**U.S. Department of Labor** Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0333 BLA

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| ASTOR SMITH | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| APOGEE COAL COMPANY | ) | DATE ISSUED: 07/16/2015 |
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| and | ) | |
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| ARCH COAL, INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-<br>Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5828) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim filed on April 29, 2010,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). Based on the filing date of the claim, and the administrative law judge's determinations that claimant established twenty-five years of underground coal mine employment, and has a totally disabling pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b). The administrative law judge also found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In addition, the administrative law judge determined that employer did not rebut the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his consideration of the evidence relevant to total disability and in shifting the burden of proof to employer. Employer also contends that the administrative law judge applied an incorrect rebuttal standard and erred in finding that employer did not satisfy its burden to rebut the amended Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, urging the Board to affirm the award of benefits and reject employer's arguments. Employer filed a brief in reply to the Director, reiterating its arguments. Claimant did not file a response brief.[3]

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[1] Claimant filed an initial claim for benefits on July 7, 1999, which was denied by the district director on October 20, 1999, because he did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on January 26, 2006. Director's Exhibit 2. In a Proposed Decision and Order issued on August 24, 2006, the district director denied benefits because the evidence was insufficient to establish total disability. *Id.* Claimant took no further action until he filed his current subsequent claim on April 29, 2010. Director's Exhibit 4.

[2] Amended Section 411(c)(4) sets forth a rebuttable presumption of total disability due to pneumoconiosis that is invoked if the miner establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in substantially similar conditions, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had twenty-five years of underground coal mine employment. *See Skrack v.*

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he has a totally disabling respiratory or pulmonary impairment, and that he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). When a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c);[5] *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, claimant's prior claim was denied because he failed to establish total disability. Consequently, claimant had to submit evidence establishing this element of entitlement in order to obtain review of the merits of this claim. 20 C.F.R. §725.309(c).

## I. INVOCATION OF THE AMENDED 411(c)(4) PRESUMPTION – TOTAL DISABILITY

Pursuant to 20 C.F.R. §718.305(b)(iii), whether a claimant establishes that he or she has a totally disabling respiratory or pulmonary impairment must be assessed under 20 C.F.R. §718.204(b)(2). Relevant to 20 C.F.R. §718.204(b)(2)(i), the record contains the results of six newly submitted pulmonary function tests. Dr. Alam obtained a pre-

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*Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because claimant's coal mine employment was in Kentucky, 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); Director's Exhibit 1.

[5] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c).

bronchodilator pulmonary function test on January 9, 2008, which was qualifying for total disability.[6] Director's Exhibit 16. A second pulmonary function test, obtained on July 15, 2010 by Dr. Habre, was qualifying for total disability, both pre-bronchodilator and post-bronchodilator. Director's Exhibit 18. Dr. Habre noted good cooperation and comprehension by claimant. *Id*. Dr. Mettu reviewed the test for the Department of Labor and concluded that it was acceptable, while Drs. Vuskovich and Broudy reviewed the test at the request of employer and found that the tracings revealed suboptimal effort. *Id*; Employer's Exhibits 4, 7. A March 18, 2011 pulmonary function test, obtained by Dr. Broudy, was qualifying for total disability, both pre-bronchodilator and post-bronchodilator. Director's Exhibit 21. Dr. Broudy opined that the results were not valid due to claimant's inability to hear, and to understand, the instructions for performing the test. *Id*. Dr. Dahhan also considered the test to be invalid. Employer's Exhibit 8. Dr. Dahhan obtained a pulmonary function test on June 9, 2011, which produced qualifying pre-bronchodilator and post-bronchodilator results. Employer's Exhibit 2. Dr. Dahhan determined that the "spirometry showed premature termination of airflow resulting in less than optimum test," the post-bronchodilator test was "completely invalid" and that the mild reduction on the FVC and FEV1 was "probably due to less than complete exhalation as a result of [claimant's] lack of comprehension." *Id.* Dr. Klayton's May 15, 2012 test showed qualifying values pre-bronchodilator and non-qualifying values post-bronchodilator. Claimant's Exhibit 4. Dr. Klayton described claimant's cooperation, effort and comprehension as good, but Dr. Broudy opined that the test was invalid due to suboptimal effort. *Id*.; Employer's Exhibit 7. Dr. Dahhan stated at his deposition that claimant's effort was "good." Employer's Exhibit 9 at 8. The June 16, 2012 pulmonary function test obtained by Dr. Splan produced qualifying values, both before and after bronchodilation. Claimant's Exhibit 7. Dr. Splan indicated that claimant's cooperation, effort and comprehension were good. *Id.*

The administrative law judge summarized the results of the newly submitted pulmonary function tests and rendered findings as to whether each was a reliable indicator of claimant's respiratory or pulmonary condition. Decision and Order at 18-19. The administrative law judge considered the pre-bronchodilator test performed by Dr. Alam on January 9, 2008, to be unreliable due to "the absence of tracings" in the record. Decision and Order at 18; *see* Director's Exhibit 16. Regarding the July 15, 2010 test obtained by Dr. Habre, the administrative law judge concluded, "[b]ecause Drs. Habre and Mettu are both Board-certified pulmonologists, whereas Dr. Broudy is [a Board-certified pulmonologist] but Dr. Vuskovich is not, and because Dr. Dahhan did not

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

expressly invalidate the test . . . there is a slight preponderance of the evidence favoring the reliability of this test."[7] Decision and Order at 18-19. The administrative law judge concluded that the March 18, 2011 test was unreliable, based on Dr. Broudy's comments that the qualifying results are the "product of lack of proper understanding."[8] Decision and Order at 19, *quoting* Director's Exhibit 21. The administrative law judge found that the June 9, 2011 test was also unreliable because Dr. Dahhan, who administered the test, invalidated the results due to suboptimal effort. Decision and Order at 19; Employer's Exhibit 2. Regarding the May 15, 2012 test performed by Dr. Klayton, the administrative law judge concluded that it was valid, despite Dr. Broudy's statement that claimant did not exert adequate effort. Decision and Order at 19; Claimant's Exhibit 4; Employer's Exhibit 7. The administrative law judge explained that he "find[s] it reasonable to infer that Dr. Dahhan joined Dr. Klayton in considering the test dated May 15, 2012, to be valid," as Dr. Dahhan cited it as an example of a valid test.[9] Decision and Order at 19; Employer's Exhibit 8. Finally, the administrative law judge determined that the test obtained by Dr. Splan on June 16, 2012 was valid, as Dr. Splan reported that claimant's cooperation, effort and comprehension was good; the tracings were attached to the report; and no physician reviewed and invalidated this test.[10] Decision and Order at 19; Claimant's Exhibit 7.

Based on his findings with respect to the validity of the new pulmonary function tests, the administrative law judge determined that the pulmonary function tests

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[7] Dr. Vuskovich is "[B]oard-certified in occupational medicine, but not in pulmonary medicine." Decision and Order at 18; *see* Employer's Exhibit 4.

[8] In his March 18, 2011 report, Dr. Broudy stated that "claimant's effort on spirometry was poor and that the results are invalid" and that "multiple attempts were made but the [claimant's] hearing loss and lack of understanding of the testing made valid results unobtainable." Director's Exhibit 21-6. Referring to the March 18, 2011 pulmonary function test in his July 24, 2012 report, Dr. Broudy stated that claimant's "very poor effort" made the test invalid. Employer's Exhibit 7. Dr. Broudy testified that the spirometry was invalid due to poor effort and that "perhaps [claimant] didn't understand what was expected of him …." Employer's Exhibit 3 at 9.

[9] In his deposition testimony, regarding the May 15, 2012 pulmonary function test administered by Dr. Klayton, Dr. Dahhan agreed that claimant gave good effort. Employer's Exhibit 9 at 8.

[10] Dr. Dahhan stated that he received the June 16, 2012 pulmonary function test obtained by Dr. Splan and agreed that claimant gave good effort. Employer's Exhibit 9 at 8.

performed on July 15, 2010, May 15, 2012, and June 16, 2012, were "sufficiently reliable." Decision and Order at 18-19. He further found that the pulmonary function tests obtained by Dr. Alam on January 9, 2008, Dr. Broudy on March 18, 2011, and Dr. Dahhan on June 9, 2011 were not valid. *Id*. The administrative law judge observed that, with the exception of the post-bronchodilator values obtained by Dr. Klayton, all of the tests that he found to be valid had qualifying values, including the most recent test obtained by Dr. Splan. *Id*. at 20. The administrative law judge concluded, "I find that the pulmonary-function test evidence, when considered alone, is sufficient to establish total disability under [20 C.F.R. §]718.204(b)(2)(i)." *Id*.

Employer argues that the administrative law judge erred in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), based on the qualifying pulmonary function tests. Employer alleges that the administrative law judge "ignored . . . Dr. Broudy's testimony that [claimant's] profound hearing loss make[s] it impossible to provide a valid test, a conclusion that was corroborated by the treatment notes and Dr. Alam's opinion." Employer's Brief in Support of Petition for Review at 15, *citing* Director's Exhibits 16-12, 16-23. Employer also asserts that the administrative law judge "ignored Dr. Dahhan's testimony that the pulmonary function tests, including the tests performed for Dr. Splan[,] reflected [claimant's] advanced age and other, non-respiratory factors (comorbities)." Employer's Brief in Support of Petition for Review at 15, *citing* Employer's Exhibit 8 at 5. We reject these arguments, as employer has not accurately characterized the medical opinions and treatment notes that employer has cited in support of its allegations of error.

Contrary to employer's position, Dr. Broudy did not opine that claimant's hearing loss rendered all of the newly submitted pulmonary function tests invalid. Rather, his reports and deposition testimony focused on his examination of claimant on March 18, 2011, and the testing performed on that date. As the administrative law judge correctly noted, in Dr. Broudy's initial report of his examination, he stated that *the pulmonary function test that he obtained on that date* was invalid, because claimant's "effort on spirometry [was] poor" and "[m]ultiple attempts were made but the patient's hearing loss and lack of understanding of the testing made valid results unobtainable." Decision and Order at 12, *quoting* Director's Exhibit 21-6. The administrative law judge also indicated accurately that, during Dr. Broudy's deposition, he only gave testimony related to his evaluation of claimant on March 18, 2011. Decision and Order at 11-12; Employer's Exhibit 3; *see also* Employer's Exhibit 2. The administrative law judge further acknowledged that, when asked to identify "the basis for those results being noted as being unobtainable on March 18, 2011," Dr. Broudy stated that the tracings showed that claimant "did not make a completely forceful exhalation, . . . that there was a great deal of variability" in the spirometry results, and claimant did not "understand what was

expected of him."[11] Decision and Order at 12, *quoting* Employer's Exhibit 3 at 8. In addition, the administrative law judge found that, in a July 24, 2012 supplemental report, Dr. Broudy reiterated that claimant's poor effort invalidated the results of the pulmonary function test that he administered on March 18, 2011.[12] Decision and Order at 12; Employer's Exhibit 7.

The administrative law judge's accurate summary of Dr. Broudy's opinion establishes that Dr. Broudy's references to claimant's hearing loss in his reports, and in his deposition testimony, are strictly related to the March 18, 2011 pulmonary test that he obtained. Dr. Broudy did not render an opinion on the qualifying June 16, 2012 pulmonary function test administered by Dr. Splan, or on whether claimant's hearing loss affected the validity of the qualifying July 15, 2010 and May 15, 2012 pulmonary function tests, which the administrative law judge found were all "sufficiently reliable" for him to determine that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i).[13] Decision and Order at 19. Even assuming that employer's argument is that the administrative law judge should have inferred from Dr. Broudy's comments on his own test that all of the pulmonary function tests were invalid due to claimant's inability to hear the instructions, employer offers no evidence that the physicians who deemed claimant's effort and comprehension to be acceptable were unable to adequately communicate the instructions to claimant. Moreover, the administrative law judge's determination that the tests were valid is supported by substantial evidence (i.e., the evidence which he cited in his Decision and Order.) *See* Decision and Order at 19-20; Director's Exhibit 18; Claimant's Exhibits 4, 7.

In addition, Dr. Alam's treatment notes and opinion, which employer avers corroborate Dr. Broudy's determination that claimant's hearing loss prevents him from

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[11] When Dr. Broudy was asked whether the test that he obtained on March 18, 2011 was "an acceptable measure to formulate an opinion on [claimant's] pulmonary impairment," based on the "variability on the multiple attempts to obtain valid spirometry as well as his hearing loss and lack of understanding," Dr. Broudy replied "No, it's not." Employer's Exhibit 3 at 10.

[12] Dr. Broudy stated: "Notable at the time of my examination was the patient's very poor effort on spirometry, making the study invalid." Employer's Exhibit 7.

[13] The administrative law judge also acknowledged correctly that Dr. Broudy invalidated the qualifying July 15, 2010 pulmonary function test obtained by Dr. Habre "due to poor effort" and the qualifying May 15, 2012 pulmonary function test administered by Dr. Klayton, due to "suboptimal effort." Decision and Order at 18-19, *quoting* Employer's Exhibit 7.

performing valid pulmonary function tests, do not support employer's assertion. Director's Exhibit 21-4; Employer's Exhibits 3, 7. Although Dr. Alam indicated that claimant had some difficulty understanding instructions when he performed the September 25, 2002 pulmonary function test, Dr. Alam did not report that the quality of claimant's effort, cooperation or comprehension were unacceptable.[14] In addition, as noted by the administrative law judge, Dr. Alam obtained a pulmonary function test on January 9, 2008, that he characterized as "acceptable and reproducible." Decision and Order at 18, *quoting* Director's Exhibit 16A-44.

With respect to Dr. Dahhan's opinion on the validity of the pulmonary function tests, we could not find a passage in Dr. Dahhan's September 18, 2012 deposition where he provided "testimony" that the "pulmonary function tests, including the tests performed for Dr. Splan[,] reflected [claimant's] advanced age and other, non-respiratory factors (co-morbidities)." Brief in Support of Petition for Review at 15, *citing* Employer's Exhibit 8 at 5. However, Dr. Dahhan made a similar statement in his supplemental report, dated July 24, 2012, which also appears at Employer's Exhibit 8. He observed:

> In assessing the functional respiratory capacity of [claimant], it is worth noting that when he is treated with aggressive bronchodilator therapy such as was the case when tested at Dr. Klayton's, he demonstrated adequate ventilatory reserve. However, due to his age, multiple co[-]morbid conditions, and the need for aggressive bronchodilator therapy, he might not be able to carry on and he does not retain the respiratory capacity to return to his previous coal mining work or job of comparable physical demand.

Employer's Exhibit 8 at 5. Again, employer appears to argue that the administrative law judge should have found that Dr. Dahhan's statement renders all of the pulmonary function tests performed by claimant invalid as indicators of claimant's total respiratory

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[14] In Dr. Alam's September 25, 2002 pulmonary function test report, he characterized claimant's "cooperation" as "[g]ood;" his "ability to understand instructions and follow directions" as "[f]air;" and stated that claimant "put forth good effort on each test[,] although he found instructions very difficult." Director's Exhibit 16A-23. Dr. Alam's treatment note, dated March 14, 2007, includes the statement: "[pulmonary function test] attempted. Patient could not comprehend instructions." Director's Exhibit 16A-12. Dr. Alam did not identify claimant's hearing loss as the reason for claimant's difficulty. *Id.* In addition, these tests were obtained during the periods when claimant's prior claims were being adjudicated and are not relevant to whether claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

or pulmonary disability. Contrary to employer's allegation, the administrative law judge referenced Dr. Dahhan's comment, but also noted that he cited the qualifying pulmonary function test obtained by Dr. Klayton on May 15, 2012, as an example of a valid test. Decision and Order at 14, 20; Employer's Exhibits 8 at 5, 9 at 8. Moreover, Dr. Dahhan relied, in part, on the results of claimant's pulmonary function tests to determine that claimant is totally disabled. Employer's Exhibits 8 at 5, 9 at 9, 12.

Accordingly, we reject employer's argument that the administrative law judge did not properly address the opinions of Drs. Broudy, Alam and Dahhan on the validity of the pulmonary function tests. In addition, because the administrative law judge considered all of the pulmonary function test evidence, and acted within his discretion in according greatest weight to the opinions of the Board-certified pulmonologists in determining the reliability of each test, we affirm his finding that the newly submitted pulmonary function test evidence, when considered alone, is sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i). *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); s*ee also Director, OWCP v. Rowe,* 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 149 (1990); *see also Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984); *Verdi v. Price River Coal Co.,* 6 BLR 1-1067, 1-1071 (1984).

After finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge stated, "[t]he question becomes then, whether there is any contrary probative evidence which would preclude the use of the pulmonary-function test evidence to establish total disability." Decision and Order at 20. The administrative law judge found, pursuant to 20 C.F.R. §718.204(b)(2)(ii), that the arterial blood-gas tests, all of which was non-qualifying, did not outweigh the pulmonary function tests. *Id*. Under 20 C.F.R. §718.204(b)(2)(iv),[15] the administrative law judge determined that the preponderance of the medical opinion evidence established that claimant has a totally disabling pulmonary impairment. *Id*. at 20-21. The administrative law judge concluded, therefore, that claimant established total disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invocation of the amended Section 411(c)(4) presumption. *Id*. at 21-22.

Employer contends that the administrative law judge erred in failing to weigh the non-qualifying arterial blood-gas tests as contrary probative evidence. Employer also maintains that the administrative law judge did not provide a valid rationale for discrediting the opinion of Dr. Broudy that claimant does not have a totally disabling

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[15] The regulation at 20 C.F.R. §718.204(b)(2)(iii) is not applicable in this case, as there is no medical evidence that claimant has cor pulmonale with right-sided congestive heart failure.

respiratory or pulmonary impairment. Employer further alleges that the administrative law judge improperly "transformed the burden of proof" on the issue of total disability "into one of production rather than persuasion." *Id.* at 12, *citing Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Employer's arguments are rejected, as they are without merit.

The administrative law judge summarized the six newly submitted arterial blood-gas tests, performed on January 8, 2008, July 15, 2010, March 18, 2011, June 9, 2011, May 15, 2012 and June 16, 2012, and determined correctly that they all produced non-qualifying values. Decision and Order at 9, 20; Director's Exhibits 16 A-43, 18-18, 21-21; Claimant's Exhibits 4, 7; Employer's Exhibit 2. The administrative law judge rationally found, however, that the arterial blood-gas tests did not preclude a finding that the pulmonary function test evidence was sufficient to establish total disability because the tests measure different types of impairment.[16] *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 798 (1984) ("blood[-]gas tests and pulmonary function tests measure different types of impairment.").

In addition, contrary to employer's contention, the administrative law judge considered the totality of Dr. Broudy's opinion, including his observations that claimant's arterial blood-gas test and the physical examination of his chest yielded "normal" results, and that the pulmonary function tests he obtained, and the tests performed by Dr. Habre and Dr. Klayton, were invalid. Decision and Order at 21. The administrative law judge further acknowledged Dr. Broudy's statement that, although it was difficult to render an opinion without a valid pulmonary function test, "there is nothing to suggest" that claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order at 21, *quoting* Employer's Exhibit 3. The administrative law judge reasonably found that:

> Dr. Broudy's opinion, however, is based in part of [sic] what he viewed as the absence of any valid pulmonary tests to quantify [claimant's] impairment. His conclusion, therefore, that [claimant] was not totally

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[16] Employer's reliance on *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996) is misplaced. In *Brandolino*, the United States Court of Appeals for the Tenth Circuit recognized the Sixth Circuit's holding in *Tussey* that non-qualifying blood-gas tests were not "contrary" to, or a "direct offset" against, qualifying pulmonary function tests. *Brandolino*, 90 F.3d at 1513, 20 BLR at 2-323. Moreover, in *Brandolino*, unlike the case at bar, the court determined that it was not clear whether the administrative law judge weighed the non-qualifying pulmonary function tests. *Id.*

> disabled is actually in part a statement of the lack of valid data, rather than an opinion based upon spirometric data he deemed valid.

Decision and Order at 21; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002). The administrative law judge acted within his discretion, therefore, in determining that Dr. Broudy's opinion is entitled to little weight because the record contains valid, qualifying pulmonary function tests performed by Drs. Habre, Klayton and Splan that contradict his claim that there was no evidence indicating that claimant has a totally disabling respiratory impairment. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 21. The administrative law judge also permissibly discredited Dr. Broudy's opinion because he stated that the pulmonary function tests obtained by Dr. Habre and Dr. Klayton were invalid, which conflicted with the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i). *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-206 (2002); Decision and Order at 24. We affirm, therefore, the administrative law judge's determination that claimant established total disability under 20 C.F.R. §718.204(b)(2)(iv), based on the reasoned and documented opinions of Drs. Habre, Klayton, Splan and Dahhan.

We further affirm the administrative law judge's determination that claimant proved that he is totally disabled, based on a consideration of all of the evidence relevant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 21-22.

Lastly, based on our review of the administrative law judge's analysis of total disability under 20 C.F.R. §718.204(b)(2), we reject employer's assertion that the administrative law judge imposed only a burden of production on claimant. Contrary to employer's contention, the administrative law judge placed the burden of proof on claimant to establish total disability by a preponderance of the more persuasive, credible evidence, and rendered findings as to the probative value of the objective tests and medical opinions in accordance with *Ondecko* and the requirements of the Administrative Procedure Act. *See Ondecko,* 512 U.S. at 281, 18 BLR at 2A-12; 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Furthermore, as indicated, *supra*, the administrative law judge rationally determined that claimant satisfied his burden of proof. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order at 19-21.

In addition, in light of our affirmance of the administrative law judge's finding that the newly submitted evidence was sufficient to establish total pulmonary disability at 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R.

§725.309. We also affirm the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption, as the present claim was filed after January 1, 2005, and was pending after March 23, 2010; claimant was credited with twenty-five years of underground coal mine employment; and the administrative law judge found that claimant has a totally disabling pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b); Decision and Order at 22.

## II. REBUTTAL OF THE AMENDED SECTION 411(c)(4) PRESUMPTION

Based on claimant's invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis, or by proving that no part of claimant's total respiratory or pulmonary disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8 (6th Cir. 2011). In addressing rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge initially stated:

> Because the presumption at 20 C.F.R. §718.305 has been invoked, [claimant] is presumed to have legal pneumoconiosis, which is defined to include "any chronic [restrictive or obstructive] pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201[(a)(2), (b)]. Given this overlap, the issue[s] of legal pneumoconiosis and disability causation will be discussed together.

Decision and Order at 22. The administrative law judge concluded that employer failed to prove that claimant does not have legal pneumoconiosis because the medical opinions that employer relied on, proffered by Drs. Dahhan and Broudy, were insufficient to establish that coal dust exposure was not a contributing cause of claimant's pulmonary impairment.[17] *Id.* at 23-24. Based on this finding, the administrative law judge

[17] The administrative law judge also weighed the opinions of Drs. Wicker and Baker. The administrative law judge discredited the opinion of Dr. Wicker, that claimant does not have pneumoconiosis, because his report, dated August 24, 1999, was remote in time compared to the newly submitted medical opinions. Decision and Order at 25; Director's Exhibit 1-136. Additionally, the administrative law judge found that Dr. Baker's opinion, set forth in a report dated March 2, 2006, did not support a finding of rebuttal, because Dr. Baker diagnosed both legal and clinical pneumoconiosis. Decision

determined that employer failed to rebut the presumed fact that claimant's total disability was due to pneumoconiosis, stating that employer failed to show that claimant's "thirty years of coal dust exposure did not significantly cause, contribute [to], or aggravate his disabling pulmonary impairment." *Id*. at 25.

Employer argues that the administrative law judge "erred in concluding that the two prongs of rebuttal under 718.305 were essentially one and that the inability to prove the absence of legal pneumoconiosis automatically precluded a finding that a claimant's disability was not due to pneumoconiosis." Employer's Brief in Support of Petition for Review at 16. Employer also alleges that the administrative law judge erred in applying the "rule out" standard when addressing whether employer established that claimant is not totally disabled due to pneumoconiosis. *Id*. at 17. Employer further contends that the administrative law judge acted improperly in considering only the medical opinions of its experts, Drs. Dahhan and Broudy. In addition, employer maintains that the administrative law judge erred in finding that these opinions were insufficient to establish that claimant does not have legal pneumoconiosis and that his disabling respiratory impairment was not due to pneumoconiosis.

Initially, we reject employer's allegation that the administrative law judge erred by failing to separately consider whether employer rebutted the presumed causal connection between pneumoconiosis and total pulmonary disability under 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge initially considered whether employer rebutted the presumed existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A), and provided valid rationales for finding that the opinions of Drs. Dahhan and Broudy are not adequately reasoned on this issue. *See infra* at 15-16. The administrative law judge then permissibly relied on these rationales to find that the opinions of Drs. Dahhan and Broudy are also insufficient to rebut the presumed causal relationship at 20 C.F.R. §718.305(d)(1)(ii). *Id*. at 16. Thus, we hold that, contrary to employer's argument, the administrative law judge fully considered rebuttal under both of the methods available to employer. *See* 20 C.F.R. §718.305(d)(1)(i), (ii); *see also Ogle*, 737 F.3d at 1070, 25 BLR at 2-431.

We also hold that there is no merit in employer's contention that the administrative law judge erroneously applied the "no part" standard when considering rebuttal of the presumption of total disability causation.[18] The Sixth Circuit rejected the same argument in *Ogle*, holding:

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and Order at 25; Director's Exhibit 2-87. We affirm these findings, as they are unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[18] Employer initially indicated that it was challenging the validity of 20 C.F.R. §718.305 "because it imposes a burden of persuasion on rebuttal that is inconsistent with

> Simply put, the "play no part" or "rule-out" standard and the "contributing cause" standard are two sides of the same coin. Where the burden is on the employer to disprove a presumption, the employer must "rule-out" coal mine employment as a cause of the disability. Where the employee must affirmatively prove causation, he must do so by showing that his occupational coal dust exposure was a contributing cause of his disability. Because the burden here is on the [employer], the [employer] must show that the coal mine employment played no part in causing the total disability.

*Ogle*, 737 F.3d at 1071, 25 BLR at 2-444. Based on the foregoing, we detect no error in the methods used by the administrative law judge to determine whether employer rebutted the amended Section 411(c)(4) presumption.

We now turn to the administrative law judge's specific findings on the issues of legal pneumoconiosis and total disability causation. The administrative law judge considered the opinions of Drs. Dahhan and Broudy, and determined that neither physician provided a well-reasoned and well-documented opinion as to whether coal dust exposure in claimant's coal mine employment contributed to his pulmonary impairment, i.e., whether claimant has legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 23-24; Director's Exhibit 21; Employer's Exhibit 8. Regarding Dr. Dahhan's opinion, the administrative law judge rationally found that the physician failed to "offer any convincing reason why the presence of bronchial asthma would serve to completely eliminate [claimant's] thirty years of dust exposure as a source of impairment, particularly the fixed component which did not respond to bronchodilation."[19] Decision

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the Administrative Procedure Act and the Black Lung Benefits Act, as interpreted by *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994)." Employer's Brief in Support of Petition for Review at 4. However, rather than briefing this issue, employer framed its argument in terms of the "no part" standard being contrary to circuit court precedent interpreting the rebuttal provisions in 20 C.F.R. Part 727 and the prior version of 20 C.F.R. §718.305. *Id.* at 17-18. We will address the issue as briefed by employer.

[19] Dr. Dahhan examined claimant on June 9, 2011, and recorded a coal mine employment history of thirty-six years and a smoking history of ten pack-years. Employer's Exhibit 2. He determined that claimant did not have either "medical" or legal pneumoconiosis, based on a negative chest x-ray, normal arterial blood-gas results, and the normal residual volume and lung capacity revealed on an otherwise invalid pulmonary function test. *Id.* In a letter dated July 24, 2012, Dr. Dahhan set forth his review of medical evidence provided to him by employer's counsel, including the report of his examination of claimant. Employer's Exhibit 8. Dr. Dahhan stated that claimant

and Order at 23; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483.

The administrative law judge also rationally determined that Dr. Broudy's opinion, that claimant does not have any impairment related to coal dust exposure, was insufficient to rebut the presumed fact that claimant has legal pneumoconiosis.[20] *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); Decision and Order at 23-24. As we indicated, *supra*, the administrative law judge acknowledged that Dr. Broudy observed that claimant's arterial blood-gas exchange and his physical examination of the claimant's chest both yielded "normal" results. Director's Exhibit 21; *see* Decision and Order at 24. Nevertheless, the administrative law judge reasonably found that Dr. Broudy's opinion, that there was no objective evidence of legal pneumoconiosis, was based on his view that the record was devoid of pulmonary function tests constituting a valid measure of impairment. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; Decision and Order at 24; Director's Exhibit 21. Because Dr. Broudy relied on a premise that is contrary to the administrative law judge's finding, he acted within his discretion in according no probative weight to Dr. Broudy's opinion. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-206 (2002); Decision and Order at 24.

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did not have "medical" pneumoconiosis, but he was totally disabled by bronchial asthma, which "is not caused by, related to, contributed to, or aggravated by inhalation of coal dust, hence, [claimant] has no finding to indicate legal pneumoconiosis." *Id*. In his deposition, taken on September 18, 2012, Dr. Dahhan reiterated his findings, and acknowledged, on cross-examination that claimant's treatment records included diagnoses of chronic bronchitis, but no diagnoses of asthma. Employer's Exhibit 9 at 12-13.

[20] Dr. Broudy examined claimant on March 18, 2011, and recorded a coal mine employment history of thirty-six years, but did not indicate whether claimant had a smoking history. Director's Exhibit 21. Dr. Broudy reported that claimant had no radiological or pathological evidence of clinical pneumoconiosis. Director's Exhibit 21. He further stated that he "could not make a positive finding" as to the existence of legal pneumoconiosis, as claimant's pulmonary function test was not valid. *Id*. In a deposition taken on May 20, 2011, Dr. Broudy reiterated his findings on examination. Employer's Exhibit 3 at 8-10. On July 24, 2012, Dr. Broudy prepared a supplemental report, based on his review of medical evidence sent to him by employer's counsel, including the results of the pulmonary function tests obtained by Dr. Habre on July 15, 2010, and by Dr. Klayton on May 15, 2012. Employer's Exhibit 7. Dr. Broudy opined that these tests were invalid due to suboptimal effort. *Id*.

In light of the administrative law judge's permissible discrediting of the opinions of Drs. Dahhan and Broudy, we affirm his determination that these opinions were insufficient to satisfy employer's burden to rebut the presumed existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). *See Ogle*, 737 F.3d at 1070, 25 BLR at 2-444. In addition, based on the administrative law judge's reasonable determination that the opinions of Drs. Dahhan and Broudy were not adequately reasoned or documented as to the existence and source of claimant's disabling pulmonary impairment, he also rationally found these opinions could not establish that no part of claimant's pulmonary disability is due to pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii).[21] *See Ogle*, 737 F.3d at 1070, 25 BLR at 2-444; *Morrison*, 644 F.3d at 479-30, 25 BLR at 2-8-9; Decision and Order at 25-26. Based on the administrative law judge's findings that employer did not rebut the amended Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(i)(A) or (ii), we affirm the award of benefits.

[21] Because employer bears the burden of proof on rebuttal, we decline to reach employer's arguments regarding whether the administrative law judge properly weighed the opinions of Drs. Baker, Klayton and Habre, that coal dust exposure was a contributing cause of claimant's total pulmonary disability, as error, if any, would be harmless, because these opinions do not support employer's burden. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge