U.S. Department of Labor

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

BRB No. 19-0418 BLA

BOBBY LEE CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, LLC	)	DATE ISSUED: 08/20/2020
	)	
and	)	
	)	
UNITED STATES STEEL CORPORATION	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for Employer/Carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Theresa C. Timlin's Decision and Order Awarding Benefits (2018-BLA-05306) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This claim involves a miner's subsequent claim filed on February 26, 2015.[1]

The administrative law judge credited Claimant with 26.25 years of underground coal mine employment and found the new evidence established total disability. She therefore found Claimant established a change in an applicable condition of entitlement[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's third claim for benefits. On June 9, 1997, the district director denied his first claim, filed on February 21, 1997, because he did not establish any element of entitlement. Director's Exhibits 1. The record for Claimant's second claim, filed December 5, 2007, "could not be located" and therefore is not part of the record in the current claim. Director's Exhibit 2.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's first claim was denied because he failed to establish any element of entitlement; therefore, he had to submit new evidence establishing one element of entitlement to have his case considered on the merits. 20 C.F.R. §725.309(c).

[3] Under Section 411(c)(4) of the Act, Claimant is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or surface 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) (2018); *see* 20 C.F.R. §718.305. Employer concedes Claimant established at least fifteen years of qualifying coal mine employment. Employer's Post-Hearing Brief at 7. We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 26.25 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.

On appeal, Employer argues the administrative law judge erred in finding Claimant established total disability and thus erred in finding he invoked the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's finding it did not rebut the presumption. Employer further contends the administrative law judge erred in not denying this claim as abandoned. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits and argues the administrative law judge acted within her discretion in declining to deny the claim as abandoned. In a reply brief, Employer reiterates its previous contentions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence and in accordance with applicable law.[4] 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).

Abandonment of Claim

Employer argues the administrative law judge erred in not dismissing the claim as abandoned based on "[C]laimant's repeated failure to attend medical examinations scheduled on behalf of [E]mployer for the purpose of development of its medical evidence in the claim."[5] Employer's Brief at 18-19. The Director contends the administrative law judge acted within her discretion and in accordance with the regulations. Director's Brief at 7-9. We agree with the Director's position.

Employer filed a Motion for Denial of Claim by Reason of Abandonment, requesting Claimant be directed to show good cause for his "unexplained refusal on multiple occasions" to cooperate with its efforts to develop evidence. Employer's March 5, 2018 Motion for Denial of Claim by Reason of Abandonment. On March 27, 2018, the administrative law judge denied Employer's motion, acknowledging its difficulties in scheduling Claimant for pulmonary evaluation. Administrative Law Judge's March 27,

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[5] We address only Employer's assertion that the administrative law judge erred because Employer's only request for the district director to deny the claim as abandoned was made after the Proposed Decision and Order issued and after it had requested the case be forwarded to the Office of Administrative Law Judges for a formal hearing. *See* Director's Exhibits 36, 37.

2018 Order. She noted Employer sought to have Claimant examined by Dr. Jarboe in Pikeville, Kentucky, and Dr. Zaldivar in Charleston, West Virginia, which are seventy-seven and ninety-four miles, respectively, from Claimant's home and are, as Employer asserts, within the one hundred mile limit allowed under the regulations. *Id*. at 1; *see* 20 C.F.R. §725.414(a)(3)(i).

Acknowledging Claimant's "reading and writing limitations" and his inability to drive long distances, as set forth by the Director in her response brief,[6] the administrative law judge determined Claimant established good cause for his failure to appear at the appointments, and denied Employer's motion. Administrative Law Judge's March 27, 2018 Order at 2; Director's March 19, 2018 letter response to Employer's March 5, 2018 Motion. The administrative law judge ordered Employer to schedule a pulmonary evaluation for Claimant in closer proximity to his home. Administrative Law Judge's March 27, 2018 Order at 2. Thereafter Employer arranged an examination with Dr. Forehand on April 25, 2018, which Claimant attended. *See* Employer's Exhibit 1. Employer also arranged for Dr. Zaldivar to provide a medical records review. *See* Employer's Exhibit 4.

Administrative law judges exercise broad discretion in resolving evidentiary and procedural matters. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 (4th Cir. 2007); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620 (4th Cir. 2006); *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc). A party seeking to overturn disposition of a procedural or evidentiary issue must establish the ruling was an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer has not established, nor has it alleged, the administrative law judge committed an abuse of discretion. *See Blake*, 24 BLR at 1-113.

Moreover, the regulations provide "[no] claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made to the claimant . . . except upon the motion or written agreement of the Director." 20 C.F.R. §725.465(d). Thus, we agree with the Director's argument that the administrative law judge could not grant Employer's motion to dismiss because the Black Lung Disability Trust Fund was paying interim benefits and the Director did not consent to the dismissal. Consequently, we reject Employer's assertion the administrative law judge erred in not dismissing the claim as abandoned. *Blake*, 480 F.3d at 297; *Williams*, 453 F.3d at 620; *Dempsey*, 23 BLR at 1-63.

[6] Claimant was not represented by counsel. Director's March 19, 2018 letter response to Employer's March 5, 2018 Motion at 1.

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Total disability can be established by pulmonary function or arterial blood gas studies, evidence of pneumoconiosis and 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 weigh all relevant supporting evidence against all relevant 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). The administrative law judge found Claimant established total disability through the pulmonary function studies, medical opinions, and the totality of the evidence.[7] Decision and Order at 23; *see* 20 C.F.R. §718.204(b)(2)(i), (iv).

The administrative law judge considered three new pulmonary function studies dated February 5, 2008, February 18, 2016, and April 25, 2018. Decision and Order at 14-16; Director's Exhibit 16; Employer's Exhibits 1, 3. Before determining whether the studies were qualifying,[8] the administrative law judge resolved the height discrepancy recorded on the studies, finding Claimant's height is 66.9 inches. Decision and Order at 15, *citing Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). She also considered Claimant's age when the pulmonary function studies were conducted, noting he was sixty-four years old at the time of the February 5, 2008 study, seventy-two years old at the time of the February 18, 2016 study, and seventy-four years old at the time of the April 25, 2018 study. Decision and Order at 15; Director's Exhibit 16; Employer's Exhibits 1, 3.

Using the table values in Appendix B to 20 C.F.R. Part 718, which end at age seventy-one,[9] the administrative law judge found the February 5, 2008 study conducted by

[7] The administrative law judge found the arterial blood gas studies do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 16-17.

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

[9] The administrative law judge noted the Board's holding that, absent contrary probative evidence, pulmonary function studies performed on a miner who is over the age

Dr. Forehand was non-qualifying before bronchodilation. Decision and Order at 14-16; Employer's Exhibit 3. She determined the February 18, 2016 and April 25, 2018 studies conducted by Dr. Porterfield and Dr. Forehand, respectively, produced qualifying values before bronchodilation.[10] Decision and Order at 14-16; Director's Exhibit 16; Employer's Exhibit 1. Dr. Forehand also conducted a post-bronchodilation study on April 25, 2018 that was non-qualifying. Employer's Exhibit 1.

The administrative law judge accorded little weight to the February 5, 2008 pulmonary function study because it was "quite remote in time."[11] Decision and Order at 16. Giving greater weight to pre-bronchodilator studies as more indicative of Claimant's ability to perform his work without medication, *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980), she found the more recent February 18, 2016 and April 25, 2018 studies support a finding of total disability.[12] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 16.

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of seventy-one must be treated as qualifying if the values produced by the miner would be qualifying for a seventy-one year old. Decision and Order at 15, *citing K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008).

[10] The administrative law judge found all of the pulmonary function studies were valid in light of the relevant quality standards and Claimant's effort. In addition, Dr. Gaziano independently validated the February 18, 2016 study. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; Decision and Order at 14-15, 21; Director's Exhibit 14. As these findings are unchallenged, they are affirmed. *Skrack*, 6 BLR at 1-711.

[11] It is unclear whether the February 5, 2008 pulmonary function study was developed in connection with Claimant's prior denied claim and therefore should not have been considered in determining whether Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). Any error is harmless, however, as the administrative law judge permissibly accorded this study little weight because it does not constitute an accurate indicator of Claimant's current pulmonary capacity. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 16.

[12] The administrative law judge properly summarized the April 25, 2018 study as including post-bronchodilator results. However, she later misstated that the test did not include post-bronchodilator results, "so it is uncertain as to whether use of a bronchodilator would affect Claimant's pulmonary condition." Decision and Order at 15. Any error is harmless, however, as she permissibly noted use of bronchodilators "does not provide an

Employer contends the administrative law judge improperly credited the February 18, 2016 pulmonary function study, as it is actually non-qualifying. Employer's Brief at 14-16. Employer also maintains that the administrative law judge's reliance on the non-qualifying study impacted her evaluation of Dr. Porterfield's medical opinion. *Id*. While Employer is correct that the administrative law judge mischaracterized the pulmonary function study, remand is not required.

The administrative law judge found the February 18, 2016 pulmonary function study qualifying based on its FEV1 value and an FEV1/FVC ratio of less than 55%. Decision and Order at 14-15. Under 20 C.F.R. Part 718, Appendix B, a seventy-two year old miner with a height of 66.9 inches is totally disabled if his FEV1 value is at or below 1.63. Dr. Porterfield recorded an FEV1 value of 1.64 and a ratio of 50%. Director's Exhibit 16.

Because the FEV1 was above the table value, the 2016 pulmonary function study was non-qualifying, albeit by the smallest quantifiable measurement used in pulmonary function studies, .01 FEV1. The administrative law judge mistakenly applied the table value of 1.66, however, and erroneously concluded the 2016 pulmonary function study was qualifying, although it missed crossing the qualifying threshold by one one-hundredth of a liter. But any error in mischaracterizing -- the quite literally -- borderline pulmonary function study as qualifying is harmless given this record for two independent reasons. Decision and Order at 15; Director's Exhibit 16.

First, in addition to the pulmonary function studies, the administrative law judge appropriately found the medical opinion evidence supports total disability. She permissibly discredited Dr. Forehand's opinion Claimant is not disabled, and credited Dr. Porterfield's contrary opinion.[13]

Employer summarizes Dr. Forehand's opinion and generally asserts the administrative law judge should have credited it. Employer's Brief at 15-16; Employer's Reply Brief at 5 n.1. But it does not identify any error in the administrative law judge's determination Dr. Forehand "did not provide any evidence or explanation" as to why he concluded Claimant's April 25, 2018 pre-bronchodilator pulmonary function study is not

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adequate assessment of [a] miner's disability." Decision and Order at 15, *quoting* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

[13] The administrative law judge also considered Dr. Zaldivar's opinion and found he did not address the issue of Claimant's total respiratory disability. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711; Decision and Order at 21.

evidence of total disability despite its qualifying values. Decision and Order 22. We thus affirm that finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We further reject Employer's contention the administrative law judge's error in finding the 2016 pulmonary function study qualifying tainted her crediting of Dr. Porterfield's opinion. Employer's Brief at 14. Dr. Porterfield characterized the February 18, 2016 pulmonary function study as "meet[ing] guidelines for complete impairment based on FEV1." Director's Exhibit 16. He was not wrong: his February 18, 2016 pulmonary function study *is* qualifying using the height he recorded for Claimant, 67 inches; it only *becomes* non-qualifying when using the averaged height of 66.9 inches found by the administrative law judge.

Moreover, as Employer concedes, even if Dr. Porterfield's study was considered non-qualifying that "in and of itself, would not negate Dr. Porterfield's finding of total disability (and Judge Timlin's reliance on it)." Employer's Brief at 14. A physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000). As the administrative law judge observed, Dr. Porterfield diagnosed moderate chronic obstructive pulmonary disease based on Claimant's FEV1/FVC ratio of 50%. Director's Exhibit 16 at 20. He further stated Claimant's FEV1/FVC ratio, together with his FVC of 3.30 and FEV1 of 1.64, rendered him "100% impaired" and "[unable to] do previous job" because he "could not haul coal as before." Decision and Order at 18, *quoting* Director's Exhibit 16 at 8, 20.

Dr. Gaziano independently validated Dr. Porterfield's testing. Decision and Order at 21. Because Dr. Porterfield concluded Claimant's test results precluded his performance of the exertional requirements of his usual coal mine work, his opinion supports a finding of a totally disabling pulmonary impairment, even if his view of the FEV1 value as qualifying is considered a mischaracterization given the administrative law judge's retroactive revision of Claimant's height by one tenth of an inch. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Substantial evidence thus supports the administrative law judge's determination to credit his opinion whether the test is considered qualifying under Dr. Porterfield's measurements or non-qualifying after the administrative law judge's revisions. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000).

Second, the pulmonary function studies still support disability under the administrative law judge's rationale whether or not the February 18, 2016 pulmonary

function study is qualifying. As the Director asserts, the administrative law judge also credited the qualifying April 28, 2018 pulmonary function study, the most recent by more than two years, as the most indicative of Claimant's current condition given its recency. Director's Brief at 10, *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51 (4th Cir. 1992). Under this rationale, the Director correctly notes the earlier February 18, 2016 study – *with an FEV1 that is .01 liter below qualifying* – actually supports rather than undermines, the later 2018 study as it shows a continuing deterioration in Claimant's condition. Director's Brief at 10. Indeed, because there is no "contrary probative evidence," the April 28, 2018 qualifying pulmonary function study would independently establish Claimant as disabled.[14] 20 C.F.R. §718.204(b)(2). Thus Employer has not shown why the administrative law judge's characterization of the February 18, 2016 pulmonary function study as qualifying, or her determination to credit Dr. Porterfield's opinion, warrants remand. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference.").

We therefore affirm the administrative law judge's findings Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and by a preponderance of the evidence as a whole. We further affirm the administrative law judge's findings that Claimant established a change in applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the Section 411(c)(4) presumption.[15]

[14] Because they measure different types of impairment, non-qualifying blood gas studies do not call into question the validity of qualifying pulmonary function studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984). Further, Dr. Porterfield's opinion that Claimant is totally disabled would not support a determination that Claimant is *not* totally disabled, even if the administrative law judge were to discredit it; Dr. Zaldivar did not address total disability; and Dr. Forehand's opinion was discredited as unreasoned.

[15] Our dissenting colleague argues substantial evidence does not support the administrative law judge's disability finding given her mischaracterization of the February 18, 2016 pulmonary function study and that we must remand for the administrative law judge to reevaluate the .01 FEV1 difference "in the first instance[.]" *Infra* at 15. We disagree. Dr. Porterfield's opinion and the two pulmonary function studies readily support the administrative law judge's disability determination for the reasons discussed. *See, e.g., Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion). Moreover, even if the earlier study did not support disability, as the Director notes, the "margin of error is so small and Claimant's work so arduous there [still] is no reasonable basis for vacating [the administrative law judge's] disability finding."

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish 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 Employer failed to rebut the presumption by either method.[17]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found the opinions of Drs. Forehand and Zaldivar that Claimant does not have legal pneumoconiosis but has

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Director's Brief at 11. Indeed, having rejected the oldest pulmonary function test as not probative, and the opinions of Drs. Forehand and Zaldivar as unreasoned, the only remaining evidence consists of a pulmonary function study that does not qualify by the smallest possible margin, Dr. Porterfield's credible statement the study nonetheless establishes disability, and a later, plainly qualifying study. Because we agree with the Director and see no reasonable basis for the administrative law judge to reverse her determination on those facts, remand is not required. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000).

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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] The administrative law judge found Employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 26.

an obstructive impairment due to cigarette smoking, insufficient to establish rebuttal.[18] Decision and Order at 19-21, 26-28; Employer's Exhibits 1, 4. Employer's challenge to this determination lacks merit.

Dr. Forehand noted Claimant left coal mining in 1992, had normal pulmonary function in 1997 with an FEV1 of 100%, normal pulmonary function in 2008, but with a decreased FEV1 of 87%, and had an obstructive respiratory impairment in 2016, with an FEV1 of only 58%. Employer's Exhibit 1. He excluded legal pneumoconiosis because "[he had] not seen nor would [he] expect a latency period of greater than [twenty] years before an individual exposed to coal mine dust would manifest coal mine dust-related disease . . . ." *Id.* Thus he concluded "Claimant's obstructive lung disease was substantially contributed to solely by his exposure to cigarette smoke." *Id.* Contrary to Employer's argument, the administrative law judge permissibly found this reasoning contrary to the principle that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. *See* 20 C.F.R. §718.201(c); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (a medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); 65 Fed. Reg. 79, 920, 79,971 (December 20, 2000); Decision and Order at 27-28; Employer's Brief at 11-13; Employer's Reply Brief at 7-8.

The administrative law judge accurately noted Dr. Zaldivar excluded legal pneumoconiosis, in part, because Claimant's pulmonary function studies showed reversibility of his impairment after use of a bronchodilator. Employer's Exhibit 4. Contrary to Employer's contention, the administrative law judge permissibly found Dr. Zaldivar's opinion inadequately reasoned because he did not address the etiology of the fixed portion of Claimant's respiratory impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 28.

The administrative law judge also permissibly rejected the opinions of Drs. Forehand and Zaldivar because they did not adequately explain why Claimant's more than twenty-six years of coal mine dust exposure was not an additive factor, along with smoking, in causing his respiratory impairment. *See* 20 C.F.R. §718.201(b); 65 Fed. Reg.

[18] The administrative law judge also considered Dr. Porterfield's opinion Claimant suffers from legal pneumoconiosis and correctly found it does not assist Employer. Decision and Order at 31-32; Director's Exhibit 19. Thus, we need not address Employer's contention the administrative law judge erred in weighing his opinion. *See* Employer's Brief at 13.

at 79,940; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 27-28. As substantial evidence supports the administrative law judge's permissible determinations to discredit the opinions of Drs. Forehand and Zaldivar they are affirmed.[19] *See Compton*, 211 F.3d at 207-08.

We therefore affirm the administrative law judge's determinations that Employer did not disprove legal pneumoconiosis and did not rebut the presumption by establishing Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer established that "no part of [Claimant'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). She rationally discounted Drs. Forehand's and Zaldivar's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Epling*, 783 F.3d at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 46-47. Therefore, we affirm the administrative law judge's determination that Employer failed to rebut legal pneumoconiosis as a cause of Claimant's disability. *See* 20 C.F.R. §718.305(d)(1)(ii). Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and Employer did not rebut the presumption, we affirm the award of benefits.

[19] Employer also argues the administrative law judge's discrediting of Drs. Forehand and Zaldivar "is tantamount to declaring that anyone with pulmonary symptoms who ever worked in a coal mine must necessarily have developed those symptoms as a result of coal workers' pneumoconiosis, ***as a matter of law***." Employer's Brief at 12. Contrary to Employer's assertion, the administrative law judge did not presume a physician could never find coal dust did not contribute to a miner's respiratory impairment. Rather, she found Drs. Forehand and Zaldivar did not adequately explain why, given Claimant's significant coal dust exposure, they were able to conclude coal dust did not contribute to his respiratory impairment.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that substantial evidence supports the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Employer's argument that the administrative law judge's errors in evaluating the pulmonary function study and medical opinion evidence necessitate a remand has merit.

With respect to the pulmonary function studies, the language of the regulation is clear; to establish total disability, a miner's test results must include:

> (i) . . . values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in Appendix B to this part for an individual of the miner's age, sex, and height for the FEV1 test . . . .

20 C.F.R. § 718.204. As the Board so often notes, a "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B; a "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(i). Consequently, the Board has held that "in weighing the pulmonary function study results, [the administrative law judge] is not permitted to round the values yielded by these studies." *Bolyard v. Peabody Coal Co.*, 6 BLR 1-767, 1-770 (1984) (interpreting ventilatory study results under 20 C.F.R. Part 727).

Here, as is noted by the majority, when awarding benefits the administrative law judge considered three new pulmonary function studies dated February 5, 2008, February

18, 2016, and April 25, 2018. Decision and Order at 14-16. In the February 18, 2016 study, Dr. Porterfield recorded an FEV1 value of 1.64 and an FEV1/FVC ratio of 50%. Director's Exhibit 16. Under 20 C.F.R. Part 718, Appendix B, a seventy-two-year-old miner with a height of 66.9 inches is totally disabled if his FEV1 value is less than or equal to 1.63 and his FEV1/FVC ratio is less than 55%. While the February 18, 2016 pulmonary function study may be qualifying for a man 67 inches tall as recorded by Dr. Porterfield, the administrative law judge found Claimant's height is 66.9 inches, and the study is not qualifying for a man of that height. Thus, the administrative law judge erred in concluding the 2016 pulmonary function study is qualifying at 20 C.F.R. §718.204(b)(2)(i).

Furthermore, the administrative law judge's error is not harmless because it is compounded by her relying on the non-qualifying study to credit Dr. Porterfield's opinion to establish total disability. Although the administrative law judge mentioned that Dr. Porterfield considered the exertional requirements of Claimant's usual coal mine work, she expressly referenced the "qualifying" nature of the 2016 study as support for her determination to credit his opinion:

> Dr. Porterfield concluded that Claimant has a total respiratory disability, citing the qualifying pulmonary function test of February 18, 2016 ("meets guidelines for complete impairment based on FEV1"). . . . Dr. Porterfield's conclusion is based on objective evidence – specifically, the qualifying pulmonary function test of 02/18/2016 - and therefore is well-reasoned and well-documented. Further, the test record reflects that Claimant gave good effort on the test and Dr. Gaziano, a Board-certified pulmonary physician independently verified the test's validity. A valid and qualifying pulmonary function test is evidence of total respiratory disability, in the absence of contrary probative evidence. [20 C.F.R.] § 718.204(b)(2). Dr. Porterfield reviewed no contrary probative evidence.

Decision and Order at 21. As such, the administrative law judge relied on facts that are not supported by substantial evidence to reach her legal conclusion.

It cannot be ignored that the weight given to Dr. Porterfield's opinion is based, at least in part, upon a non-qualifying study improperly considered as qualifying. While his opinion regarding total disability may or may not be valid based on his explicit reliance on a non-qualifying pulmonary function study he considered as qualifying, such a ruling is not for this Board to make in the first instance. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (administrative law judge's function as trier of fact is to

weigh the evidence); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012).

Similarly, while the February 18, 2016 pulmonary function study is close to qualifying, it does not qualify under the regulations, yet it was weighed as equally probative as the actually qualifying April 28, 2018 study. 20 C.F.R. Part 718, Appendix B; Decision and Order at 16. Whether the 2016 and 2018 studies are in equipoise, whether the 2016 study is viewed as supporting the 2018 study, or whether the 2016 study is viewed as undermining the 2018 study is a matter for the administrative law judge, not the Board, to decide. *See Stallard*, 876 F.3d at 670; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

The Board cannot find facts; it cannot weigh the evidence and make determinations which are the proper province of the administrative law judge. *Looney*, 678 F.3d at 316-17. Consequently, I would vacate the administrative law judge's rulings that Claimant established total disability through the pulmonary function studies, medical opinions, and the totality of the evidence. I, therefore, also would vacate the award of benefits and would remand this case for further consideration of whether Claimant invoked the Section 411(c)(4) presumption. I concur in all other aspects of the decision.

MELISSA LIN JONES
Administrative Appeals Judge