U.S. Department of Labor

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

BRB Nos. 15-0374 BLA
and 15-0375 BLA

SHIRLEY STALLARD (Widow of and o/b/o CREED STALLARD) Claimant-Respondent v. WESTMORELAND COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/23/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Miner's and Survivor's Claims of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2012-BLA-05151, 2012-BLA-05284) of Administrative Law Judge John P. Sellers, III, rendered on claims 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 subsequent claim[1] filed on November 16, 2010, and a survivor's claim filed on October 25, 2011.[2]

Considering the miner's claim, the administrative law judge credited the miner with sixteen years and two months of underground coal mine employment. The administrative law judge found that the new evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge further found that employer failed to rebut the

[1] The miner's first claim for benefits, filed on June 20, 1986, was finally denied by Administrative Law Judge Frank D. Marden in a Decision and Order on Remand issued on May 4, 1992, because the miner did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The miner filed a second claim on December 20, 2007, which was denied by the district director on August 5, 2008, because the miner failed to establish total disability. Director's Exhibit 2. The miner filed his current claim on November 16, 2010, which was pending when he died on September 21, 2011. Director's Exhibits 4, 12.

[2] Claimant, the widow of the miner, filed her claim for survivor's benefits on October 25, 2011, and is pursuing the miner's claim on his behalf. Widow's Claim Director's Exhibit 4; Director's Exhibit 27.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b).

presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

With regard to the survivor's claim, the administrative law judge noted that Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), provides that a survivor of a miner who is determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption by establishing that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). 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 in both the miner's and survivor's claims. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, stating that employer mischaracterizes the Director's position regarding the use of the Alveolar-arterial oxygen (A-a O2) gradient in determining impairment on blood gas study testing.

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

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

In order to invoke the Section 411(c)(4) presumption, claimant must initially establish that the miner had at least fifteen years of employment "in one or more underground coal mines," or "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).

[4] The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibits 1, 2, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

The administrative law judge noted that Administrative Law Judge John S. Patton credited the miner with "at least 10 years of coal mine employment" in the miner's initial (1986) claim.[5] Decision and Order at 3. In the current claim, however, the administrative law judge noted that the district director credited the miner with 14.27 years of coal mine employment, [6] and claimant alleged that the miner worked for twenty-one years in coal mining. Decision and Order at 3-4. Weighing the relevant evidence, the administrative law judge credited the miner with sixteen years and two months of underground coal mine employment. Decision and Order at 4.

Employer initially asserts that the administrative law judge erred in recalculating the length of the miner's coal mine employment, when prior administrative law judges, the Board and the district director found less than fifteen years of qualifying employment. Employer's Brief at 12-16. Employer maintains that both collateral estoppel and the "law of the case" doctrine preclude re-litigation of this previously decided issue.[7] *Id*. We disagree.

[5] The Board affirmed Administrative Law Judge Patton's finding of at least ten years of coal mine employment as unchallenged on appeal, but remanded the case for further consideration of the medical evidence. *Stallard v. Westmoreland Coal Co.*, BRB No. 88-2285 BLA (Feb. 22, 1991)(unpub.); Director's Exhibit 1. On remand, the case was reassigned to Judge Marden, who noted the Board's affirmance of Judge Patton's finding and, therefore, did not further address the issue.

[6] The district director credited the miner with 14.27 years of coal mine employment. Director's Exhibit 21. Specifically, referencing the Itemized Statement of Earnings printout from the Social Security Administration for the years 1949 through 2009 and a statement from Westmoreland Coal Company regarding its employment of the miner, the district director stated that the evidence "appears to support approximately 14.27 years of coal mine employment from 1947 through January 24, 1986." Director's Exhibit 22. The district director's Proposed Decision and Order does not contain specific calculations.

[7] Additionally, we note that, as this claim is a subsequent claim in which a change in an applicable condition of entitlement has been established, no findings made in a prior claim are binding on any party in this claim, unless the party either failed to contest that issue, or stipulated to that issue in the prior claim. 20 C.F.R. §725.309(c)(5). The record reflects that neither exception is applicable in this case.

The United States Court of Appeals for the Fourth Circuit has held that there are five requirements that must be satisfied for collateral estoppel to apply: (1) the issue sought to be precluded is identical to the one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006).

In this case, the issue of the length of the miner's coal mine employment was not "a critical and necessary part of the judgment in the prior proceeding," as the denial of the earlier claim was based on the miner's failure to establish a totally disabling respiratory or pulmonary impairment. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-138 (1999) (en banc). Additionally, the miner did not have a full and fair opportunity to litigate the issue in his earlier claims, as he had no incentive to appeal the original administrative law judge's general finding of at least ten years of coal mine employment. Until the 2010 amendments to the Act reinstated the fifteen-year presumption at Section 411(c)(4), the sole rebuttable presumption available to the miner required only ten years of coal mine employment in order to establish invocation pursuant to 20 C.F.R. §718.203(b). Therefore, contrary to employer's contention, collateral estoppel does not apply to preclude the administrative law judge from making a more explicit finding on the length of the miner's coal mine employment.

Moreover, the administrative law judge properly did not apply the "law of the case" doctrine, a discretionary rule of practice that is based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). Specifically, "the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Because the fifteen-year presumption at Section 411(c)(4) was not available to the miner in his initial claim, and intervening controlling authority is recognized as an exception to its application, the "law of the case" doctrine is not applicable in the miner's subsequent claim. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J. dissenting).

Additionally, contrary to employer's contention, the administrative law judge is not bound by findings made by the district director, as the administrative law judge's review of the evidence is *de novo*. *See Dingess v. Director, OWCP*, 12 BLR 1-141 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Therefore, the administrative

law judge was not restricted by the district director's determination of 14.27 years of coal mine employment.

Employer next contends that the administrative law judge erred in crediting the miner with a full quarter of employment during certain quarters in which he earned $50.00 or more in coal mine employment, as reflected in his Social Security Administration (SSA) earnings records. Employer's Brief at 14-16. Employer asserts that the use of this method does not comply with the current regulation set forth at 20 C.F.R. §718.301, which provides, in pertinent part, that "[t]he length of the miner's coal mine work history *must* be computed as provided by 20 C.F.R. [§]725.101(a)(32)." *Id*. at 15, *citing* 20 C.F.R. §718.301 (emphasis added). Specifically, employer maintains that the formula set forth at 20 C.F.R. §725.101(a)(32)(iii)[8] is the only "credible" method available in this case for determining the length of the miner's employment. Employer's Brief at 15-16. Had the administrative law judge utilized that formula, employer argues, claimant would have established less than fifteen years of coal mine employment. Employer's arguments lack merit.

In determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). Contrary to employer's contention, while the administrative law judge *must* compute the length of the miner's coal mine employment as provided by 20 C.F.R. §725.101(a)(32), he is not required to use the specific method of computation set forth in subsection (a)(32)(iii). The regulation provides only that an administrative law judge "may" use such method. *See Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

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[8] Section 725.101(a)(32)(iii) provides, in relevant part, that:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer *may* use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii) (emphasis added).

In determining the total length of the miner's coal mine employment, the administrative law judge initially identified the number of quarters in each year in which the miner's SSA earnings records indicated that he earned at least $50.00 from coal mine employment, and credited him with a total of thirty-one quarters, or seven years and nine months, of employment for the years 1947 through 1976.[9] Director's Exhibits 8, 9. For income earned prior to 1978, the Board has held that this is a reasonable method of computation. *See Clark*, 22 BLR at 1-280-81; *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *Combs v. Director, OWCP*, 2 BLR 1-904, 1-906 (1980). The administrative law judge then credited the written statement from employer, indicating that the miner worked for the company for nine years and five months, from August 1976 to January 1986. *See* 20 C.F.R. §725.101(a)(32)(ii); Decision and Order at 4; Director's Exhibit 7. The administrative law judge correctly found that this statement was confirmed by the miner's SSA documentation and hearing testimony. Decision and Order at 4; Director's Exhibits 1, 8, 9. Adding these terms of employment together, the administrative law judge found that claimant established that the miner had seventeen years and two months of coal mine employment. Decision and Order at 4. However, noting that claimant testified that the miner transported coal in his employment with Norton Coal Company, the administrative law judge deducted the four quarters of the miner's employment with that company from the total, and credited the miner with sixteen years and two months of underground coal mine employment. Decision and Order at 4; Hearing Transcript at 24.

Thus, the administrative law judge acted within his discretion in relying on the SSA earnings records documenting at least $50.00 in earnings per quarter to credit the miner with five quarters of coal mine employment between 1947 and 1949, one quarter in 1955, and eighteen quarters between 1969 and 1976,[10] for a total of six years and nine

[9] The administrative law judge credited the miner with five quarters of coal mine employment with F.A. Bolling Coal Company, between 1947 and 1949; one quarter with W.P. Ison Coal Company, in 1955; four quarters with Norton Coal Company, in 1966 and 1967; eighteen quarters with Coal Processing Corporation, between 1969 and 1973; and three quarters with the United Mine Workers of America in 1974 and 1975, for a total of thirty-one quarters of coal mine employment. Director's Exhibits 8, 9.

[10] Employer contends that the administrative law judge erred in crediting the miner with three quarters of coal mine employment in 1974 and 1975, when the miner was employed by the United Mine Workers of America. Employer also maintains that there is no evidence that the miner was working underground or at a mine site in the fourth quarter of 1955 when he worked for W.P. Ison Coal Company. Employer's Brief at 17-19. Error, if any, in the administrative law judge's crediting the miner with these quarters is harmless, as their exclusion does not result in a total finding of less than fifteen years

months, irrespective of the comparative amount of the miner's earnings from quarter to quarter, or year to year.[11] Decision and Order at 4; *see Tackett*, 6 BLR at 1-841. Because the administrative law judge's determination is based on a reasonable method of computation, and is supported by substantial evidence, we affirm his finding that the miner had at least fifteen years of qualifying coal mine employment.[12] *See Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1232 (1984); *Tackett*, 6 BLR at 1-841; Decision and Order at 4.

Employer next argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer specifically challenges the administrative law judge's finding that total disability was established by the arterial blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii). Employer further contends that the administrative law judge erred in not considering all of the relevant evidence of record in finding that claimant established a totally disabling respiratory or pulmonary impairment. Employer's Brief at 22-31.

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of qualifying coal mine employment under Section 411(c)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] Employer contends that the miner should not have been credited with full quarters of employment for the fourth quarters of 1970, 1971 and 1972 because the miner earned less money during those quarters than he did during the remainder of those calendar years. However, the miner earned greater than the $50.00 per quarter required by the administrative law judge to credit the miner with a full quarter of employment. *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984).

[12] Although employer has pointed to earnings from non-coal mine work during the fourth quarter of 1955 and the third quarter of 1969, in urging that the earnings from coal mine employment in those quarters not be credited under the SSA formula, the amount earned from non-coal mine work in this case does not, by itself, demonstrate that the miner did not engage in coal mine employment that would count as full-time employment. Nor is there evidence that the miner was paid an hourly wage in coal mine employment that would demonstrate that the miner did not engage in coal mine employment for the full quarter. Consequently, the administrative law judge's use of the SSA formula was reasonable.

The administrative law judge determined that the record contained one newly submitted blood gas study performed on January 6, 2011, which produced qualifying[13] values under 20 C.F.R. §718.204(b)(2)(ii) and was deemed technically valid by Dr. Michos. Decision and Order at 8, 22; Director's Exhibit 13. Finding that this evidence supports a finding of total disability, the administrative law judge reviewed the remaining relevant evidence of record to determine whether it outweighed the qualifying blood gas study.[14] After determining that the pulmonary function study evidence did not undermine a finding of total disability because it measured a different form of impairment than the blood gas study evidence, *see Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984), the administrative law judge reviewed the medical opinions of Drs. Al-Khasawneh and Perper that the miner was totally disabled by a respiratory or pulmonary impairment,[15] and the contrary opinions of Drs. Rosenberg and Tuteur that the miner retained the respiratory capacity to perform his usual coal mine employment. Decision and Order at 22.

The administrative law judge determined that Dr. Rosenberg based his opinion that there was no objective evidence of a disabling respiratory impairment on his conclusion that the most recent pulmonary function studies were invalid due to

[13] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those table values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[14] Because no party challenges the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21 n.9, 22.

[15] Dr. Al-Khasawneh diagnosed a severe obstructive pattern as revealed on the miner's pulmonary function study. Director's Exhibit 13. He further found that the miner's blood gas study results were abnormal and met the criteria for total disability. *Id.* Based on his review of the testing associated with his examination, Dr. Al-Khasawneh opined that the miner did not retain the pulmonary capacity to work as a coal miner. *Id.* Dr. Perper diagnosed chronic obstructive pulmonary disease (COPD) and emphysema due to the miner's significant smoking history and his longstanding coal mine dust exposure. Claimant's Exhibit 4. Dr. Perper opined that the miner suffered from a totally disabling respiratory impairment, based on his review of the objective studies of record. *Id.*

incomplete effort.[16] Employer's Exhibit 4; Employer's Exhibit 12 at 12-13. Relying on the March 20, 2008 pulmonary function study and blood gas study from the miner's prior claim, Dr. Rosenberg stated that the miner's test results were indicative of normal lung function. Employer's Exhibit 12 at 15-16. Dr. Rosenberg conceded that the record may contain lower and "probably" qualifying blood gas studies, but stated that the abnormalities were "likely" due to the miner's malignancy and end of life issues. Employer's Exhibit 12 at 13. Consequently, Dr. Rosenberg opined that when the miner's condition was stable, i.e., in 2008, his pO_2 rose with exercise, thus producing a normal response.

The administrative law judge accorded Dr. Rosenberg's opinion little probative weight, finding that the doctor relied on the older, non-qualifying March 2008 tests, rather than the more recent January 2011 blood gas study, which yielded qualifying values. Additionally, in light of the doctor's hypothesis that the abnormalities seen in the miner's January 2011 blood gas study were "likely" due the miner's malignancy and end of life issues, the administrative law judge found that Dr. Rosenberg's opinion was equivocal, vague, and not supported by the evidence of record. Decision and Order at 23.

The administrative law judge also accorded little weight to the opinion of Dr. Tuteur, finding that the doctor relied on the March 2008 tests and determined that they demonstrated "no worse than a mild obstructive defect." Employer's Exhibits 6, 13 at 13. Although Dr. Tuteur noted that the more recent pulmonary function studies exhibited a numerical decline, he found that they were invalid, and that the most recent blood gas study of January 6, 2011, while producing qualifying values, constituted a normal study upon calculation of the A-a O_2 gradient. Employer's Exhibits 6; 13 at 15-16. Dr. Tuteur testified that the more accurate measure of disability on a blood gas study is the A-a O_2 gradient, which takes into account the altitude and barometric pressure at the time the blood was drawn, as well as the miner's age. Based on his reliance on the older objective studies and his calculation of the miner's A-a O_2 gradient, which he described as "flat out normal," Dr. Tuteur opined that the miner was not totally disabled. Employer's Exhibits 6, 13 at 13. Noting that the Department of Labor (DOL), in promulgating the regulations, chose to rely on the PO_2 and PCO_2 values to measure disability, and that the tables take

[16] The two most recent pulmonary function studies, dated January 6, 2011 and March 1, 2011, produced qualifying values. Director's Exhibit 13. However, Dr. Michos, who reviewed the tracings on behalf of the Department of Labor, and Drs. Rosenberg and Tuteur, who reviewed the tracings on behalf of employer, invalidated the two qualifying studies, finding greater that 5% variation in the FEV_1 values and incomplete effort by the miner in performing the tests. Director's Exhibit 13; Employer's Exhibits 4, 6.

altitude into account, the administrative law judge declined to credit Dr. Tuteur's interpretation of the miner's January 2011 blood gas study. Decision and Order at 25.

Employer contends that the administrative law judge erred in discounting Dr. Tuteur's opinion regarding the A-a O_2 gradient "out of hand," without fully considering it. Employer's Brief at 22. Employer maintains that DOL, in the 1980 preamble to the regulations, declined to use the calculation of the A-a O_2 gradient as a measure of disability because it was laborious, difficult to administer, and few laboratories were equipped to perform it, but employer asserts that the comments "indicate that [DOL] would have adopted it if the technology existed." *Id.* at 23, *citing* 45 Fed. Reg. 13,678 *et seq.* (Feb. 29, 1980). In his response brief, the Director counters that DOL provided an additional reason for declining to use the A-a O_2 gradient as a benchmark for disability, i.e., because "the arterial blood oxygen tension measures the overall ability of the lung to properly provide oxygen for body metabolism and thus provides a more useful measurement in order to determine the overall ability of the individual to function." 42 Fed. Reg. 13,683 (Feb. 29, 1980). Thus, the Director maintains, while the administrative law judge may consider the A-a O_2 gradient as "other medical evidence," it was within the administrative law judge's discretion to place greater reliance on the values set forth in the regulations as indicative of total disability. Director's Brief at 1.

Contrary to employer's argument, the administrative law judge fully considered Dr. Tuteur's report and deposition testimony, including Dr. Tuteur's explanation of why his calculation of the A-a O_2 gradient showed that the miner's January 6, 2011 blood gas study produced normal gas exchange. Decision and Order at 13-18, 23-25. The administrative law judge further considered that Dr. Al-Khasawneh, an equally-qualified physician who "actually examined" the miner and administered the qualifying blood gas study, found that the PO_2 and PCO_2 values were a reliable basis upon which to conclude that the miner suffered from a totally disabling respiratory or pulmonary impairment. Decision and Order at 25; Director's Exhibit 13. Noting that DOL has accepted the PO_2 and PCO_2 values as the more valid indicators of impairment on blood gas studies, the administrative law judge acted within his discretion in according little weight to Dr. Tuteur's discussion and reliance on his calculation of the A-a O_2 gradient. Decision and Order at 25; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997).

In the alternative, employer argues that the administrative law judge did not consider that the January 6, 2011 blood gas study was taken during a period of acute respiratory or cardiac illness. Employer's Brief at 25, 27-30. To the contrary, the administrative law judge fully discussed employer's contention that the test was

performed during, or soon after, an acute respiratory or cardiac illness and, within a reasonable exercise of his discretion as trier-of-fact, found no support in the record for employer's assertion that, as a result, the test should not be credited. Decision and Order at 26; *see Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-14 (1993). The administrative law judge noted that, while the miner had been recently released from the hospital for treatment of a biliary mass, only Dr. Rosenberg found that this treatment affected the miner's January 2011 blood gas study. Specifically, the administrative law judge found that Dr. Al-Khasawneh, the physician who administered the study, did not opine that the miner's hospitalization affected any of the studies he administered. Decision and Order at 26; Director's Exhibit 13. Likewise, the administrative law judge found that Dr. Tuteur did not find that the miner's physical condition, aside from his age, affected the results of the blood gas study. Consequently, the administrative law judge reasonably found that there is insufficient medical evidence in the record to support Dr. Rosenberg's opinion that the miner's treatment of a biliary mass adversely affected the values produced by the January 6, 2011 blood gas study. *See generally Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Jeffries v. Director, OWCP*, 6 BLR 1-1013 (1984).

Lastly, we reject employer's contention that the administrative law judge failed to consider all of the relevant evidence in determining that claimant established a totally disabling respiratory or pulmonary impairment at Section 718.204(b)(2)(i)-(iv). The administrative law judge considered, separately, the new medical evidence of record in each category, then considered both like and unlike evidence together, and concluded that the qualifying January 6, 2011 blood gas study, as supported by the medical opinions of Drs. Al-Khasawneh and Perper, was entitled to the most weight. Decision and Order at 27-29, 41; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). The administrative law judge also considered the evidence in the miner's earlier claims and found that, because total disability is based on the miner's most recent pulmonary status, the new evidence was the most probative. Decision and Order at 28-29; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director,* OWCP, 8 BLR 1-139 (1985). Since Drs. Rosenberg and Tuteur relied on earlier evidence to find that the miner was not disabled, and the administrative law judge was not persuaded by their conclusions regarding the qualifying January 6, 2011 blood gas study, the administrative law judge permissibly discounted their opinions. *Id.* As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the medical evidence as a whole establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that claimant established invocation of the Section 411(c)(4) presumption, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

Rebuttal of the Section 411(c)(4) Presumption in the Miner's Claim

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[17] 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)(i), (ii).

In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered the x-ray evidence of record, finding that it was positive for the disease. Decision and Order at 31-32. Specifically, the administrative law judge considered seven interpretations of three x-ray films. He found the x-rays dated May 14, 2010 and April 1, 2011 were each read as positive by Dr. Crum and as negative by Dr. Shipley. As the administrative law judge determined that both physicians are dually qualified as B readers and Board-certified radiologists, and that they have "essentially equal credentials and arrived at opposite conclusions," he found that the May 14, 2010 and April 1, 2011 x-rays were inconclusive. Decision and Order at 31; Claimant's Exhibits 5, 6; Employer's Exhibits 1, 2. However, the administrative law judge found the January 6, 2011 x-ray to be positive for pneumoconiosis, despite a negative reading by Dr. Meyer, a dually-qualified physician, as two other dually-qualified physicians, Drs. DePonte and Alexander, provided positive readings. Decision and Order at 31-32; Director's Exhibits 13, 14; Employer's Exhibit 3. The administrative law judge, therefore, found that the overall weight of the x-ray evidence was positive for clinical pneumoconiosis. Decision and Order at 32.

Employer contends that the administrative law judge erred in weighing the x-ray evidence, arguing that the administrative law judge merely "counted heads." Employer's Brief at 31-32. Additionally, employer contends that the administrative law judge erred in finding the professional qualifications of Drs. Crum and Shipley to be equal, arguing that "Dr. Crum is not a medical doctor, but a doctor of osteopathy," and that Dr. Shipley

[17] "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" 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).

is a professor of radiology, whereas Dr. Crum has been a B reader for only two years. Employer's Brief at 32.

Contrary to employer's contention, although an administrative law judge may give greater weight to the interpretations of a physician based upon his or her academic qualifications, the administrative law judge is not required to do so.[18] *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Bateman v. E. Associated Coal Corp*., 22 BLR 1-255, 1-261 (2003). In this case, the administrative law judge considered the physicians' radiological qualifications and, finding that all of the physicians were dually-qualified as B readers and Board-certified radiologists, he permissibly assigned equal weight to the readings by Drs. Crum, Shipley, Alexander, DePonte and Meyer. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); Decision and Order at 31. Because the administrative law judge performed both a quantitative and qualitative analysis of the x-ray evidence, and explained how he resolved the conflicts in the evidence, we affirm, as supported by substantial evidence, his finding that the x-ray evidence was positive for pneumoconiosis and, therefore, insufficient to disprove the existence of clinical pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i)(B); *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Rose v. Clinchfield Coal Co.*, 614 F.3d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Employer next contends that the administrative law judge erred in his consideration of the CT scan evidence of record, arguing that he failed to adequately discuss the CT scans contained in the miner's treatment records. Employer's Brief at 32-33. We disagree.

The administrative law judge summarized the five interpretations of four CT scans, taken on October 18, 2009, May 25, 2010, December 25, 2010, and June 29, 2011. Decision and Order at 6-7, 32; Claimant's Exhibits 1-20, 1-36, 2-48, 2-50; Employer's Exhibit 9-67. Dr. Gopalan, whose credentials are not in the record, interpreted the October 18, 2009 and May 25, 2010 CT scans of the miner's abdomen as revealing a 4.2 millimeter (mm) pleural-based nodule at the posterolateral aspect of the right lower lobe and a slightly lobulated nodule, measuring 17 mm by 14 mm, in the posterior aspect of the right lower lobe. Claimant's Exhibits 1-20, 1-36. Dr. Jernigan, whose radiological

[18] A review of the record also shows that Dr. James Crum is on the faculty of DeBusk College of Osteopathic Medicine, teaching clinical and diagnostic imaging. Claimant's Exhibit 7.

qualifications are not in the record, interpreted the December 25, 2010 CT scan of the miner's abdomen as showing bibasilar atelectasis in the miner's lung bases. Employer's Exhibit 9-67. Dr. Dann, whose credentials are not in the record, interpreted the June 29, 2011 CT scan as revealing bibasilar emphysema, bibasilar atelectasis, a stable nodular opacity in the right lung base, and a recently developed 5 mm nodule in the miner's right middle lobe. Claimant's Exhibit 2-48. Dr. Joshua Crum, whose credentials are not in the record, also interpreted the June 29, 2011 CT scan, stating that it revealed "patchy right lower lung airspace disease" as well as a 5 mm right middle lobe noncalcified nodule, a pleural-based nodule and a nodular opacity in the right lung base. Claimant's Exhibit 2-50.

None of the physicians who interpreted the CT scan evidence specifically stated that it did not show pneumoconiosis. Rather, all of the physicians identified nodules in the miner's right lung, but did not attribute them to any specific cause. Consequently, the administrative law judge properly found that the CT scan evidence does not comment on the presence or absence of clinical pneumoconiosis, Decision and Order at 32, and it is therefore insufficient to satisfy employer's burden to disprove the existence of clinical pneumoconiosis.

Employer further contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to disprove the existence of clinical pneumoconiosis. Employer argues that the administrative law judge's weighing of the medical opinion evidence was "tainted" by his errors in weighing the x-ray evidence and CT scan evidence. Employer's Brief at 34. We disagree.

In considering the medical opinion evidence, the administrative law judge initially found that Drs. Al-Khasawneh and Perper diagnosed the presence of clinical pneumoconiosis and, therefore, their opinions do not support employer's burden on rebuttal. Decision and Order 32. The administrative law judge then considered the medical opinions of Drs. Rosenberg and Tuteur that the miner did not have clinical pneumoconiosis. Dr. Rosenberg, a Board-certified pulmonologist, acknowledged that there were some x-ray interpretations by B readers that were positive for pneumoconiosis, but stated that the CT scan evidence was more accurate and did not show micronodularity, even though it did show evidence of nodules. Employer's Exhibit 4. Dr. Rosenberg, in his deposition testimony, reiterated the lack of micronodularity in concluding that the miner did not have clinical pneumoconiosis, although he acknowledged that the evidence contained features characteristic of clinical pneumoconiosis. Employer's Exhibits 4, 12. Weighing Dr. Rosenberg's opinion, the administrative law judge found that the doctor excluded a diagnosis of clinical pneumoconiosis because the CT scan evidence showed no micronodularity, even though the record contains positive x-ray readings by B readers. Decision and Order at 33. Because the CT scans were not read specifically for the presence or absence of

pneumoconiosis, whereas dually-qualified physicians read the x-rays specifically for pneumoconiosis and classified them accordingly, the administrative law judge permissibly found that Dr. Rosenberg's opinion is not sufficiently persuasive to establish that the miner did not have clinical pneumoconiosis. *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); Decision and Order at 33.

Similarly, the administrative law judge found that Dr. Tuteur's opinion is insufficient to rebut the presumption of clinical pneumoconiosis. Dr. Tuteur, a Board-certified pulmonologist, initially opined that there was no credible evidence to establish that the miner had clinical pneumoconiosis. Employer's Exhibit 6. However, in his deposition, Dr. Tuteur testified that the miner may have clinical pneumoconiosis, but "does not have clinical pneumoconiosis to such a degree that it is sufficient to produce clinical symptoms …." Employer's Exhibit 13 at 21. Acknowledging the presence of positive x-ray interpretations by B readers, Dr. Tuteur testified that even if these readings are accurate, the record does not contain other findings that reflect clinically significant coal workers' pneumoconiosis. *Id*. at 22. He noted a lack of clinical abnormalities on physical examination of the miner, such as breathlessness or late inspiratory crackles. *Id.* at 25-26. Dr. Tuteur also stated that, in order to diagnose clinical pneumoconiosis, he looked for diminished total lung capacity, which was not shown on the March 20, 2008 pulmonary function study. *Id*. at 27. Dr. Tuteur further stated that "in persons with sufficient coalworkers' pneumoconiosis to produce abnormal lung function," he looked for impairment of oxygen gas exchange that is first shown during exercise. *Id*. Relying on the 2008 blood gas study, Dr. Tuteur found the miner's gas exchange to be normal. *Id.* Additionally, he interpreted the 2011 blood gas study as showing gas exchange within normal limits for a man of the miner's age.[19] *Id*. at 28.

Weighing the totality of Dr. Tuteur's opinion, the administrative law judge permissibly found that it did not rebut the presumed fact of clinical pneumoconiosis, as the physician's conclusion that the x-ray evidence did not establish clinical pneumoconiosis was contrary to the administrative law judge's finding that the weight of this evidence was positive. Decision and Order at 34; *see Scott*, 289 F.3d at 269, 22 BLR at 2-383-84; *Toler*, 43 F.3d at 116, 19 BLR at 2-83. Moreover, the administrative law judge found that Dr. Tuteur allowed for the possibility of simple pneumoconiosis in his deposition testimony, but stated that it was not of a degree to be clinically significant. Noting that the regulations do not require that clinical pneumoconiosis be clinically

[19] As the administrative law judge found, the January 6, 2011 blood gas study produced qualifying values under the regulations.

significant to be present, the administrative law judge permissibly accorded Dr. Tuteur's opinion diminished weight. Decision and Order at 34; *see* 20 C.F.R. §718.201(a)(1).

Considering the x-rays, CT scans and medical opinions,[20] the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption by affirmatively disproving the existence of clinical pneumoconiosis, Decision and Order at 35, and we affirm his finding as supported by substantial evidence.

In evaluating whether employer disproved the presumed fact of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Al-Khasawneh, Perper, Tuteur, and Rosenberg.[21] Drs. Al-Khasawneh and Perper opined that the miner suffered from legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), due to both coal mine dust exposure and cigarette smoking.[22] Director's Exhibit 13; Claimant's Exhibit 4. By contrast, Drs. Rosenberg and Tuteur opined that the miner did not have legal pneumoconiosis, but suffered from, at most, a

[20] The administrative law judge also discussed the medical opinions of Drs. Agarwal, Fino, Endres-Bercher, and Robinette, submitted in connection with the miner's 1986 and 2007 claims. Director's Exhibits 1, 2. Because the physicians' reports were issued prior to the more recent positive x-ray evidence, the administrative law judge permissibly found that their opinion were insufficient to rebut the presumed fact of clinical pneumoconiosis. Decision and Order at 35; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

[21] The administrative law judge also discussed the medical opinions of Drs. Agarwal, Fino, Endres-Bercher, and Robinette, submitted in association with the miner's 1986 and 2007 claims. Director's Exhibits 1, 2. Because of the age of the reports, developed prior to the miner being diagnosed with a total respiratory disability, the administrative law judge found that these opinions are not probative. Decision and Order at 39.

[22] Dr. Al-Khasawneh opined that the miner's pulmonary function study revealed a severe obstructive pattern attributable to coal mine dust exposure, but further stated that the miner's history of tobacco abuse may have contributed to the obstructive defect. Director's Exhibit 13. Dr. Perper diagnosed COPD and emphysema due to the miner's significant smoking history and his longstanding coal mine dust exposure. Claimant's Exhibit 4.

mild degree of COPD that was unrelated to coal mine dust exposure.[23] Employer's Exhibits 4, 6, 12, 13.

Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Tuteur on the issue of legal pneumoconiosis, based on his "faulty" analysis and weighing of their opinions on the issue of total disability. Employer's Brief at 34-35. Employer's contention lacks merit.

In reviewing Dr. Rosenberg's opinion, the administrative law judge determined that the physician concluded that the most recent pulmonary function studies were invalid and that the January 6, 2011 blood gas study was not a reliable indicator of the miner's respiratory status, as it was performed during a period of acute illness. Employer's Exhibit 4; Employer's Exhibit 12 at 16-17. Finding that the earlier objective studies showed normal lung function, and that the results of the January 6, 2011 blood gas study were "likely" due to the miner's malignancy and other end of life issues, Dr. Rosenberg opined that there was no evidence of legal pneumoconiosis. *Id.* However, as the administrative law judge found that the qualifying January 6, 2011 blood gas study was valid, and that Dr. Rosenberg's opinion was vague and speculative regarding the cause of the miner's gas exchange abnormalities, the administrative law judge permissibly discounted the opinion. Decision and Order at 36; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951, 21 BLR at 2-32. Additionally, the administrative law judge acted within his discretion in finding that Dr. Rosenberg failed to adequately explain how he excluded coal dust exposure as a significant cause of either the miner's oxygenation impairment, as seen on the qualifying blood gas study, or the mild degree of obstructive impairment that Dr. Rosenberg indicated may have been shown by the earlier pulmonary function studies. *Id.*

Similarly, the administrative law judge was not persuaded by Dr. Tuteur's opinion that the miner's COPD did not constitute legal pneumoconiosis, but was due solely to smoking. Decision and Order at 37-39. The administrative law judge determined that Dr. Tuteur relied on his view that the relative risk of developing COPD from smoking is greater than the risk of developing it from coal mine dust exposure.[24] *Id.*; Employer's

[23] Dr. Tuteur diagnosed chronic bronchitis, mild COPD and possible emphysema caused by cigarette smoking that is unrelated to coal mine dust exposure. Employer's Exhibits 6, 13. Dr. Rosenberg opined that legal pneumoconiosis was not present because there were no valid pulmonary function studies in the record to suggest legal pneumoconiosis or any impairment. Employer's Exhibits 4, 12.

[24] Dr. Tuteur acknowledged that both coal dust exposure and cigarette smoking can cause airflow obstruction. Employer's Exhibit 13 at 35. He opined that if a miner

Exhibits 6, 13. Noting DOL's position that "nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners[,]" 65 Fed. Reg. 79,938 (Dec. 20, 2000), the administrative law judge acted within his discretion in according little weight to Dr. Tuteur's reliance on the statistical averaging of the miner's risk of developing legal pneumoconiosis. Decision and Order at 38, *citing Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). The administrative law judge further found that Dr. Tuteur failed to address the possible additive effects of smoking and coal dust exposure, but rather, reduced the discussion to an "all or nothing" proposition, contrary to DOL's position that neither exposure necessarily excludes the other, whereas both exposures can combine to produce an additive injurious effect. Decision and Order at 39; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Consequently, the administrative law judge permissibly determined that Dr. Tuteur's opinion was entitled to diminished weight to the extent that his analysis was inconsistent with the conclusions reached in the medical literature and studies accepted by DOL. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103.

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Tuteur, and substantial evidence supports his credibility determinations, we affirm his finding that employer failed to rebut the presumed fact of legal pneumoconiosis under Section 411(c)(4). 20 C.F.R. §718.305(d)(1)(i). We, therefore, affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption under the first method of rebuttal by disproving the existence of clinical and legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *Rose*, 614 F.3d at 939, 2 BLR at 2-43-44.

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with COPD is also a smoker, a doctor cannot rely upon physical examination findings or physiologic and radiographic characteristics to determine the cause(s) of the COPD. Dr. Tuteur stated that one has to look at the medical literature to see if one can assign likelihood of one cause versus another as the responsible agent. Employer's Exhibit 13 at 34. Dr. Tuteur determined that the miner's COPD was due to smoking, rather than coal dust, based on the miner's heavy smoking history and the relative risk of developing COPD from smoking (20% for persons who smoke throughout their adult life) versus coal dust (1% for miners who never smoked). Employer's Exhibit 13 at 35. Comparing the incidence of coal dust-induced obstruction of 1-2% or less, versus the incidence of the same clinical picture among adult cigarette smokers of 20%, Dr. Tuteur concluded that cigarette smoking was the sole cause of the miner's condition. Employer's Exhibit 6.

The administrative law judge next addressed whether employer rebutted the presumed fact of total disability causation, 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. *See* 20 C.F.R. §718.305(d)(1)(ii). As Drs. Rosenberg and Tuteur diagnosed neither clinical nor legal pneumoconiosis, contrary to the weight of the evidence, the administrative law judge permissibly concluded that their opinions were entitled to little weight on the issue of total disability causation. Decision and Order at 40; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015); *Scott*, 289 F.3d at 269, 22 BLR at 2-383-84; *Toler*, 43 F.3d at 116, 19 BLR at 2-83. Additionally, contrary to employer's contention, the administrative law judge rationally determined that the same reasons he provided for discrediting the opinion of Drs. Rosenberg and Tuteur on the issue of total disability also undercut their opinions on the issue of disability causation. *Id.* As the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Tuteur, and substantial evidence supports his findings, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and we affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Decision and Order at 42; *see* 30 U.S.C. §932(*l*). As the administrative law judge's findings are supported by substantial evidence, we affirm his determination that claimant is derivatively entitled to receive survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge