U.S. Department of Labor

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

BRB No. 17-0491 BLA

WILLIS R. STATON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHELL COAL & TERMINAL COMPANY, D/B/A WOLF CREEK COLLIERIES, INCORPORATED	)	DATE ISSUED: 09/10/2018
	)	
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 Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Office, PLLC), Lexington, Kentucky, for employer.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Granting Benefits (2015-BLA-05034) of Administrative Law Judge Joseph E. Kane rendered on a subsequent claim[1] filed on December 4, 2013, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with eighteen years of underground coal mine employment[2] and found that the new evidence establishes that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, he found that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer failed to rebut the presumption, and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that the new pulmonary function study evidence establishes that claimant is totally disabled, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[4]

---

[1] Claimant filed two prior claims for benefits, both of which were finally denied. Director's Exhibits 1, 2. His most recent prior claim, filed on April 7, 2008, was denied by Administrative Law Judge Daniel F. Solomon on January 31, 2011, for failure to establish that claimant was totally disabled. Director's Exhibit 2 at 176-83.

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibits 1 at 114, 2 at 310. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eighteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 19.

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).

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

The administrative law judge determined that the arterial blood gas studies and medical opinions do not support a finding of total disability, but found that claimant established total disability based on the new pulmonary function study evidence.[5] Decision and Order at 12-14. The administrative law judge considered a non-qualifying[6] study performed by Dr. Forehand on March 6, 2014, and three qualifying studies performed by Dr. Sikder on March 6, 2012, April 3, 2014, and May 7, 2015. Decision and Order at 13; Director's Exhibit 8; Claimant's Exhibit 1. The administrative law judge found that the quality standards at 20 C.F.R. §718.103 and Part 718, Appendix B do not apply to Dr. Sikder's studies because those studies were conducted in connection with the claimant's personal medical treatment. Decision and Order at 13; *see* 20 C.FR. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78 (2008). However, the administrative law judge recognized that he still had a duty to determine if Dr. Sikder's studies were reliable before he could base a finding of total disability on them. Decision and Order at 13; *see* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Upon weighing the evidence, the administrative law judge found:

[5] The administrative law judge also found no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 13.

[6] 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).

> Dr. Forehand reviewed the April 3, 2014, PFT [pulmonary function test] by Dr. Sikder and opined that the PFT did not change his opinion on the issue of total disability. He opined that the PFT is invalid, as it does not comply with the quality standards as outlined in the regulations. Dr. Sikder, however, noted on the 2012 and 2014 PFTs that Claimant used good effort. She then used the PFTs to diagnose Claimant with COPD [chronic obstructive pulmonary disease]. I find that the PFTs are reliable. I give greater weight to Dr. Sikder's findings than the opinion of Dr. Forehand based on Dr. Sikder's superior qualifications. Accordingly, I find that the PFTs support a finding of total disability.

Id.

The administrative law judge determined that the arterial blood gas study evidence does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), because the only new study was non-qualifying. Decision and Order at 7, 13; Director's Exhibit 8. He also found that the medical opinion evidence does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), because none of the three physicians concluded that claimant is totally disabled.[7] Decision and Order at 13-14. Considering the evidence as a whole, the administrative law judge gave more weight to the qualifying pulmonary function studies, and therefore determined that claimant is totally disabled, established a change in the applicable condition of entitlement, and invoked the Section 411(c)(4) presumption. *Id*. at 13-14.

Employer first contends that the administrative law judge erred by not applying the quality standards at 20 C.F.R. §718.103 and Part 718, Appendix B to Dr. Sikder's pulmonary function studies. Employer's Brief at 3-4. Employer notes that claimant designated Dr. Sikder's April 3, 2014 and May 7, 2015 studies for submission under 20 C.F.R. §725.414(a)(2)(i) on his evidence summary form, and argues that not applying the quality standards "is inappropriate when those studies are considered . . . pulmonary function study evidence under 20 C.F.R. §725.414(a)(2)(i)." *Id*. at 3. This argument lacks merit.

[7] The administrative law judge noted that Dr. Ammisetty did not provide an opinion on total disability, Dr. Rosenberg opined only that claimant is "potentially" totally disabled, and Dr. Forehand concluded that claimant retained the pulmonary capacity to perform his most recent coal mine employment. Decision and Order at 14; Claimant's Exhibits 7, 8; Employer's Exhibit 1; Director's Exhibit 8.

Whether the quality standards apply to claimant's evidence is determined not by his designation on the evidence summary form, but by whether the evidence was developed in connection with the claim. *See* 20 C.F.R. §718.101(b); 65 Fed. Reg. 79927 (Dec. 20, 2000) ("[T]here was no need to add an exemption from the quality standards for hospitalization and treatment records because § 718.101 is clear that it applies quality standards only to evidence developed 'in connection with a claim' for black lung benefits."); 64 Fed. Reg. 54975 (Oct. 8, 1999) ("[T]he quality standards are inapplicable to evidence, such as hospitalization reports or treatment records, that is not developed for the purpose of establishing, or defeating, entitlement to black lung benefits.").[8] As the administrative law judge found, and employer does not contest, Dr. Sikder's pulmonary function studies were performed in the course of claimant's treatment, and not for the purpose of developing evidence for this claim. Decision and Order at 13. Therefore, the quality standards do not apply to them. 20 C.F.R. §718.101(b); *see Stowers*, 24 BLR at 1-89, 1-92.[9]

[8] Employer contends that *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78 (2010), which held that the quality standards do not apply to x-rays contained in treatment records, is inapplicable here because "the quality standards serve an entirely different purpose with pulmonary function study evidence than with x-ray evidence." Employer's Brief at 3. This argument lacks merit. As an initial matter, *Stowers* was not limited to x-ray evidence, but also held that the quality standards do not apply to biopsy evidence contained in treatment records. *Stowers*, 24 BLR at 1-92. Moreover, while 20 C.F.R. §718.101(b) plainly states that the quality standards apply to "all evidence developed . . . in connection with a claim," employer cites no authority to support its view that they also apply to pulmonary function studies *not* conducted in connection with a claim.

We also reject employer's argument that the administrative law judge erred by considering all three pulmonary function studies conducted by Dr. Sikder, even though claimant designated only two as affirmative evidence under 20 C.F.R. §725.414(a)(2)(i) on his evidence summary form. Employer's Brief at 5. Despite claimant's designation, the evidentiary limitations at 20 C.F.R. §725.414(a)(2)(i) do not apply to treatment records. 20 C.F.R. §725.414(a)(4); *Stowers*, 24 BLR at 1-85-86. Therefore, the administrative law judge permissibly considered all three of Dr. Sikder's studies.

[9] We disagree with our dissenting colleague, who would remand this claim based on a statement in *L.P. [Preston] v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc), that "the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order." As an initial matter, employer does not raise this argument on appeal or otherwise suggest that it was disadvantaged by the *procedural timing* of the administrative law judge's determination that Dr. Sikder's March 6, 2012, April 3, 2014, and May 7, 2015 pulmonary function studies "were all taken in conjunction

Employer next contends that even if the quality standards do not apply to Dr. Sikder's pulmonary function studies, the administrative law judge ignored evidence from

---

with . . . treatment of the claimant" and thus were not developed "in connection with a claim for benefits." Decision and Order at 13. Employer's arguments, which the majority opinion addresses, relate primarily to the administrative law judge's finding that the studies are reliable.

Moreover, the aforementioned guidance in *Preston* must be read in context. The Board did not state that all evidentiary rulings must be done by interlocutory order in every case. Nor did the Board's statement undermine an administrative law judge's "broad discretion in dealing with procedural matters." *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(en banc). The primary holding in *Preston* was that the administrative law judge improperly excluded evidence from the record. Then, guided by a "concern for fairness and the need for administrative efficiency," the Board addressed "another important matter" by stating, "[I]f the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order." *Preston*, 24 BLR at 1-63. The stated purpose of requiring an interlocutory order when excluding evidence was to give the aggrieved party an opportunity to make a "good cause" argument for why the excluded evidence should be admitted into the record, despite exceeding the evidentiary limitations. *Id.*; *but see Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006) (administrative law judge not obligated *sua sponte* to conduct a good cause inquiry and may consider the issue forfeited where the party submitting excess evidence does not attempt to make such a showing).

In the present case, the administrative law judge properly admitted Dr. Sikder's three pulmonary function studies into the record. Thus, *Preston's* concerns about the preservation of a party's ability to make a "good cause" argument for the admission of otherwise excludable evidence is not applicable. Further, the admission of Dr. Sikder's pulmonary function studies did not create unfair surprise or otherwise result in the derogation of the parties' rights. Claimant and employer had a full opportunity, both at the hearing and in their post-hearing briefs, to present their arguments to the administrative law judge regarding the pulmonary function studies performed by Dr. Sikder. Furthermore, employer was able to submit evidence that it argues undermines the credibility of those studies, i.e., the medical opinion of Dr. Rosenberg who reviewed Dr. Sikder's studies and opined that they are unreliable. Thus, the fairness and administrative efficiency considerations identified in *Preston* are not served by remanding this claim for further procedural and evidentiary rulings on evidence that was properly admitted into the record.

Dr. Rosenberg that the studies were unreliable. Employer's Brief at 4. We agree. Dr. Rosenberg reviewed Dr. Sikder's pulmonary function studies and opined that all three were either invalid or "unlikely valid."[10] Employer's Exhibit 1 at 4-5. In weighing those studies, however, the administrative law judge referred only to Dr. Sikder's observations that claimant "gave good effort" on the March 6, 2012 and April 3, 2014 tests and Dr. Forehand's opinion that the April 3, 2014 study conducted by Dr. Sikder was invalid because it did not comply with the quality standards. Decision and Order at 13. As an initial matter, contrary to the administrative law judge's characterization of Dr. Sikder's notes, the March 6, 2012 study does not include any observation about claimant's effort. Claimant's Exhibit 1. Moreover, by overlooking Dr. Rosenberg's opinion that all three pulmonary function studies were unreliable, the administrative law judge failed to consider "all relevant evidence," as required by the Act.[11] 30 U.S.C. §923(b); *see Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480-81, 25 BLR 2-1, 2-10 (6th Cir. 2011).

Furthermore, in giving more weight to Dr. Sikder's opinion regarding claimant's effort than Dr. Forehand's opinion because of Dr. Sikder's "superior qualifications," the administrative law judge failed to identify Dr. Sikder's qualifications or explain why he determined that they were superior to those of Dr. Forehand. Decision and Order at 6-14. Thus, the administrative law judge failed to comply with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated

[10] Dr. Rosenberg stated that the March 6, 2012 test was performed with "incomplete effort," the April 3, 2014 test was "unlikely valid" because it was performed "with incomplete efforts based on the shape of the flow-volume and volume-time curves," and the May 7, 2015 test similarly was performed "with incomplete effort." Employer's Exhibit 1.

[11] In weighing the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Rosenberg's opinion that claimant "potentially is disabled from a pulmonary perspective[.]" Decision and Order at 14; Employer's Exhibit 1 at 6. The administrative law judge gave Dr. Rosenberg's opinion less weight because Dr. Rosenberg considered Dr. Sikder's pulmonary function testing to be invalid, whereas the administrative law judge "found, however, that the testing is reliable." Decision and Order at 14. Thus, the administrative law judge erred not only in failing to weigh Dr. Rosenberg's opinion concerning the reliability of the studies along with the opinions of Drs. Sikder and Forehand at 20 C.F.R. §718.204(b)(2)(i), but also in relying on that incomplete finding to discount Dr. Rosenberg's opinion concerning the miner's disability at 20 C.F.R. §718.204(b)(2)(iv).

into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In light of these errors, we vacate the administrative law judge's determination that the new pulmonary function studies conducted by Dr. Sikder and found in claimant's treatment notes support a finding of total disability, and vacate his finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 13-14. Therefore, we must also vacate the findings that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Decision and Order at 14.

On remand, the administrative law judge must consider all of the new pulmonary function study evidence, and explain his weighing of it. *See Morrison*, 644 F.3d at 480-81, 25 BLR at 2-10. Even though the quality standards do not apply to Dr. Sikder's pulmonary function studies, the administrative law judge still must determine if the studies are sufficiently reliable to support a finding of total disability. *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). If the administrative law judge finds that the new evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), he must weigh all of the relevant new evidence together and determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock,* 9 BLR at 1-198.

Because we have vacated the administrative law judge's finding that claimant is totally disabled and invoked the Section 411(c)(4) presumption, we decline at this time to address employer's contention that the administrative law judge erred in finding that it did not rebut the presumption. Employer's Brief at 5.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

GREG J. BUZZARD
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's determination that the administrative law judge permissibly considered the April 3, 2014 and May 7, 2015 pulmonary function studies conducted by Dr. Sikder as records related to the miner's treatment for a respiratory or pulmonary disease.[12] A history of this case will demonstrate the problems that arise when an administrative law judge fails to resolve evidentiary issues before issuing his decision.

Claimant submitted an evidence summary form, wherein he designated Dr. Sikder's April 3, 2014 and May 7, 2015 pulmonary function studies as his two affirmative pulmonary function studies.[13] At the June 9, 2016 hearing, employer objected to consideration of these pulmonary function studies "because they [did] not appear to have

[12] The majority is incorrect in asserting that this issue was not raised. In its brief, employer argues that the April 3, 2014 and May 7, 2015 pulmonary function studies are invalid because they do not satisfy the quality standards applicable to a party's affirmative evidence. Employer's Brief at 2-3.

[13] Claimant designated Dr. Sikder's office notes from December 9, 2010 to April 20, 2016 as treatment records.

been done in compliance with the quality standards under the [regulations]." Hearing Transcript at 11. In response to employer's objection, the following exchange took place:

> [Claimant's Counsel]: Judge, we would like to brief the issue if that would be okay and address any issues that maybe the pulmonary function testing may have. That will be our response.
>
> [Administrative Law Judge]: I tend to think that [e]mployer is right, but you can go ahead and brief the issues. I know you're entitled to your medical reports, but I'm not sure how treatment records that encompass pulmonary function studies not done in compliance, how that would - - -
>
> [Employer's Counsel]: Well, I have no objection to it being considered as treatment records, but as pulmonary function studies under - - - I can't cite the [regulation] now. As pulmonary function study evidence, I would have to object to them because they don't have any compliance with the standards set forth in the [regulations].
>
> [Administrative Law Judge]: I think that's correct if in fact they don't comply with the standards, but the parties can brief that.
>
> [Employer's Counsel]: Your honor, I guess we would need to brief it before you address the ultimate issue since you will have to have an evidentiary ruling - - -
>
> [Administrative Law Judge]: Right.
>
> [Employer's Counsel]: - - before everything else is done.
>
> [Administrative Law Judge]: Okay. Well, my ruling would be that they're not - - - they're only admitted as part of the treatment records and they can't be considered pulmonary function studies if they don't comply with the appropriate standard. So, they won't be considered. I guess you could still brief it and if I overturn that, then that would be a whole new - - - would have

> to allow [e]mployer to respond and all. That's my ruling. Okay, so is that the end of your objection?
>
> [Employer's Counsel]: Yes, sir.

Hearing Transcript at 11-12.

The administrative law judge's ruling is not entirely clear. Although he indicated that the studies were "only admitted as part of the treatment records," he further ruled that they would not be considered.[14]

In his post-hearing brief, claimant noted that he had "designated the pulmonary function testing from April 3, 2014 and May 7, 2015 as evidence *on behalf of claimant*." Claimant's Post-Hearing Brief at 7 (unpaginated). Claimant did not otherwise address the administrative law judge's ruling that these two pulmonary function studies would not be considered. By contrast, employer noted that the administrative law judge had ruled on its objection at the hearing, holding that the studies "could not be considered pursuant to 20 C.F.R. §718.204(b)(2)(i)." Employer's Post-Hearing Brief at 7.

In his decision, the administrative law judge for the first time ruled that all of the pulmonary function studies conducted by Dr. Sikder[15] were admissible as treatment record evidence:

> The [pulmonary function studies] taken by Dr. Sikder on March 6, 2012, April 3, 2014 , and May 7, 2015 all produced qualifying results. At the hearing, the [e]mployer objected to the submission of the [pulmonary function studies] from Dr. Sikder. The [e]mployer argued that the [pulmonary function studies] taken by Dr. Sikder do not comply with the quality standards as provided in the regulations, and therefore, should not be taken into consideration. I agreed with the [e]mployer that [pulmonary function studies] taken in conjunction with a claim must comply with the quality standards. However, *I have now had an opportunity to review the evidence.* The [pulmonary function studies] taken by Dr. Sikder were not

[14] Although the pulmonary function study studies conducted by Dr. Sikder could arguably be admissible as treatment records, claimant did not attempt to re-designate this evidence at the hearing, or post hearing.

[15] In addition to the April 3, 2014 and May 7, 2015 pulmonary function studies, the administrative law judge also considered a third pulmonary function study conducted by Dr. Sikder on March 6, 2012. Decision and Order at 6-7; Claimant's Exhibit 1.

> taken in conjunction with this case. The [pulmonary function studies] by Dr. Sikder are all treatment records. The regulations state that the quality standards at Part 718 are applicable to evidence developed "in connection with a claim for benefits." In the comments to the revised regulations, the Department of Labor clarified that the quality standards do not apply to evidence developed in the hospital or during treatment. Furthermore, the Board has stated that the quality standards are not applicable to hospitalization and treatment records. But, the administrative law judge "still must be persuaded that the evidence is reliable in order to form a basis for a finding of fact on an entitlement issue."

Decision and Order at 13 (emphasis added) (footnotes omitted). After finding that the three qualifying pulmonary function studies conducted by Dr. Sikder were reliable, the administrative law judge credited this evidence, and found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

First and foremost, the administrative law judge erred in rendering his final evidentiary rulings in his Decision and Order. Consistent with principles of fairness and administrative efficiency, the administrative law judge should have reviewed the evidence and issued his evidentiary rulings before he issued his decision. *See L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc). His failure to do so prevented employer from having the opportunity to respond to the designation of Dr. Sikder's pulmonary function studies as "treatment record" evidence. The administrative law judge's error is especially egregious given that the ruling set out in his decision directly contradicts his earlier statement at the hearing that the April 3, 2014 and May 7, 2015 pulmonary function studies "would not be considered." Hearing Transcript at 12.

The majority's attempt to curtail the standard articulated in *Preston* by holding that it should only be applicable if the evidentiary ruling in question causes some demonstrable harm ignores the critical issue: does an administrative law judge have to authority to re-designate a represented party's evidence without providing notice to the other parties? The answer is no.

The majority effectively imposes a new burden on administrative law judges, to not only determine whether evidence is admissible under the evidentiary limitations, but to also determine, sua sponte, whether that evidence has been properly designated on the evidentiary form. The majority cites no case law or regulation granting an administrative law judge with the authority to do so.

In this case, the administrative law judge abused his discretion by determining, sua sponte, that the April 3, 2014 and May 7, 2015 pulmonary function studies were conducted

in the course of the miner's treatment. While they may well have been conducted in the course of treatment, it is also plausible that claimant's counsel sent the miner to Dr. Sikder to have him conduct the studies to support the claim. This could be why claimant's counsel designated the pulmonary function studies as affirmative evidence on the evidentiary form. Where a claimant is represented by counsel, counsel is in a better position to designate its evidence than is the administrative law judge. Moreover, even if an administrative law judge legitimately questions whether evidence has been properly designated, he or she must provide notice to the parties of the evidentiary issue, and allow them to reconcile it. This is the essential holding in *Preston* which must be applied in black lung litigation.

In black lung litigation, the parties should be bound by their designations of the evidence. Claimant designated the April 3, 2014 and May 7, 2015 pulmonary function studies as its affirmative evidence, not evidence developed in the course of claimant's treatment for a pulmonary disease. It is not the role of the administrative law judge to second guess the parties' designation of their evidence or determine whether they have properly designated it. Despite opportunities to do so at the hearing and in its post-hearing brief, claimant did not attempt to re-designate the evidence.

Consequently, although I would remand for the reasons articulated by the majority, I would instruct the administrative law judge to first clarify the record by issuing an Order, consistent with *Preston*, in which he rules on the designation of the evidence, advises the parties of his rulings, and provides them with an opportunity to respond appropriately. After issuing such an order resolving the evidentiary issues, the administrative law judge should apply the appropriate standards to the designated evidence.

RYAN GILLIGAN
Administrative Appeals Judge