion capacity." *Id*.

Similar to Dr. Jarboe, the administrative law judge rationally rejected Dr. Dahhan's opinion because he failed to discuss the most recent, credible, qualifying pulmonary function studies. *See Rowe*, 710 F.2d at 255; *Balsavage*, 295 F.3d at 396; Decision and Order at 16. Moreover, the administrative law judge found that the February 8, 2013 pulmonary function study that Dr. Dahhan discussed was not part of the record. Thus, the administrative law judge rationally discredited Dr. Dahhan's opinion based on Dr. Dahhan's reliance of this evidence. *See Harris*, 23 BLR at 1-108; Decision and Order at 16.

[14] As discussed below, the administrative law judge found that the February 8, 2013 study referenced by Dr. Dahhan is also not in the record. Decision and Order at 16.

[15] Because the administrative law judge provided valid reasons for discrediting Dr. Jarboe's opinion, we need not address employer's remaining arguments regarding the weight she accorded to this opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983)

Finally, we reject employer's argument that the administrative law judge erred in crediting Dr. Baker's opinion. Employer's Brief at 22-24. Dr. Baker identified claimant's usual coal mine employment as an electrician. Director's Exhibit 11 at 20. He noted that claimant experiences "dyspnea" when exerting himself on two-hundred yards of level ground. *Id*. at 22. He also noted that claimant's March 28, 2012 pulmonary function study evidenced a "moderate obstructive ventilatory defect." *Id*. He opined that claimant is totally disabled because he has a "severe" impairment with his FEV1 and FVC values meeting disability standards." *Id*. at 24. Contrary to employer's argument, the administrative law judge permissibly found that Dr. Baker's diagnosis of total disability is well-reasoned and documented. *See Napier*, 301 F.3d at 713-714; *Rowe*, 710 F.2d at 255; Decision and Order at 16. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer further argues that the administrative law judge erred by not weighing the non-qualifying May 13, 2015 blood gas study and by not weighing the totality of non-qualifying arterial blood gas study evidence against the qualifying pulmonary function study and medical opinion evidence. Employer's Brief at 15-18, 22. Although the administrative law judge did not explicitly weigh the non-qualifying blood gas studies against the medical opinions and pulmonary function studies, employer has not established reversible error. The blood gas studies measure a different type of impairment than pulmonary function studies and therefore do not contradict the qualifying pulmonary function studies or the medical opinions that diagnosed total disability based on the results of pulmonary function studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993). Thus, the administrative law judge's failure to weigh the blood gas studies together with the pulmonary function studies and medical opinions is harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that claimant invoked the Section 411(c)(4) presumption.

III. Rebuttal of the Section 411(c)(4) presumption

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, the burden shifted to employer to establish that claimant

has neither legal nor clinical pneumoconiosis,[16] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer does not challenge the finding that it failed to disprove clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 18-19. Accordingly, we affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis.[17] 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Contrary to employer's argument, the administrative law judge rationally discounted the opinions of Drs. Jarboe and Dahhan that claimant's disability is not due to pneumoconiosis because neither physician diagnosed clinical pneumoconiosis, contrary to his finding that employer failed to disprove that claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 22-23. Therefore, we affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

IV. Benefits Commencement Date

Once entitlement to benefits is established, benefits commence in the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If that date is not ascertainable from all the relevant evidence of record, benefits will commence in the month during which the

[16] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[17] Because employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis, we need not address its contentions with regard to the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Larioni*, 6 BLR at 1-1278.

claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-50 (1990). In this case, the administrative law judge summarily awarded benefits as of May 2012.

Initially, we reject employer's argument that the administrative law judge should have awarded benefits no earlier than December 2012 because the record contains non-qualifying pulmonary function studies taken on December 19, 2012 and October 22, 2013, along with the December 30, 2012 and February 8, 2013 medical opinions of Drs. Jarboe and Dahhan. Employer's Brief at 31. As discussed above, the administrative law judge discredited this evidence. The administrative law judge also found in this case that the March 28, 2012 pulmonary function study was qualifying for total disability. Decision and Order at 15-16. Further, the administrative law judge's finding of total disability was based in part on Dr. Baker's March 28, 2012 opinion that claimant is totally disabled. Decision and Order at 16; Director's Exhibit 11.

We hold, however, that the administrative law judge erred by awarding benefits commencing in May 2012. Claimant filed this claim in March 2012. Director's Exhibit 2. Because the administrative law judge's finding of total disability was based in part on the March 28, 2012 pulmonary function study and medical opinion of Dr. Baker, the administrative law judge was precluded from finding that credible evidence establishes that the miner was not totally disabled due to pneumoconiosis at any time subsequent to March 2012, the month in which he filed this claim and the month in which the first pulmonary function study evidenced total disability. *Owens*, 14 BLR at 1-50. Thus we modify the administrative law judge's decision to reflect that benefits are payable from March 2012, the month in which claimant filed his claim. 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed as modified to reflect that benefits commence as of March 2012.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge