U.S. Department of Labor

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

BRB Nos. 20-0253 BLA
and 20-0253 BLA-A

LAVERNE B. MCDANIEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SQUAW CREEK COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	
	)	DATE ISSUED: 06/25/2021
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

William M. Bush (Elena S. Goldstein, Deputy 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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and Employer and its Carrier (Employer) cross-appeal Administrative Law Judge Jonathan C. Calianos's Decision and Order Denying Benefits (2017-BLA-05845) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a miner's claim filed on December 7, 2015.[2]

The administrative law judge found Claimant worked more than fifteen years in qualifying coal mine employment. However, he found the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant did not invoke 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] and failed to establish a required element of entitlement. He therefore denied benefits.

On appeal, Claimant argues the administrative law judge erred in finding the evidence did not establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (Director), has not responded to Claimant's appeal.

On cross-appeal, Employer argues that Peabody Energy Corporation (Peabody), as its Carrier, is not liable for benefits in the event of a remand and ultimately an award.

[1] This claim was previously before District Chief Administrative Law Judge Colleen A. Geraghty, who conducted the hearing. Hearing Transcript at 1. After Employer and its Carrier requested reassignment given the decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), the case was reassigned to Judge Calianos. *See* Order of Reassignment, Sept. 13, 2018.

[2] A prior claim was filed, but was withdrawn. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[3] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Employer also contends the Department of Labor district director is an "inferior officer" of the United States not properly appointed under the Appointments Clause of the Constitution.[4] Employer further argues the regulatory procedure used to adjudicate the responsible operator issue violated its right to due process. The Director responds, urging the Benefits Review Board to reject Employer's constitutional arguments and affirm the administrative law judge's determination that Employer is the responsible operator, as self-insured through Peabody.

The 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.[5] 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).

Claimant's Appeal

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR

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[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

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

1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Total Disability

A miner is 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 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 consider all relevant evidence and weigh the evidence supporting 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).

The administrative law judge found Claimant did not establish total disability based on any category of evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 10-11, 22. Claimant alleges the administrative law judge erred in discrediting certain pulmonary function studies, in determining Claimant's most recent employment was his usual coal mine employment, and in finding the medical opinions did not establish total disability.[6]

Pulmonary Function Studies

The administrative law judge first considered three pulmonary function studies designated by the parties dated December 2, 2015, February 11, 2016, and April 5, 2018. 20 C.F.R. §718.204(b)(i); Decision and Order at 8-10. Initially, because there were conflicting heights noted for Claimant in the record, the administrative law judge resolved these discrepancies by averaging the various recorded heights to find Claimant is 68 inches tall.[7] Decision and Order at 8 n.4. Using the closest greater height of 68.1 inches listed in the tables for determining "qualifying" pulmonary function study values at Appendix B of

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that the arterial blood gas studies do not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii),(iii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] Claimant does not challenge the administrative law judge's determination regarding his height; thus, it is affirmed. *Skrack*, 6 BLR at 1-711.

20 C.F.R. Part 718,[8] the administrative law judge analyzed the results of the pulmonary function studies and found only the February 11, 2016, pre-bronchodilator study qualified as disabling. Decision and Order at 9. However, he found this study "seriously called into question" by Drs. Tuteur's and Broudy's opinions that the decrease in function indicated on the study was likely due to an acute illness. Decision and Order at 9 (citing Employer's Exhibits 3 at 20; 5 at 9-12; 7).[9] The administrative law judge accorded the most weight to the non-qualifying April 5, 2018 pulmonary function study as best reflecting Claimant's current pulmonary status. Decision and Order at 10. Weighing the pulmonary function studies together, he found they did not establish total disability.[10] *Id.*

Claimant argues the administrative law judge mischaracterized Drs. Broudy's and Tuteur's testimony that Claimant was suffering from an acute illness at the time the February 11, 2016 pulmonary function study was administered. Claimant's Brief at 8-9. He argues Dr. Broudy never stated the February 11, 2016 testing was invalid. Claimant's Brief at 9. Claimant further argues that while Dr. Tuteur noted the testing was invalid in his report, he did not explain this opinion; moreover, the administrative law judge cited a portion of Dr. Tuteur's testimony that addressed the reliability of Claimant's arterial blood gas studies in support of his finding regarding total disability, but not the pulmonary function studies. *Id.* Finally, Claimant argues the administrative law judge did not adequately address whether an acute illness existed at the time of the February 11, 2016 testing. *Id.* at 9-10.

[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] As Claimant notes, it appears the administrative law judge was referring to Dr. Tuteur's deposition testimony when citing Employer's Exhibit 3; however, his testimony was admitted as Employer's Exhibit 4.

[10] Claimant argues in a footnote in his brief that the administrative law judge erred in finding the December 2, 2015 pulmonary function study's pre-bronchodilator values invalid based on the laboratory technician's comments that the study did not meet American Thoracic Society criteria. Claimant's Brief at 12 n.5. Claimant does not allege the administrative law judge erred in finding this study non-qualifying for disability. Decision and Order at 9. Further, the administrative law judge did not discredit any medical opinion for relying on the December 2, 2015 study. Thus, any error by the administrative law judge in finding its pre-bronchodilator values invalid is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Contrary to Claimant's arguments, the administrative law judge permissibly considered evidence that the February 11, 2016 pulmonary function study was obtained "soon after" an acute illness to find it unreliable. Decision and Order at 9 (citing Appendix B of 20 C.F.R. Part 718; *Jeffries v. Director, OWCP*, 6 BLR 1-1013 (1984)). As Claimant acknowledges, he was hospitalized for pneumonia, acute renal failure, and congestive heart failure exacerbation from January 4, 2016 to January 8, 2016. Employer's Exhibit 7 at 7-9. The administrative law judge rationally determined a pulmonary function study obtained only a month after hospitalization for pneumonia, acute renal failure, and an exacerbation of congestive heart failure was "soon after" an acute respiratory illness that could affect the reliability of the testing, given Drs. Broudy's and Tuteur's testimony that Claimant's recent hospitalization and illness likely affected the February 11, 2016 pulmonary function study.[11] *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94 (7th Cir. 1990)(administrative law judge weighs the evidence and draws inferences); Employer's Exhibits 4 at 17; 5 at 10-12. Because the administrative law judge permissibly found the reliability of the only qualifying pulmonary function study to be undermined, his determination that the three designated pulmonary function studies do not establish total disability is supported by substantial evidence and is affirmed. Decision and Order at 10.

The administrative law judge also considered several pulmonary function studies contained in Claimant's treatment records. 20 C.F.R. §725.414(a)(4). Claimant underwent four pulmonary function studies at St. Mary's Hospital in September 2015, and an additional study which his treating pulmonologist Dr. Rieti administered in October 2017. Employer's Exhibit 7. Of those five studies, the administrative law judge found only the non-qualifying September 28, 2015 study worthy of any weight, as it bore a notation that it met the American Thoracic Society standards and Claimant put forth good effort on the study. Decision and Order at 18-19.

He gave the other September 2015 pulmonary function studies less weight because either the actual resulting values were not provided or he found that the notes provided with the studies undermined their reliability. *Id.* For example, the administrative law judge found the September 23, 2015 study worthy of no weight given the attending physician's statement that its results would be "skewed considering that [Claimant] is having bronchospasm." Decision and Order at 18 (quoting Employer's Exhibit 7 at 55-57). Furthermore, the October 2, 2017 pulmonary function study Dr. Rieti obtained was non-

[11] Claimant correctly notes the administrative law judge cited a portion of Dr. Tuteur's testimony regarding Claimant's acute congestive heart failure affecting his arterial blood gas studies; however, Dr. Tuteur also addressed the decline in Claimant's February 11, 2016 pulmonary function study results due to his acute illness. Employer's Exhibit 4 at 17.

qualifying for disability. Employer's Exhibit 18; Decision and Order at 19. The administrative law judge therefore found the pulmonary function studies in Claimant's treatment records "do not aid [Claimant] in establishing total disability." Decision and Order at 19-20.

Claimant argues the administrative law judge erred in giving the September 23, 2015 qualifying pulmonary function study less weight. Claimant's Brief at 11. Claimant argues the laboratory technician's "firsthand observation" of Claimant's "good effort" on the testing warranted more weight than the attending physician's statement, which was provided before the testing took place, and there was no indication Claimant was still in bronchospasm at the time of the testing. *Id.* at 11-12. Claimant's argument is without merit. Whether the laboratory technician noted good effort is irrelevant to the physician's statement that Claimant was in bronchospasm, which could potentially skew the testing results. Further, while the laboratory technician noted good effort, the administrative law judge summarized that the technician also noted Claimant was "short of breath throughout the tests and could not do many trials." Decision and Order 18 (citing Employer's Exhibit 7 at 97). The administrative law judge thus permissibly relied upon the observation of the attending physician, as well as the laboratory technician's observation, to find this pulmonary function study less reliable.[12] *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988) (it is the job of the administrative law judge to weigh the evidence, draw inferences, and determine credibility).

Claimant does not challenge the remainder of the administrative law judge's determinations regarding the pulmonary function studies contained in Claimant's treatment records. As the administrative law judge's determination that the pulmonary function studies in Claimant's treatment records do not support his burden to establish total disability is supported by substantial evidence, it is affirmed. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 19.

[12] While pulmonary function studies contained in treatment records are not subject to the quality standards in the regulations, the administrative law judge must nonetheless determine whether the studies can reliably establish total disability. 20 C.F.R. §718.101(b); Appendix B to 20 C.F.R. Part 718; 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000) ("Despite the inapplicability of quality standards to certain categories of evidence, the adjudicator must still be persuaded the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.").

Usual Coal Mine Employment

Before considering the medical opinions, the administrative law judge determined Claimant's usual coal mine employment and its exertional requirements. Decision and Order at 12. He noted the parties stipulated that Claimant's last coal mining job was working as an equipment operator, and also stipulated to his job duties.[13] Decision and Order at 12 (citing ALJ Exhibit 2). The administrative law judge cited these stipulated job duties, as well as Claimant's testimony that he performed this most recent job for two years as part of the reclamation process after the mine closed. Decision and Order at 12; Hearing Transcript at 23. Claimant also testified he welded[14] two days per week in his most recent job; thus, the administrative law judge found welding was also required as part of his usual coal mine employment. Decision and Order at 12 (citing Hearing Transcript at 23-24). Based on the stipulated job duties, Claimant's description in his claim application of the requirements of his work as a welder, and the *Dictionary of Occupational Titles* (DOT), which the administrative law judge took official notice of, he found Claimant's usual coal mine employment required moderate physical exertion.[15] *Id.*

Claimant argues the administrative law judge erred in relying on the parties' stipulation to find his reclamation work was his usual coal mine employment. He contends the parties did not stipulate that his job as an equipment operator during the reclamation process was his usual coal mine employment, only that it was his last coal mining job. Claimant's Brief at 12. Claimant also argues that since his last job was for the sole purpose of closing the mine, it was not intended to be a permanent position, and so does not qualify as his usual coal mine employment. *Id*. (citing *Brown v. Cedar Coal Co.*, 8 BLR 1-86 (1985)). Rather, Claimant argues his prior job as a welder is his usual coal mine employment. *Id.* Finally, Claimant argues that even if the administrative law judge correctly identified his reclamation work as his usual coal mine employment, the

[13] The duties provided were: "Operating equipment, occasional refueling of equipment, and daily cleaning of machine. Claimant scaled 8-10 steps to enter and exit cab multiple times per shift." ALJ Exhibit 2 at 2.

[14] Before the mine shut down in 1997, Claimant worked there as a welder, primarily at the tipple. Director's Exhibits 4-5; Hearing Transcript at 14, 24.

[15] No party objected to the administrative law judge's taking official notice of or his use of the *Dictionary of Occupational Titles* (DOT) in his decision. Claimant referenced the DOT in his Amended Post-Hearing Brief. Claimant's Amended Post-Hearing Brief at 5 n.1.

administrative law judge mischaracterized the physical demands of the job, which Claimant argues should be classified as heavy labor. *Id.* at 13-14.

First, we disagree that the administrative law judge erred in relying on the parties' stipulation to find Claimant's job as an equipment operator performed during the reclamation process was his usual coal mining work. Although the parties' joint pre-hearing statement specified Claimant's *last* coal mine job, but not his *usual* coal mining employment, the parties set forth the stipulation under the heading "Total Disability-Summary of Evidence." Updated Joint Pre-Hearing Statement at 2. The job duties were also specifically listed. *Id.* The joint pre-hearing statement was admitted without objection. Hearing Transcript at 6. Thus, the administrative law judge reasonably considered the parties' stipulation regarding Claimant's last coal mine job to be a stipulation as to his usual coal mine employment for purposes of determining its exertional requirements when determining total disability. *See Amax Coal Co. v. Beasley*, 957 F.2d 324, 327 (7th Cir. 1992); *see also Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982) (a claimant's usual coal mine employment is the most recent job the miner performed regularly and over a substantial period of time and is to be determined for purposes of determining total disability).

Further, the administrative law judge considered Claimant's post-hearing argument that under *Brown*, his reclamation work should not be considered his usual coal mine employment. Decision and Order at 12 n.8. The administrative law judge accurately noted the Board did not hold in *Brown* that reclamation work cannot constitute a miner's usual coal mine employment. Rather, the Board affirmed an administrative law judge's finding that a miner's last work as a general inside laborer for three and a half months while the mine was being closed was a temporary, short-term job and thus was not his usual coal mine employment. *Brown*, 8 BLR at 1-87. Here, the administrative law judge reasonably found Claimant's reclamation work over a period of two years was Claimant's regular job performed over a substantial period of time. *See Shortridge*, 4 BLR at 1-538-39.

Moreover, Claimant's arguments regarding his usual coal mine employment raise a distinction that makes no difference in the outcome. Claimant alleges his usual coal mine employment was his welding job prior to the closing of the mine. However, the administrative law judge found welding remained part of Claimant's job duties as an equipment operator during his two years of reclamation work, based on his testimony. Decision and Order at 12. The administrative law judge used Claimant's description of welding in his application for benefits as the basis for his determinations regarding the exertional requirements of his welding work duties. *Id.* Thus, the finding that Claimant actually contests is the administrative law judge's finding regarding the exertional requirements of his welding work duties.

Claimant argues the administrative law judge erroneously considered how many days a week he performed welding and his shorter shifts in the reclamation process in determining the exertional requirements of the job. Claimant's Brief at 13. While the administrative law judge considered Claimant's testimony that he did not perform welding every day in his reclamation job, he did not find that fact changed the exertional requirements of the welding job, but rather merely noted Claimant performed welding in addition to the duties of an equipment operator consistent with the parties' stipulation. *See* Decision and Order at 12. As Claimant acknowledges, the administrative law judge considered Claimant's description regarding his welding job provided in his claim application.[16] Decision and Order at 12; Claimant's Brief at 14.

Claimant further argues the administrative law judge misapplied the DOT to his description of his welding work to find it required moderate[17] exertion rather than heavy labor. Claimant's Brief at 14. Claimant stated that in his job as a welder, he was required to lift five to twenty-five pounds "several" times per day and carry twenty-five to fifty pounds a distance of fifty to one hundred feet "several" times per day. Decision and Order at 12 (citing Director's Exhibit 5). Claimant argues his description of carrying twenty-five to fifty pounds several times per day should be considered performing this work "frequently," which would constitute heavy labor as set forth in the DOT.[18] Claimant's Brief at 14. Claimant's argument is without merit.

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[16] Claimant does not argue that the administrative law judge erred in considering this evidence in determining the exertional requirements of his work as a welder. Claimant's Brief at 14.

[17] The administrative law judge used the term "moderate," while the DOT, upon which he relied, uses the term "medium." Decision and Order at 12 & n.9. Claimant does not contend that "moderate" means anything different than "medium" as used in the DOT.

[18] As the administrative law judge noted, the DOT defines medium work as "[e]xerting 25 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects." Decision and Order at 12 n.9 (citing http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM). Claimant notes the DOT defines heavy work as exerting 50 to 100 pounds of force "occasionally," and/or exerting 25 to 50 pounds of force "frequently." Claimant's Brief at 14 (citing *Dictionary of Occupational Titles*, Appendix C (4th Ed., Rev. 1991)). Claimant further notes the DOT defines "occasionally" as occurring up to 1/3 of the time, and "frequently" as occurring 1/3 to 2/3 of the time. *Id.*

It is Claimant's burden to establish the exertional requirements of his usual coal mine employment. *See Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219, 1221 (1984). Given Claimant's description that he carried twenty-five and fifty pounds "several" times per day during his job as a welder, the administrative law judge reasonably determined these tasks were an "occasional," but not a "frequent," occurrence per the DOT; therefore, he acted within his discretion to find Claimant's work required medium physical exertion.[19] Decision and Order at 12 n.9. As the administrative law judge's determination that Claimant's usual coal mine employment required medium physical exertion is supported by substantial evidence, this finding is affirmed. *See Beasley*, 957 F.2d at 327.

Medical Opinion Evidence

Claimant further argues the administrative law judge erred in his consideration of the medical opinion evidence to find it did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Ryon and Houser that Claimant is totally disabled by a respiratory or pulmonary impairment and the medical opinions of Drs. Broudy and Tuteur that Claimant is not totally disabled. The administrative law judge found the opinions of Drs. Ryon and Houser undermined for various reasons and thus found the medical opinions did not establish total disability. Decision and Order at 20-22.

The administrative law judge found Dr. Ryon's opinion that Claimant is totally disabled unreliable because he considered only the objective testing obtained as a part of his evaluation and was unaware of the additional testing obtained later; thus, he did not have a complete picture of Claimant's pulmonary capacity. Decision and Order at 20. He also found Dr. Ryon did not take into account Claimant's hospitalizations for an illness both before and after his testing, and what affect, if any, his illness had on the reliability of his testing. *Id.*

The administrative law judge found Dr. Houser's opinion regarding total disability to be conclusory as he did not identify what testing, clinical findings, or other data he relied on to support his conclusion that Claimant, "solely from a respiratory standpoint[,] has a disabling respiratory impairment which would physically preclude him from performing his last [coal mine employment]." Decision and Order at 20 (citing Claimant's Exhibits 2 at 8; 6 at 2-3).

[19] The term "several" is defined as "more than two but fewer than many." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/several (last visited May 12, 2021).

The administrative law judge found the opinions of Drs. Broudy and Tuteur consistent with his analysis of Claimant's objective testing and found they persuasively opined that while Claimant is disabled due to his "many other serious comorbidities," he would be able to perform his last coal mine employment purely from a respiratory standpoint. Decision and Order at 21.

Claimant argues the administrative law judge did not consider the abnormal diffusion capacity test Dr. Tuteur administered when weighing the medical opinion evidence, noting Dr. Tuteur's diffusion capacity test was thirty-three percent of predicted both before and after it was corrected for alveolar volume. Claimant's Brief at 16-17. Claimant notes Dr. Houser indicated this value represents a class IV impairment under the American Medical Association guidelines and alleges the administrative law judge failed to consider this evidence. *Id.* at 17. Claimant further argues the administrative law judge's finding that Dr. Houser's opinion is conclusory is not a fair assessment of his opinion. *Id.* at 21.

Contrary to Claimant's argument, the administrative law judge addressed Dr. Houser's comment regarding Dr. Tuteur's diffusion capacity test result. The administrative law judge indicated that while low diffusing capacity may be a basis for finding total disability, Dr. Houser's comments did not support such a finding, as he did not specify what physical limitations would result from a thirty-three percent diffusion capacity or associated class IV impairment, or whether such limitations would prevent Claimant from performing his usual coal mine employment. Decision and Order at 21. He further found that while Dr. Houser indicated in his supplemental report that the "various medical records support the presence of a disabling lung disease, which includes abnormal spirometry, a low diffusion capacity, and varying degrees of hypoxemia," he did not specify which objective or clinical data contained in those records that he relied on or explain how the findings in those medical records established total disability. Decision and Order at 20 (quoting Claimant's Exhibit 6 at 2). Further, the administrative law judge found Dr. Houser's reference to Claimant's treatment records "particularly unpersuasive" given the administrative law judge's determination that the valid testing in the treatment records did not support total disability. Decision and Order at 20-21.

It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). While Dr. Houser summarized the various testing results and records, including the diffusing capacity test Dr. Tuteur administered, the administrative law judge found Dr. Houser did not specify what evidence he relied on to find Claimant unable to perform his usual coal mine employment or adequately explain his determination that Claimant is totally disabled solely from a respiratory standpoint. *See* Claimant's Exhibits 2, 6.

Accordingly, the administrative law judge, within his discretion as the factfinder, found Dr. Houser's opinion conclusory and thus insufficient to support a finding of total disability. *See Smith v. Director, OWCP*, 843 F.2d 1053, 1057 (7th Cir. 1988); Decision and Order at 20-21.

Claimant also argues the administrative law judge erred in discrediting Dr. Ryon's opinion, as "studies conducted after Dr. Ryon's testing do not necessarily detract from his opinion." Claimant's Brief at 20. The administrative law judge, however, permissibly found Dr. Ryon's opinion less probative because he did not review non-qualifying objective tests obtained after conducting his examination and therefore had an incomplete picture of Claimant's condition.[20] *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (an administrative law judge may assign less weight to a physician's opinion which reflects an incomplete picture of a miner's health).

The remaining medical opinions do not support a finding of total disability. Thus, we affirm the administrative law judge's finding that the medical opinions do not establish total disability.[21] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21-22. Further, we affirm the administrative law judge's finding that the relevant evidence, when weighed together, does not establish total disability. 20 C.F.R. §718.204(b)(2). As Claimant failed

[20] Because the administrative law judge provided a valid basis for according less weight to Dr. Ryon's opinion, we need not address Claimant's additional arguments regarding his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[21] Claimant argues the administrative law judge mischaracterized Dr. Broudy's opinion to find it did not support total disability. Claimant's Brief at 18-19. Claimant argues Dr. Broudy "consistently considered [Claimant] incapable of performing his job from a pulmonary standpoint." *Id.* at 19. In his initial report, Dr. Broudy opined that Claimant is totally disabled based on Dr. Ryon's objective testing. Decision and Order at 14-15 (citing Director's Exhibit 42). In his deposition, Dr. Broudy again stated Claimant is totally disabled based on Dr. Ryon's testing. Decision and Order at 15 (citing Employer's Exhibit 5 at 8, 24, 32). The record reflects, however, that after Dr. Broudy considered Dr. Tuteur's more recent testing, Dr. Broudy indicated that "purely from a respiratory standpoint, [Claimant] would retain the capacity to do previous work." Decision and Order at 16 (citing Employer's Exhibit 8). Thus, substantial evidence supports the administrative law judge's finding that Dr. Broudy did not consider Claimant totally disabled. Decision and Order at 21. Because Drs. Broudy's and Tuteur's opinions do not support a finding of total disability, we need not address Claimant's remaining arguments regarding their opinions.

to establish total disability, he did not invoke the Section 411(c)(4) presumption and failed to establish an essential element of entitlement. *Trent*, 11 BLR at 1-27. We therefore affirm the denial of benefits.

Employer's Cross-Appeal

On cross-appeal, Employer sets forth multiple arguments in the event of a remand, urging the Board to instruct the administrative law judge that Peabody is not liable for the payment of benefits. Employer's Brief at 2-47. Because we affirm the denial of benefits, we need not address Employer's cross-appeal.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge