U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0367 BLA

NORMAN C. BARNES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COWIN & COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 08/25/2015
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Mary Lou Smith (Howe, Anderson & Smith, P.C.), Washington, D.C., for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, BUZZARD and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (09-BLA-5923) of Administrative Law Judge Adele H. Odegard 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). This case involves a miner's claim filed on August 25, 2008, and is before the Board for the second time.

In a Decision and Order dated December 21, 2010, Administrative Law Judge Janice K. Bullard credited claimant with 21.26 years of coal mine employment, more than fifteen years of which she found to be underground coal mine employment.[1] Judge Bullard further found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Judge Bullard therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Judge Bullard further found that employer did not rebut the presumption. Accordingly, Judge Bullard awarded benefits.

Upon review of employer's appeal, a majority of the Board vacated Judge Bullard's decision to credit claimant with at least fifteen years of qualifying coal mine employment for purposes of the Section 411(c)(4) presumption. *Barnes v. Cowin & Co.*, BRB No. 11-0324 BLA, slip op. at 5-6 (Feb. 29, 2012)(unpub.)(McGranery, J., concurring & dissenting). Specifically, the Board held that Judge Bullard erred in construing claimant's testimony to be that he worked underground for all of his coal mine construction employers because, based on the Board's review of the record, claimant's testimony that he worked in underground coal mine employment "appeared to be referring" only to his coal mine construction work with employer, and his work as a fire boss with Oak Grove Resources LLC (Oak Grove). *Id*. at 6. Those two periods of

[1] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Slatick v. Director, OWCP*, 698 F.2d 433, 434, 5 BLR 2-49, 2-50 (11th Cir. 1983); *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

underground coal mine employment totaled 14.45 years.[3] Thus, the Board remanded the case for Judge Bullard to determine whether any of claimant's additional coal mine employment, with other companies between 1975 and 1986, was employment in an underground mine, or employment that took place in conditions substantially similar to those in an underground mine. *Id*.

Additionally, a majority of the Board vacated Judge Bullard's finding of total disability based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] *Id*. at 7-9. Specifically, the Board held that Judge Bullard erred in crediting Dr. Hawkins's medical opinion that claimant is totally disabled, without addressing Dr. Hawkins's reference to a pulmonary function study and blood gas study not contained in the record. *Id*. at 8; *see* 20 C.F.R. §725.414(a)(2)(i). Therefore, the Board remanded the case for Judge Bullard to determine if Dr. Hawkins's opinion was inextricably tied to the evidence not contained in the record and, if so, to consider whether to exclude the report, redact a portion of the report, or factor in the physician's reliance on the non-record evidence when deciding the weight to accord his opinion. *Id*. at 9; *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). The Board further instructed Judge Bullard to reconsider Dr. Barney's opinion diagnosing total disability, in light of the non-qualifying objective studies upon which it was based. *Id*. at 9. Consequently, the Board vacated Judge Bullard's finding that claimant invoked the Section 411(c)(4) presumption, and instructed her to reconsider that issue on remand.[5] *Id*. Finally, the Board instructed Judge Bullard that if claimant did not establish at least fifteen years of qualifying coal mine employment, she was to consider entitlement under 20 C.F.R. Part

[3] The Board affirmed, as unchallenged, Administrative Law Judge Janice K. Bullard's finding of 14.45 years of underground coal mine employment. *Barnes v. Cowin & Co.*, BRB No. 11-0324 BLA, slip op. at 5 n.6 (Feb. 29, 2012)(unpub.)(McGranery, J., concurring & dissenting).

[4] Judge Bullard found that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). *Barnes*, slip op. at 7 & n.9.

[5] Additionally, because Judge Bullard relied on the opinions of Drs. Hawkins and Barney in finding that employer failed to rebut the Section 411(c)(4) presumption, the Board vacated her rebuttal findings, and instructed Judge Bullard to reconsider rebuttal, if she again found that claimant invoked the Section 411(c)(4) presumption. *Barnes*, slip op. at 9 n.12 (McGranery, J., concurring & dissenting).

718. *Id*. at 10 n.13.[6]

On remand, because Judge Bullard was unavailable, the case was reassigned, without objection, to Administrative Law Judge Adele H. Odegard (the administrative law judge). In an Order issued on January 3, 2013, which the administrative law judge later incorporated into her Decision and Order on Remand, the administrative law judge found that claimant established 15.13 years of qualifying coal mine employment. Order at 2-5; Decision and Order on Remand at 5. Specifically, the administrative law judge credited claimant with the 14.45 years of underground coal mine employment previously found established, plus .68 of a year of qualifying coal mine employment found established on remand. The .68 of a year credited was for coal mine construction work that claimant performed with two companies, Graciano Corporation (Graciano) (.63 of a year in 1983 and 1984) and Gunther-Nash, Incorporated (Gunther-Nash) (.05 of a year in 1985). Based on claimant's description of his employment, the administrative law judge found that claimant's .68 of a year of coal mine construction work for those two companies took place "at an active underground mine site" and was, therefore, qualifying coal mine employment for purposes of Section 411(c)(4).[7] Order at 3.

The administrative law judge additionally found that the evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Reconsidering the medical opinion evidence, the administrative law judge found that Dr. Hawkins's diagnosis of total disability was well-documented and well-reasoned, and was not inextricably tied to the non-record pulmonary function study and blood gas study. The administrative law judge further determined that, even if Dr. Hawkins's opinion was inextricably linked to the non-record evidence, there was no reason to accord his opinion less weight on that basis. Decision and Order on Remand at

[6] Administrative Appeals Judge McGranery agreed with the majority that Judge Bullard did not adequately explain her finding of fifteen years of qualifying coal mine employment. However, Judge McGranery would have affirmed Judge Bullard's alternative finding that claimant established entitlement pursuant to 20 C.F.R. Part 718, and thus would have affirmed the award of benefits. *Barnes*, slip op. at 10-17 (McGranery, J., concurring & dissenting).

[7] Because the additional .68 of a year of qualifying coal mine employment with Graciano Corporation and Gunther-Nash, Incorporated resulted in a total of over fifteen years of qualifying coal mine employment, the administrative law judge declined to address whether any of claimant's additional employment with other coal mine construction companies during the years 1983 to 1985 constituted qualifying coal mine employment under Section 411(c)(4). Order at 5 n.7.

13. Weighing Dr. Hawkins's opinion[8] along with the pulmonary function study and blood gas study evidence of record, the administrative law judge found that claimant established total disability by a preponderance of the evidence.

Based on the foregoing findings, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Additionally, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, and thus erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board instruct the administrative law judge that she may take official notice of several documents pertaining to the credibility of Dr. Wheeler's x-ray interpretations, if the Board vacates the administrative law judge's findings regarding the rebuttal evidence on the issue of clinical pneumoconiosis.[9] Employer filed a reply brief, urging rejection of the Director's assertions regarding the credibility of Dr. Wheeler's x-ray readings.

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).

[8] The administrative law judge discounted Dr. Barney's opinion diagnosing total disability, finding that it was not well-documented or reasoned. Decision and Order on Remand at 14. Further, the administrative law judge found that Dr. Goldstein's opinion, submitted by employer, was silent on the issue of whether claimant is totally disabled by a respiratory or pulmonary impairment. *Id*. at 10, 14.

[9] In support of his argument, the Director identifies several documents "pertaining to the credibility of Dr. Wheeler's x-ray reading[s]," including BLBA Bulletin 14-09, issued June 2, 2014, which instructs District Directors to not credit Dr. Wheeler's negative readings for pneumoconiosis in the absence of persuasive evidence rehabilitating his readings. Director's Brief at 2.

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

Qualifying Coal Mine Employment

Employer argues that substantial evidence does not support the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. Employer's Brief at 4-5, 13-14. To invoke the Section 411(c)(4) presumption, claimant must establish at least fifteen years of "employment in one or more underground coal mines" or "employment in a coal mine other than an underground mine" in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Conditions in a mine other than an underground mine are considered substantially similar to those in an underground mine "if the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Employer first contends that the administrative law judge erred in crediting claimant with the 14.45 years of underground coal mine employment that Judge Bullard previously found established, and that the Board affirmed as unchallenged on appeal. *Barnes*, slip op. at 5 n.6. Employer argues that, contrary to the Board's prior holding, employer challenged Judge Bullard's finding that claimant established 14.45 years of underground coal mine employment with employer and Oak Grove. Employer therefore argues that the current administrative law judge, on remand, erred in using the 14.45 years as the starting point for her analysis of whether claimant established at least fifteen years of qualifying coal mine employment. We disagree.

In the argument section of its brief filed in the previous appeal, employer alleged no error in Judge Bullard's finding that claimant had a total of 14.45 years of underground coal mine employment with employer and Oak Grove. Instead, employer argued that while Judge Bullard "found less than 15 years of underground coal mine employment by Cowin and Oak Grove," she identified no basis in the record for "counting any *additional* employment for purposes of [the] 15 year presumption." Employer's Brief at 17 in BRB No. 11-0324 BLA (emphasis added). Earlier, in the "Summary of Evidence" section of that brief, employer stated that the total underground employment with employer and Oak Grove found by Judge Bullard was "no more than 14.45 years." *Id*. at 4. Employer now points to a sentence that followed, in which employer stated that, "[s]ince claimant's employment by [employer] during the 1986-2002 period was not continuous, and [Judge Bullard] appears to have included other employment in the 1986-2002 total, the total of proven underground employment is actually less than this." *Id*. However, employer did not further brief that issue; it resumed referring to "the 14.45 years of underground coal mine employment" found established, *Id*. at 5, and instead specifically challenged the additional 6.81 years of coal mine employment that Judge Bullard had credited to claimant. *Id*. at 5-7.

Based on that briefing, the Board concluded that employer did not challenge Judge Bullard's finding of 14.45 years of underground coal mine employment with employer and Oak Grove. *See* 20 C.F.R. §802.211(b). As employer has neither shown that the Board's holding was clearly erroneous or results in a manifest injustice to it, nor set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting). Therefore, we reject employer's argument that the administrative law judge, on remand, erred in considering the 14.45 years of underground coal mine employment previously established as the starting point for her calculation of the length of claimant's qualifying coal mine employment for purposes of Section 411(c)(4).

Employer next argues that the administrative law judge erred by crediting claimant with an additional .68 of a year of qualifying coal mine employment. Employer's Brief at 13-14. The administrative law judge, on remand, noted that claimant listed coal mine construction work with multiple employers from 1983 to 1986. The administrative law judge focused on two such employers, Graciano in 1983 and 1984, and Gunther-Nash in 1985. Director's Exhibit 4. The administrative law judge first addressed the nature and location of that employment. Because claimant described that work as "coal mine construction," and stated that he was engaged in "mining," was a "miner," and was exposed to dust, gases, and fumes, the administrative law judge inferred that claimant "was performing mining-related work at an active underground mine site" during those periods.[10] Order at 3; Decision and Order on Remand at 5. The administrative law judge therefore concluded that claimant's coal mine construction work with Graciano and Gunther-Nash constituted qualifying coal mine employment under Section 411(c)(4). The administrative law judge then turned to determining the length of that employment.

The record did not contain the beginning and ending dates of claimant's employment with Graciano or Gunther-Nash, and claimant worked for additional coal mine construction employers during the same period, 1983 to 1986. To determine the length of claimant's combined employment with Graciano and Gunther-Nash, the administrative law judge considered claimant's Social Security Administration (SSA) earnings records, and compared claimant's earnings with those two companies to claimant's total earnings for the relevant year, and calculated the portion of the year that

[10] The administrative law judge contrasted claimant's description of that period of his coal mine construction work with claimant's description of other coal mine construction work, in which claimant "did not specifically indicate that he was involved in mining." Order at 3 n.3.

claimant worked for either Graciano or Gunther-Nash.[11] Order at 4-5; Decision and Order on Remand at 5; Director's Exhibit 7. Using that method, the administrative law judge determined that the length of claimant's combined employment with Graciano and Gunther-Nash was .68 of a year. *Id*. Adding that amount to the 14.45 years found established by Judge Bullard, the administrative law judge determined that claimant established 15.13 years of qualifying coal mine employment.

Employer contends that the administrative law judge erred in considering claimant's coal mine construction work with Graciano and Gunther-Nash to be qualifying coal mine employment under Section 411(c)(4), because there is no evidence that the work occurred at an active underground mine site, or that claimant had "exposure specifically to coal mine dust." Employer's Brief at 13. Employer's contention lacks merit. Employer concedes that, apart from claimant's work as a fire boss with Oak Grove, "[t]he remainder of [claimant's] alleged coal mine employment . . . involved coal mine construction," and that "some of this employment occurred in an underground setting . . . ." Employer's Brief at 4. In that context, employer does not explain what was unreasonable in the administrative law judge's inference that claimant's coal mine construction work with Graciano and Gunther-Nash took place at the site of an underground mine, given claimant's description of working as "a miner" and of being exposed to dust, gases, and fumes. Decision and Order on Remand at 5; Order at 3. The Board is not authorized to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). We therefore reject employer's allegation of error.

Moreover, even if we agreed with employer that there was not sufficient support for the administrative law judge's inference that the employment with Graciano and Gunther-Nash took place at the site of an underground mine, we conclude that, on the facts of this case, any error was harmless, in view of the regulatory provisions that apply specifically to coal mine construction workers. *See* 20 C.F.R. §725.202(b); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Under those rules, employer's argument, that claimant must prove that his employment took place at an "active underground mine site" and that he had "exposure specifically to coal mine dust," is misplaced. It is undisputed that the period of coal mine employment at issue was coal mine construction work. Employer's Brief at 4. The applicable regulation provides that "[t]here shall be a rebuttable presumption that [a coal mine construction worker] was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of . . . establishing the applicability

[11] In making the above calculation, the administrative law judge assumed that claimant's "wage rate was basically the same, no matter who the [e]mployer was . . . ." Order at 5.

of *any of the presumptions described in [S]ection 411(c) of the Act* and part 718 . . . ." 20 C.F.R. §725.202(b)(1)(ii)(emphasis added). Thus, regardless of whether claimant performed his coal mine construction work with Graciano and Gunther-Nash at the site of an underground mine, or at a surface mine, he is presumed to have been exposed to coal mine dust during that coal mine construction work. Employer may rebut the presumption with "evidence which demonstrates that [claimant] was not regularly exposed to coal mine dust during his . . . work in or around a coal mine . . . or [that claimant] did not work regularly in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(b)(2)(i),(ii). Employer does not point to any such evidence, nor is any such evidence apparent in the record.[12] Therefore, on that additional basis, we affirm the administrative law judge's determination that claimant's coal mine construction work with Graciano and Gunther-Nash constituted qualifying coal mine employment for purposes of Section 411(c)(4).

Employer next contends that the administrative law judge did not properly analyze claimant's SSA earnings records to calculate the length of claimant's coal mine employment with Graciano and Gunther-Nash. Employer's Brief at 13-14. Specifically, employer contends that it was not rational for the administrative law judge to assume that, during the years 1983 to 1986, claimant was paid at the same rate and was fully employed each year by the multiple listed coal mine construction employers,[13] when calculating the portion of each year that claimant worked for Graciano or Gunther-Nash. We disagree.

In determining the length of coal mine employment, an administrative law judge may apply any reasonable method of calculation. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). In relying on claimant's SSA earnings records, the administrative law judge compared claimant's total yearly income to the average yearly income for miners

[12] The administrative law judge found that employer did not rebut a related presumption, "that any person working in or around a coal mine or coal preparation facility is a miner," 20 C.F.R. §725.202(a), because employer presented no evidence that claimant was not regularly employed in or around a coal mine. Order at 2-3; *see* 20 C.F.R. §725.202(a)(2). That unchallenged finding is affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), and precludes rebuttal under 20 C.F.R. §725.202(b)(2)(ii). Further, a review of the record discloses no evidence that claimant was not regularly exposed to coal mine dust during his coal mine construction work with Graciano and Gunther-Nash. *See* 20 C.F.R. §725.202(b)(2)(i).

[13] Employer points to claimant's testimony that he was subject to layoffs in his coal mine construction work, and worked for multiple coal mine construction employers. Employer's Brief at 13-14; Hr'g Tr. at 11.

for that year reported by the Bureau of Labor Statistics (BLS). The administrative law judge found that claimant's total income exceeded the average yearly income for miners reported by BLS for 1984 through 1986, and his total income for 1983 "was only slightly below the average wage." Order at 5, n.6. Employer does not challenge those findings, which are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As those yearly earnings totals suggest fairly consistent employment, the administrative law judge reasonably calculated claimant's length of coal mine employment with Graciano and Gunther-Nash in the years 1983 to 1985 by dividing the reported earnings with those employers by the total earnings for each year. *See Muncy*, 25 BLR at 1-27; *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988). Consequently, we affirm the administrative law judge's decision to credit claimant with an additional .68 of a year of qualifying coal mine employment with Graciano and Gunther-Nash. Because the administrative law judge's determination was based on a reasonable method of computation, and is supported by substantial evidence, we affirm her finding that claimant had a total of 15.13 years of qualifying coal mine employment.

Total Disability

Employer next contends that the administrative law judge erred in finding that Dr. Hawkins's opinion establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer's Brief at 14-16. The administrative law judge considered the opinions of Drs. Hawkins, Barney, and Goldstein.[14] Decision and Order on Remand at 5-10. While both Drs. Hawkins and Barney opined that claimant has a totally disabling respiratory or pulmonary impairment, Dr. Goldstein did not render an opinion as to whether claimant is totally disabled. Director's Exhibit 10; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 8. The administrative law judge relied on Dr. Hawkins's opinion to find that total disability was established, because she found that it was well-documented and well-reasoned. Decision and Order on Remand at 14.

[14] Dr. Hawkins treated claimant from June 2009 through February 2010, and opined, in a June 19, 2009 clinical note, that claimant "certainly cannot perform any prior coal mine work," and "cannot perform any significant manual labor . . . because of severe respiratory impairment." Claimant's Exhibit 2. Dr. Barney examined and tested claimant, and opined that claimant could not perform his usual coal mine employment, due to severe shortness of breath with moderate exercise. Director's Exhibit 10; Claimant's Exhibit 1. Dr. Goldstein examined and tested claimant, and attributed claimant's shortness of breath to asthma, cardiac disease, obesity, sleep apnea, and deconditioning, but did not address whether claimant is totally disabled. Employer's Exhibits 1, 8.

Employer contends that it was irrational for the administrative law judge to credit Dr. Hawkins's opinion, given his reliance on the results of objective testing not contained in the record. This contention lacks merit. As instructed by the Board, the administrative law judge, on remand, considered Dr. Hawkins's reliance on objective testing that was not of record in determining the credibility of his opinion. The administrative law judge found that the pulmonary function study and blood gas study results "influenced Dr. Hawkins's opinion" that claimant is totally disabled, but were not the only factors he considered, as Dr. Hawkins also took into account the results of his physical examinations of claimant between June 2009 and March 2010. Decision and Order on Remand at 8-9, 13. Further, the administrative law judge considered that Dr. Hawkins, a Board-certified pulmonologist, saw claimant on multiple occasions and treated him for his respiratory condition. *Id*. at 11-12. The administrative law judge determined that the treatment relationship, while of moderate duration, nevertheless afforded Dr. Hawkins "a good base of knowledge from which to draw conclusions about the level of [c]laimant's respiratory impairment. . . ." *Id*. at 11. The administrative law judge therefore determined that Dr. Hawkins's opinion was not inextricably tied to the non-record test results. Contrary to employer's contention, we conclude that the administrative law judge acted within her discretion in determining that Dr. Hawkins's opinion was not inextricably tied to the non-record evidence, given the physician's reliance on additional medical information. *See Harris*, 23 BLR at 1-108. Further, the administrative law judge reasonably determined that, even if Dr. Hawkins's opinion was inextricably tied to the results of a non-record pulmonary function study or blood gas study, there was no reason to discredit his opinion, since the results of those studies were "not anomalous" when compared with the results of the pulmonary function and blood gas studies of record. Decision and Order on Remand at 13. We therefore reject employer's allegation of error in the administrative law judge's resolution of this evidentiary issue. *See Harris*, 23 BLR at 1-108.

Employer further asserts that the administrative law judge erred in relying on Dr. Hawkins's opinion, because there is no evidence that Dr. Hawkins understood the exertional requirements of claimant's usual coal mine employment as a fire boss. Employer's Brief at 14. We disagree. Contrary to employer's contention, the administrative law judge reasonably inferred that Dr. Hawkins adequately understood the exertional requirements of such work, since Dr. Hawkins "cited the [c]laimant's specific coal mine job" as a fire boss, Decision and Order on Remand at 10, in opining that claimant is totally disabled. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552 (6th Cir. 2002). Moreover, the administrative law judge considered Dr. Hawkins's opinion that, because of "progressive and limiting" exertional dyspnea, claimant "cannot perform any prior coal mine work," and "cannot perform any significant manual labor . . . because of severe respiratory impairment." Claimant's Exhibit 2. The administrative law judge reasonably concluded from the physician's entire opinion that he understood that claimant's work as a fire boss "involved significant

manual labor."[15] Decision and Order on Remand at 11; *see Napier*, 301 F.3d at 713, 22 BLR at 2-552; *Anderson*, 12 BLR at 1-113.

As the administrative law judge provided valid bases for relying on Dr. Hawkins's opinion to establish total disability, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[16] *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-239 (11th Cir. 2004); *Black Diamond Coal Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534, 7 BLR 2-209, 2-210, *reh'g denied*, 768 F.2d 1353 (11th Cir. 1985). Moreover, we affirm the administrative law judge's finding that, when all of the relevant evidence was considered, including the pulmonary function study and blood gas study evidence, claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order on Remand at 14-15.

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 rebut the presumption. 30 U.S.C. §921(c)(4). Under the implementing regulation, employer may rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[17]

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[15] In its brief, employer states that a definition of "fire boss" employed by the Mine Safety and Health Administration "does not specify any manual labor or any actual underground mining duties." Employer's Brief at 14. The evidence of record, however, contains claimant's uncontradicted testimony that, as a fire boss, he had to walk and crawl considerable distances while carrying a respirator, mining belt, and the instruments he used to check the mine for gas. Hr'g Tr. at 21-22. Claimant further testified that for the first half of his shift, he had to shovel coal spills around the beltline, and he would then perform his fire bossing duties for the second half of the shift. Hr'g Tr. at 21; *see also* Director's Exhibit 5, Description of Coal Mine Work, at 1-2. In sum, employer presents no reason to disturb the administrative law judge's finding that claimant's usual coal mine work as a fire boss involved significant manual labor.

[16] Because the administrative law judge provided valid reasons for crediting Dr. Hawkins's opinion, which we have affirmed, we need not address employer's remaining challenges to the administrative law judge's finding of total disability based on Dr. Hawkins's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 15.

[17] "Legal pneumoconiosis" includes any chronic lung disease or impairment and

20 C.F.R. §718.305(d)(1)(i), or 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). The administrative law judge found that employer failed to establish rebuttal by either method.[18] Decision and Order on Remand at 15-21.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered Dr. Goldstein's opinion. Dr. Goldstein opined that claimant does not suffer from pneumoconiosis, but has obstructive airways disease that is due to smoking and which is unrelated to claimant's coal mine dust exposure. Employer's Exhibits 1, 8. The administrative law judge discounted Dr. Goldstein's opinion, in part, because she found that Dr. Goldstein did not adequately explain his view that the partial reversibility of claimant's obstructive impairment with bronchodilators eliminated coal mine dust exposure as a cause of the impairment. The administrative law judge further found that, for the same reason, Dr. Goldstein's opinion did not establish that no part of claimant's disabling impairment is due to pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii).

Employer asserts that the administrative law judge substituted her judgment for that of Dr. Goldstein when she discounted his opinion as inadequately explained. Employer's Brief at 17. Contrary to employer's contention, the administrative law judge found, as was within her discretion, that Dr. Goldstein did not adequately explain his opinion that claimant's FVC became "normal" after the administration of bronchodilators, in light of the physician's observation that claimant did not "experience any difference in his breathing with the bronchodilation," Decision and Order on Remand

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its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or 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).

[18] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined her discussion of whether employer disproved the existence of pneumoconiosis, with her discussion of whether employer proved that no part of the miner's totally disabling respiratory impairment was due to pneumoconiosis. Decision and Order on Remand at 15-21. Employer does not challenge this aspect of the administrative law judge's decision.

at 20, or in light of the fact that claimant's post-bronchodilator FEV1 and FEV1/FVC values remained low. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Whether Dr. Goldstein adequately explained his opinion was a credibility matter for the administrative law judge, which we will not overturn. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238.

Employer argues that the administrative law judge erred by requiring Dr. Goldstein to "rule out" the existence of legal pneumoconiosis in order to rebut the Section 411(c)(4) presumption.[19] Employer's Brief at 17. Employer's argument lacks merit. A review of the administrative law judge's Decision and Order as a whole reflects that the administrative law judge correctly stated that employer bore the burden of "establishing that the miner does not have or did not have pneumoconiosis," and accurately stated that employer "must demonstrate that the miner does not suffer from either clinical or legal pneumoconiosis . . . ." Decision and Order on Remand at 15; *see* 20 C.F.R. §718.305(d)(1)(i). Moreover, the administrative law judge did not reject Dr. Goldstein's opinion as insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, she found that Dr. Goldstein's opinion on the existence of legal pneumoconiosis was not credible, because he did not adequately explain his opinion. Decision and Order on Remand at 20. Further, as to whether employer rebutted the presumed fact of disability causation, the administrative law judge correctly inquired whether employer's evidence could establish that no part of claimant's disabling impairment is due to pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Therefore, we reject employer's arguments challenging the administrative law judge's finding that Dr. Goldstein's opinion did not rebut the Section 411(c)(4) presumption. Because the opinion of Dr. Goldstein is the only opinion potentially supportive of a rebuttal finding, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal.[20] *See Antelope Coal Co. v.*

[19] Employer apparently refers to the administrative law judge's additional finding that Dr. Goldstein did not "unequivocally state that the [c]laimant's pulmonary function test results ruled out pneumoconiosis," but rather, stated only that the results argued against "'significant interstitial disease,' leaving open the possibility that the [c]laimant had some degree of . . . pneumoconiosis." Decision and Order on Remand at 20.

[20] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address employer's challenge to the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. Employer's Brief at 16; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Goodin, 743 F.3d 1331, 1337, 1345-46, 25 BLR 2-549, 2-569 (10th Cir. 2014); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980). Because claimant invoked the Section 411(c)(4) presumption, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

On July 14, 2014, claimant's counsel filed a fee petition with the Board requesting a total fee of $6,000.00, representing 24.00 hours of legal services at an hourly rate of $250.00, for work performed in the prior appeal, BRB No. 11-0324 BLA. On July 22, 2014, employer requested that the Board defer acting on claimant's counsel's fee petition pending resolution of the current appeal in BRB No. 14-0367 BLA. By Order dated September 30, 2014, the Board granted employer's request to defer action on claimant's counsel's fee petition until a decision is issued by the Board in this appeal, BRB No. 14-0367 BLA. *Barnes v. Cowin & Co.*, BRB No. 11-0324 BLA (Sept. 30, 2014)(unpub. Order). In view of the Board's affirmance of the administrative law judge's award of benefits in this case, any party may file a response to claimant's counsel's fee petition in BRB No. 11-0324 BLA, within ten (10) days of receipt of this decision. 20 C.F.R. §802.203(g).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed. Any party may respond to claimant's counsel's fee request in BRB No. 11-0324 BLA within ten (10) days of receipt of this decision.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

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GREG J. BUZZARD
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

While I concur with the majority's affirmance of the administrative law judge's finding that claimant established a total of 15.13 years of qualifying coal mine employment, I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that the medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Specifically, I disagree with the majority that the administrative law judge acted within her discretion in determining that Dr. Hawkins's opinion, that claimant suffers from a totally disabling respiratory impairment, was not inextricably tied to the results of pulmonary function and arterial blood gas studies not found in the record.[21] The administrative law judge determined that, while these test results influenced Dr. Hawkins's opinion, they were not the only factors that the doctor considered, as he also cited an x-ray interpretation and the results of a physical examination. Decision and Order on Remand at 13. X-ray readings, however, are not evidence of total disability. *Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129 n.4 (1987); §718.204(b)(2)(i)-(iv). Similarly, symptoms and complaints are not evidence of total disability.[22] *Wright v.*

[21] In her December 21, 2010 Decision and Order, Administrative Law Judge Janice K. Bullard noted that Dr. Hawkins's medical opinion was "submitted as part of [claimant's] medical records from Norwood Clinic." Decision and Order at 6 n.4. Although Judge Bullard acknowledged that claimant had not designated any part of Dr. Hawkins's treatment records as one of his two affirmative medical reports, *see* 20 C.F.R. §725.414(a)(2)(i), Judge Bullard nevertheless considered Dr. Hawkins's June 19, 2019 Clinical Note "to be a medical opinion under the evidentiary limitations." *Id.* The record does not reveal that claimant was provided prior notice that Dr. Hawkins's treatment records would be considered a medical report for purposes of the evidentiary limitations. The designation of medical evidence is not insignificant, and could have impacted this case. The regulations provide that "[n]otwithstanding the limitations" of 20 C.F.R. §725.414(a)(2), (a)(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). Moreover, because the quality standards apply only to evidence developed in connection with a claim for benefits, they are inapplicable to hospitalization and treatment records. *See* 20 C.F.R. 718.101(b); 64 Fed. Reg. 54966, 54975 (Oct. 8, 1999); 65 Fed. Reg. 79928 (Dec. 20, 2000); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008).

[22] While Dr. Hawkins lists claimant's complaints and the history of his present illness, the doctor does not provide any findings on physical examination to support his assessment of a severe respiratory impairment. Claimant's Exhibit 2.

Director, OWCP, 8 BLR 1-245, 1-247 (1985). Consequently, I would hold that the administrative law judge erred in determining that Dr. Hawkins's assessment of claimant's respiratory impairment was not inextricably tied to the results of pulmonary function and arterial blood gas studies not found in the record.

I also find unpersuasive the administrative law judge's determination that Dr. Hawkins's reliance upon pulmonary function study results not found in the record is rendered harmless by the fact that the results referenced in his treatment record "are generally consistent with the other test results of record." Decision and Order on Remand at 13. An administrative law judge is not authorized to interpret medical data or substitute her opinion for that of a physician. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Moreover, the administrative law judge failed to explain how this consistency in results would support the doctor's determination, given that the administrative law judge found the pulmonary function and arterial blood gas studies of record insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).

Claimant has the burden of proof to establish that he suffers from a totally disabling respiratory impairment. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); §718.305(b)(1)(iii); §725.103. In this case, there is no basis for Dr. Hawkins's diagnosis of a severe respiratory impairment beyond the results of pulmonary function and arterial blood gas studies that are not found in the record. An opinion that lacks supporting test results is properly discredited.[23] *See Lollar v. Ala. By-Products Corp.*, 893 F.2d 1258, 1266, 13 BLR 2-277, 2-284 (11th Cir. 1990).

Although I am cognizant that an administrative law judge has broad discretion in analyzing whether an opinion is documented and reasoned, *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc) *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989), and in resolving procedural issues, *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(en banc)(McGranery & Hall, JJ., concurring & dissenting), I am constrained to hold that, under the facts of this case, substantial evidence does not support the administrative law judge's determination that

[23] The administrative law judge noted that "Dr. Hawkins's opinion is informed by his role as the [c]laimant's treating physician . . . ." Decision and Order on Remand at 13. Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation. 20 C.F.R. §718.104(d)(5).

Dr. Hawkins's opinion is a documented and reasoned opinion under 20 C.F.R. §718.204(b)(2)(iv). 33 U.S.C. §921(b)(3).

In light of the above, I would reverse the administrative law judge's determination that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[24] Moreover, based upon claimant's failure to establish total disability pursuant to 20 C.F.R. §718.204(b), I would reverse the administrative law judge's award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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RYAN GILLIGAN
Administrative Appeals Judge

[24] The administrative law judge found that Dr. Barney's opinion, the only other medical opinion evidence supportive of a totally disabling respiratory impairment, was not well-reasoned. Decision and Order on Remand at 14; Director's Exhibit 10.