U.S. Department of Labor

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

BRB No. 19-0235 BLA

STANLEY PERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RS MINING, INCORPORATED	)	DATE ISSUED: 05/22/2020
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.) Prestonsburg, Kentucky, for claimant.

Cameron Blair (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits (2017-BLA-05949) of Administrative Law Judge Jason A. Golden rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's second request for modification of the denial of a claim filed on March 5, 2008.[1]

The administrative law judge found claimant established twenty-three years of underground coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and established a change in conditions at 20 C.F.R. §725.310. He further determined employer did not rebut the presumption and awarded benefits.

On appeal, employer contends remand is required because the administrative law judge took significant action in this case when he was not appointed consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2. It also challenges the administrative law judge's determinations that claimant established total respiratory disability, thereby invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4), and employer failed to rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers'

[1] On January 25, 2011, Administrative Law Judge John P. Sellers, III, denied benefits based on claimant's failure to establish total respiratory disability. Director's Exhibit 102. Claimant filed a request for modification of the denial on February 22, 2011, which Administrative Law Judge Peter B. Silvain, Jr. denied on October 23, 2015. Director's Exhibits 103, 173. Claimant filed a second request for modification on April 29, 2016. Director's Exhibit 175.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's Appointments Clause challenge. Employer filed a reply brief, reiterating its contentions regarding the administrative law judge's appointment.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected, including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Appointments Clause Challenge

Citing *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), employer contends this case is "tainted with an appointments [clause] violation" because the administrative law judge "was not properly appointed at [the time he issued the Notice of Hearing on November 28, 2017]."[5] Employer's Brief at 12; *citing Lucia*, 138 S.Ct. at 2055. Employer states this action is not "ministerial" and therefore the case must be remanded to a different administrative law judge for a new hearing. Employer's Reply Brief at 3.

[3] We affirm, as unchallenged, the administrative law judge's finding claimant established twenty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 24 at 9, 12.

[5] Prior to the formal hearing, employer raised its challenge to the administrative law judge's authority to render a decision in its July 16, 2018 Notice that It is Preserving as an Issue Whether the [Administrative Law Judge] is Properly Appointed as Required Under the Appointments Clause of the US Constitution. Employer also noted it was preserving this issue at the February 21, 2018 hearing. Hearing Transcript at 7.

On December 21, 2017, the Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of the administrative law judge.[6] Administrative Law Judge's Exhibit 1. The only action the administrative law judge took before his appointment was ratified was the issuance of a Notice of Hearing. The Notice of Hearing alone does not involve any consideration of the merits, nor would it be expected to influence the administrative law judge's consideration of the case. It simply reiterates the statutory and regulatory requirements governing the hearing procedures. *See Noble v. B & W Resources, Inc.*, BLR , 18-0533 BLA, slip op. at 4 (Jan. 15, 2020). Thus, unlike *Lucia*, in which the judge presided over a hearing and issued a decision while not properly appointed, the issuance of the Notice of Hearing in this case would not be expected to affect this administrative law judge's ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation requiring remand. *See Noble*, BRB No. 18-0533 BLA, slip op. at 4.

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

To invoke the Section 411(c)(4) presumption, the miner must establish he has a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[7] evidence of cor pulmonale with right-sided

[6] The Secretary of Labor issued a letter to Judge Golden on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Golden.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R.

congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting a finding of total disability against the contrary probative 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 the pulmonary function study and medical opinion evidence support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[8] Decision and Order at 6-20. He further determined that the non-qualifying blood gas studies "do not contradict the pulmonary function studies as they measure a different aspect of lung function." *Id*. at 20. Finally, he found the qualifying pulmonary function study evidence, for which there is no contrary probative evidence, supports a finding claimant is disabled "without regard to the exertion required by his last coal mine job." *Id*. The administrative law judge thus concluded claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and demonstrated a change in conditions at 20 C.F.R. §725.310(c). *Id*. Employer challenges these findings.

Pulmonary Function Studies

The administrative law judge considered fifteen pulmonary function studies, dated January 23, 2008, through August 23, 2016, and accurately found seven studies produced uniformly non-qualifying values, five studies produced uniformly qualifying values, and three studies produced mixed results.[9] Decision and Order at 8-9; Director's Exhibits 12,

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Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The administrative law judge found the blood gas studies alternated in producing non-qualifying and qualifying values, rendering the tests "suspect" as to whether claimant is totally disabled. Decision and Order at 14. The administrative law judge credited the most recent study, which was non-qualifying, as the most probative test and found the blood gas studies did not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 14. The administrative law judge further found Dr. Alam's mention of cor pulmonale in a treatment note insufficient to establish cor pulmonale with right-sided congestive heart failure and therefore claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 7.

[9] The June 20, 2011 and August 23, 2016 pulmonary function studies produced qualifying values before the administration of a bronchodilator and non-qualifying values after the administration of a bronchodilator. Director's Exhibits 126, 189. The June 8,

15, 21, 74, 88, 92, 111, 117, 155, 152, 159, 179.[10] The administrative law judge also considered evidence regarding the validity of the studies and found all of the tests prior to the August 23, 2016 study were "either unreliable or non-qualifying."[11] *See* Decision and Order at 9-13. Because the August 23, 2016 qualifying study was the most recent valid study by more than two years, the administrative law judge found it the "most probative" of claimant's pulmonary condition and thus established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer contends the administrative law judge erred in discrediting Dr. Broudy's opinion that the qualifying pre-bronchodilator results of the August 23, 2016 study were invalid. Employer's Brief at 14-16. It argues the administrative law judge failed to address the administering technician's observations of "fair but variable effort, coughing during testing, and suboptimal chest excursion" and Dr. Broudy's opinion "that repeatability of the studies does not establish validity." Employer's Brief at 16. Employer's arguments lack merit.

Contrary to employer's assertion, the administrative law judge acknowledged Dr. Broudy predicated his opinion on the technician's observations of "variable effort throughout the testing" and "suboptimal chest excursion."[12] Decision and Order at 12, *quoting* Employer's Exhibit 3 at 15; *see also* Director's Exhibit 189 at 13. However, given Dr. Broudy's acknowledgment that the study nonetheless met the American Thoracic

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2016 study produced non-qualifying values before the administration of a bronchodilator and qualifying values after the administration of a bronchodilator. Director's Exhibit 183.

[10] The record contains duplicate reports of some of the pulmonary function studies. These citations list only when the report first appears in the record.

[11] He found the April 22, 2010, June 20, 2011, and June 18, 2012 studies were invalid based on the opinions of Drs. Westerfield and Broudy. Decision and Order at 9-11. He further determined the August 30, 2010, March 24, 2011, and May 25, 2016 studies were not in substantial compliance with the quality standards set forth in 20 C.F.R. §718.103, and therefore were unreliable. *Id*. at 10-12. He noted the quality standards were not applicable to the June 8, 2016 study because it was obtained in the course of treatment but still found it was not sufficiently reliable. *Id*. at 12. The administrative law judge found Dr. Broudy, who ordered the August 23, 2016 study, did not adequately explain why it was invalid, and therefore deemed this test reliable. *Id.* at 12-13.

[12] The technician who administered the August 23, 2016 study reported "fair but somewhat variable effort throughout testing, coughing, [complaints of] 'lungs hurting,' suboptimal chest excursion, [and] using accessory muscles." Director's Exhibit 189 at 13.

Criteria for validity and was "repeatable in that the second highest value was within five percent of the highest value on FEV1,"[13] the administrative law judge permissibly found he did not sufficiently explain why he questioned the study's validity. Decision and Order at 12, *quoting* Employer's Exhibit 3 at 15; *see* 20 C.F.R. §718, Appendix B (2)(ii)(G) ("The variation between the two largest FEV1's of the three acceptable tracings should not exceed [five] percent of the largest FEV1 or 100 ml, whichever is greater."); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072 (6th Cir. 2013). He thus found the study "is probative of the Claimant's pulmonary condition and can be relied upon in forming an opinion regarding disability." Decision and Order at 13.

As employer has not otherwise challenged the administrative law judge's weighing of the pulmonary function study evidence, we affirm his finding the qualifying pre-bronchodilation results of the August 23, 2016 pulmonary function study are the most probative of claimant's condition and establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See* 20 C.F.R. §718.103(c).

Medical Opinions

The administrative law judge considered the medical opinions of Drs. Rasmussen, Alam, Tidal, Broudy, and Westerfield. Decision and Order at 15-19; Director's Exhibits 12, 15, 21, 24, 48, 69, 74, 78-79, 88, 92, 108, 117, 121, 150, 170, 189; Claimant's Exhibit 8; Employer's Exhibit 3. Drs. Alam and Tidal, claimant's treating physicians, opined claimant is unable to perform his usual coal mine work from a respiratory standpoint. Director's Exhibits 15, 19, 23-24, 48, 74, 79, 92, 108, 121; Claimant's Exhibit 8. Drs. Rasmussen and Westerfield opined claimant is not totally disabled. Director's Exhibits 12, 69, 88, 117, 150. Dr. Broudy initially opined claimant was disabled from his usual coal mine work but subsequently appeared to retract that statement, saying he was not sure. Director's Exhibit 189 at 5-6; Employer's Exhibit 3 at 25-26, 29.

The administrative law judge accorded the most weight to Dr. Alam's opinion, and little weight to the opinions of Drs. Rasmussen, Tidal, Broudy, and Westerfield. Decision and Order at 15-19. Because Dr. Alam's opinion was "the only one . . . found to be well-documented and well-reasoned," the administrative law judge concluded "the preponderance of medical opinion evidence supports a finding of total disability." *Id*. at 19.

[13] Dr. Broudy diagnosed claimant with a "restrictive ventilatory defect, which may be related to less than optimal effort." Director's Exhibit 189 at 5. At his deposition, Dr. Broudy responded "[y]es" when asked if it was possible for the studies to be repeatable by coincidence. Employer's Exhibit 3 at 15.

Employer argues Dr. Broudy's opinion is credible and supports the conclusion claimant is not disabled. Employer's Brief at 17-25. We disagree. Dr. Broudy initially stated "I would tend to agree [with Dr. Alam] that if [claimant's] lung function is valid, that he would not be able to do the work of an underground coal miner." Director's Exhibit 189 at 5-6. He reiterated this statement during his deposition. *See* Employer's Exhibit 3 at 26. He also testified the August 23 2016 study satisfied the American Thoracic Society's criteria for validity, demonstrated a respiratory impairment, and "meets the federal criteria, so [claimant] wouldn't be able to return to work." *Id*. at 25. Dr. Broudy later clarified that, although the study was qualifying, he questioned its validity and stated "I'm not going to say [claimant's pulmonary function results] establish disability." *Id.* at 29. He also stated "I won't say for sure that this gentleman has significant impairment." *Id*. at 31.

Contrary to employer's contention, the administrative law judge permissibly accorded little weight to Dr. Broudy's opinion because he relied, in part, on his conclusion that the August 23, 2016 qualifying pulmonary function study results are invalid, contrary to the administrative law judge's finding. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (administrative law judge may discount medical opinions he finds contradict his findings); Decision and Order at 16-17. The administrative law judge also permissibly found Dr. Broudy's opinion equivocal because he initially opined claimant was totally disabled[14] but made subsequent statements indicating he was "either unable or unwilling" to render a disability assessment. Decision and Order at 16; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1073 (6th Cir. 2013) (whether an opinion is equivocal is a matter for the administrative law judge as fact-finder); Director's Exhibit 189 at 8; Employer's Exhibit 3 at 18. Thus, we affirm the administrative law judge's decision to give Dr. Broudy's medical opinion little weight. *See* Decision and Order at 17.

Employer also contends the administrative law judge erred in giving controlling weight to Dr. Alam as claimant's treating physician,[15] asserting his opinion is based only

[14] Dr. Broudy stated claimant's "pulmonary impairment would prevent similarly arduous work in a dust-free environment and it is supported by the pulmonary function studies." Director's Exhibit 189 at 8.

[15] An administrative law judge can give controlling weight to a treating physician's opinion based on the nature and duration of his relationship with the miner and the frequency and extent of his treatment. 20 C.F.R. §718.104(d)(1)-(4). The weight given to a treating physician's opinion, however, "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v.*

on claimant's work history, subjective complaints, and an undated and unreliable pulmonary function study. Employer's Brief at 17-20. Although the administrative law judge invalidated the qualifying pulmonary function studies Dr. Alam conducted, he also permissibly found Dr. Alam's opinion "consistent with the evidence from his examination of the Claimant and with the overall weight of the medical evidence in the record," including the valid, qualifying August 23, 2016 pulmonary function study. *Banks*, 690 F.3d at 489; Decision and Order at 19; Employer's Brief at 20. Moreover, even though Dr. Alam's valid June 12, 2013 and July 9, 2014 studies were non-qualifying, they showed a moderate to moderately severe restriction and Dr. Alam relied on the 2013 study in concluding claimant's chronic obstructive pulmonary disease (COPD) and shortness of breath continued to require treatment with nebulizers and oxygen. Director's Exhibits 152, 159; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000).

In addition, the administrative law judge observed Dr. Alam's opinion "is based on his routine treatment of the [c]laimant over the last decade[,]" beginning in 2008, and concluded he "is likely to be more familiar with the [c]laimant's condition than the physicians who examined [him] episodically in association with his claims for benefits."[16] Decision and Order at 19; *see* Director's Exhibits 15, 23, 48, 79, 92, 158-59, 170; Claimant's Exhibits 1-2, 4, 8. In his March 18, 2008 report, Dr. Alam noted claimant had a severe respiratory impairment and indicated that although his FEV1 value was stable at rest, he was unable to exercise based on his cough and sputum production. Director's Exhibit 15. Dr. Alam therefore concluded claimant did not have the respiratory capacity to perform his coal mine work. *Id*.

Dr. Alam subsequently documented claimant's diagnoses of COPD, chronic bronchitis, dyspnea, and emphysema, and his routine treatment with bronchodilator therapy, inhaled steroids, nebulizers, and home oxygen. Director's Exhibits 23, 48, 79. In his September 23, 2010 supplemental report, Dr. Alam stated he had ordered multiple pulmonary function studies on claimant over the last three to four years and they

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Williams, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade.").

[16] Claimant testified he sees Dr. Alam "[e]very two to three months. And if I feel like I need to see him between then, I go to see him and they get me in." Director's Exhibit 170-25. The record also contains extensive medical records documenting Dr. Alam's treatment of claimant from January 23, 2008, through 2018. *See* Director's Exhibits 15, 23, 48, 79, 92, 158-59; Claimant's Exhibits 1-2, 4, 8.

demonstrated "significant decline over the last three year period on his FEV1."[17] Director's Exhibit 92. He also relied on claimant's blood gas study values to diagnose "significant hypoxemia at rest."[18] *Id*. Dr. Alam continued to see claimant frequently, including during hospital admissions for "acute exacerbation of COPD[,]" and performed several bronchoscopies due to increased pulmonary secretions and difficulty breathing.[19] Claimant's Exhibit 4; *see also* Director's Exhibits 158-59; Claimant's Exhibits 1-2, 4. In his summary of claimant's January 24, 2018 visit, Dr. Alam stated claimant has "complete pulmonary disability" and reiterated his COPD symptoms are aggravated by daily activities, he has daily dyspnea, and both conditions require treatment with medications. Claimant's Exhibit 8.

Thus, substantial evidence in the record belies employer's contention that Dr. Alam relied solely on claimant's work history, symptoms, and invalid tests, and supports the administrative law judge's conclusion that he based his opinion on "his routine treatment of the Claimant over the last decade" reflecting a "deterioration of Claimant's pulmonary capacity." Decision and Order at 19. Consequently, we affirm the administrative law judge's crediting of Dr. Alam's opinion as "well-documented and well-reasoned." *See Banks*, 690 F.3d at 489; Decision and Order at 19.

Employer also contends the claim must be remanded because the administrative law judge failed to make a finding concerning the exertional requirements of claimant's usual coal mine work and therefore did not properly examine whether Dr. Alam offered a reasoned opinion on total disability. Employer's Brief at 18. We disagree.

An administrative law judge is required to determine the exertional requirements of a claimant's usual coal mine work and then consider them in conjunction with the medical

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[17] Contrary to employer's argument, the fact that FEV1 values alone do not establish total disability at 20 C.F.R. §718.204(b)(2)(i) does not mean a physician cannot rely on those values to conclude a claimant is totally disabled. *See* 20 C.F.R. §718.204(b)(2)(iv) (physician can offer reasoned opinion diagnosing total disability despite non-qualifying objective testing).

[18] The blood gas studies Dr. Alam ordered, dated February 21, 2009, September 13, 2010, and March 17, 2011, produced qualifying values and were not invalidated. Decision and Order at 14; Director's Exhibits 74, 91, 109. Dr. Alam noted the September 13, 2010 study also qualified claimant for home oxygen use. Director's Exhibit 92.

[19] Claimant's bronchoscopies, performed on October 11, 2016, and March 28, 2017, showed emphysema, generalized inflammation, and thick secretions in his lungs. Claimant's Exhibit 4.

opinions assessing disability. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). Claimant's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

Claimant testified all of his coal mine work was underground. Hearing Transcript at 18. His jobs included operating a continuous miner, running a roof bolter, and "t[aking] care of the belt heads" by shoveling coal that fell off the belts. *Id*. at 18-20. His last coal mine job was working on the "dead shift" which involved "getting the mine ready for the next shift" by repairing machinery, bolting, scooping loose coal off the face and rock dusting it, and moving belts. *Id*. at 28-29. He described his coal mine jobs as "physically demanding" and stated repairing machines is a "very physical job" because it required him to carry a fifty-pound tool box "and drag it around all night." *Id*. at 19-20, 22. When asked if his breathing would prevent him from doing "the physical requirements" of coal mine work, including "the bending, the lifting" and "moving around underground," claimant responded "[t]here ain't no way I could do it." *Id*. at 21-22.

The administrative law judge found claimant's last coal mine job was "dead work," which is "preparing the mine for the next miner shift." Decision and Order at 5. He observed claimant's work included "[r]epairing and rock dusting and moving belts and stuff like that" and noted claimant testified he is currently incapable of performing the physical requirements of his previous coal mine jobs and "wear[s] oxygen anywhere from 18 to 24 hours a day." *Id*., *quoting* Hearing Transcript at 28, Director's Exhibit 170 at 21; *see also* Hearing Transcript at 18-22, 28-30.

In light of claimant's testimony regarding the "very physical" demands of his most recent work, and to the extent the administrative law judge specifically credited Dr. Alam's opinion that claimant "does not have the respiratory capacity to perform the work of a coal miner" and suffers "complete pulmonary disability," employer has not explained the necessity of remanding for further consideration of the physical demands of claimant's work. *See Shinseki*, 556 U.S. at 413 (holding the appellant must explain how the "error to which [it] points could have made any difference"). Moreover, the administrative law judge specifically found claimant's qualifying April 23, 2016 pulmonary function study is the "most probative" of claimant's condition, is uncontradicted by the other evidence of record, and therefore establishes "the Claimant is disabled without regard to the exertion required by his last coal mine job." Decision and Order at 19. Thus, even had the administrative law judge erred in his consideration of the exertional requirements of claimant's usual coal mine work in relation to Dr. Alam's opinion, any such error would be harmless as the uncontradicted qualifying April 23, 2016 pulmonary function study is

sufficient to establish total disability.[20] 20 C.F.R. §718.204(b)(2); *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We therefore affirm the administrative law judge's permissible finding that the qualifying pulmonary function study evidence, as supported by Dr. Alam's opinion, establishes claimant is totally disabled. *See Banks*, 690 F.3d at 489; Decision and Order at 19-20. Consequently, we also affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption and established a change in conditions pursuant to 20 C.F.R. §725.310.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish claimant has neither legal nor clinical pneumoconiosis,[21] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method. Decision and Order at 20-25.

Employer's sole allegation is that the administrative law judge erred in finding it did not rebut the existence of clinical pneumoconiosis. Employer's Brief at 20-22. Employer, however, must establish the absence of legal *and* clinical pneumoconiosis to

[20] As the administrative law judge observed, none of the other evidence is contrary to the qualifying pulmonary function study evidence. Pulmonary function studies and blood gas studies measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Further, we have affirmed the administrative law judge's discrediting of Dr. Broudy's opinion, and employer has not challenged the administrative law judge's finding that the opinions of Drs. Rasmussen and Westerfield are not probative of claimant's current pulmonary condition. Decision and Order at 15, 17. Finally, Dr. Alam's opinion claimant is totally disabled is not contrary to the qualifying pulmonary function study evidence.

[21] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis is defined as "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).

satisfy the first prong of rebuttal. 20 C.F.R. §718.305(d)(1)(i); *see Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278. Employer has not challenged the administrative law judge's determination that it failed to rebut legal pneumoconiosis and we therefore affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 28-32. Thus we further affirm the administrative law judge's finding employer did not rebut the existence of pneumoconiosis.

Employer makes no further challenges to the administrative law judge's findings on rebuttal. We therefore affirm his determination that employer failed to prove that no part of claimant's total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 32-33. We further affirm his conclusion employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Copley*, 25 BLR at 1-89; Decision and Order at 33. Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge