U.S. Department of Labor

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

BRB No. 15-0265 BLA

JOHN R. SPATAFORE, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 08/12/2016
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, 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: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-06015) of Administrative Law Judge Drew A. Swank, rendered on a miner's claim filed on March 25, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 17.8 years of underground coal mine employment[1] and found that claimant has a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the presumption set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] that he is totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant has at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory or pulmonary impairment. Employer therefore contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds, urging the Board to affirm the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also filed a response, arguing that the administrative law judge erred in finding that claimant worked as a miner for at least fifteen years and urges the Board to remand the case for further consideration. Employer and claimant have filed reply briefs, reiterating their arguments on appeal.

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

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[1] Claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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).

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

Coal Mine Employment

The administrative law judge credited claimant with 17.8 years of underground coal mine employment. Decision and Order at 7-8. The administrative law judge first credited claimant with seven years of underground coal mine employment for employer, from 1975 to 1982.[3] Decision and Order at 5, 7; Director's Exhibits 4, 5. Next, the administrative law judge considered claimant's work from 1982 to 2006 as a mine safety trainer or instructor for West Virginia state mine regulatory agencies.[4] Decision and Order at 5-7; Director's Exhibit 4. Citing claimant's testimony that, as a state mine safety trainer,[5] he worked in underground mines and was exposed to coal dust approximately eighteen hours per week (i.e., forty-five percent of a forty-hour work week), the administrative law judge determined that forty-five percent of claimant's twenty-four years (10.8 years) as a mine safety trainer should be counted as underground coal mine employment. Decision and Order at 5, 7; Hearing Transcript (Tr.) at 41-42. Therefore, the administrative law judge determined that claimant had a total of 17.8 years of underground coal mine employment for purposes of invoking the Section 411(c)(4) presumption.

Employer and the Director contend that the administrative law judge erred in crediting any of claimant's time as a state mine safety trainer as coal mine employment.[6]

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[3] The record reflects that claimant worked for employer as a general laborer, mainline motorman, beltman, and finally, as a supply motorman. Hearing Transcript (Tr.) at 23-27; Director's Exhibits 4, 5.

[4] Claimant's earnings records indicate that he worked for the West Virginia Department of Mines from 1982 to 1986, the West Virginia Department of Environmental Protection from 1987 to 1991, and the West Virginia Office of Miners' Health Safety and Training from 1991 to 2006. Director's Exhibit 6. At the hearing, claimant testified that his job responsibilities remained the same from 1982 to 2006 and that all of his work during that period was for the same state agency, but that the agency's name changed over the years. Tr. at 21-22, 32-33.

[5] Although claimant's position is described in the record as "mine safety trainer" or "mine safety instructor," those terms appear to have been used interchangeably. For simplicity and consistency, and to distinguish it from his subsequent position as a mine safety instructor at West Virginia University, the Board will refer to claimant's job at the state regulatory agencies as "mine safety trainer."

[6] We affirm, as unchallenged on appeal, the administrative law judge's decision to credit claimant with seven years of underground coal mine employment for his time working for employer. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer's Brief at 7-18; Director's Brief at 3-4. Both employer and the Director argue that claimant was not a "miner," as defined by the Act, during his twenty-four years as a mine safety trainer. Employer's Brief at 16-18; Director's Brief at 3-4.

Under the Act, a "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of "miner" comprises a "situs" requirement (i.e., that the claimant worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that the claimant worked in the extraction or preparation of coal). *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41-42, 14 BLR 2-139, 2-143 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70, 2 BLR 2-68, 2-72-73 (4th Cir. 1981); *Whisman v. Director, OWCP*, 8 BLR 1-96, 1-97 (1985). To satisfy the function requirement, work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 42, 14 BLR at 2-145; *Whisman*, 8 BLR at 1-97.

Claimant described his job duties as a mine safety trainer for West Virginia's state regulatory agencies in response to employer's interrogatories: "Trained mine rescue teams and did safety training for miners underground[.]" Director's Exhibit 24 at 5. Claimant expanded on that description on his Department of Labor employment history form, which noted that claimant was "a safety instructor[,] which required him to train mine rescue teams." Director's Exhibit 11. According to claimant, he trained the rescue teams "to build stoppages, shovel[,] and do various mining duties while using the breathing apparatus," and he conducted escape studies "to try out the effects of the self[-]rescuer." *Id*. Claimant indicated that training occurred both inside and outside the mines, and that he was exposed to "significant amounts" of smoke and coal dust in drills and training. *Id*.

At the hearing, claimant provided more details of his work as a state mine safety trainer. He testified that, in training mine rescue teams, "[w]e'd go underground and work problems," and conduct smoke drills and mine escape drills. Tr. at 22. Claimant added that he and the rescue teams would "go up on a section [underground] and talk

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We also affirm the administrative law judge's unchallenged finding that claimant's work as a mine safety instructor for West Virginia University from 2006 to 2009 was not qualifying coal mine employment. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5-8.

safety to the guys, watch them mine coal," and "tell them where to stand, where not to stand." *Id*. at 40. Claimant testified that when he and the rescue teams were underground, they did not do work related to coal production. *Id*. at 34. On days he was not in an underground mine, claimant would give "certification tests" for the agency. *Id*. at 23. According to claimant, he worked underground three days a week and typically spent five to six hours a day underground, for a total of about eighteen hours underground per week. *Id*. at 41-42.

There is no dispute that claimant's work as a state mine safety trainer occurred in or around coal mines, and thus satisfies the situs requirement. The issue in this case is whether that work also satisfies the function requirement. As we noted earlier, to satisfy the function requirement, work must be integral or necessary to the extraction or preparation of coal, and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 42, 14 BLR at 2-145; *Whisman*, 8 BLR at 1-97.

Employer and the Director both contend that claimant's duties as a mine safety trainer were not integral or necessary to the extraction or preparation of coal. Employer argues that the Board has held that a federal training specialist was not a miner, because he was not engaged in work integral to the extraction or preparation of coal. Employer's Brief at 17, *citing Zavora v. U.S. Steel Corp.*, 2 BLR 1-1202, 1-1209-10 (1980). The Director argues that claimant's duties observing mining operations and providing safety-related instructions to miners were similar to those of a government mine inspector, who "acts out of governmental concern for the safety and health of miners, and not to maximize the extraction or processing of coal." Director's Brief at 3. The Director further asserts that claimant's other duties, in training mine rescue teams, were "even further removed from coal production," as the purpose of those duties was to train emergency responders in case of a mining accident, not to facilitate the extraction or processing of coal in any particular mine. *Id*. at 4.

In urging the Board to affirm the administrative law judge's determination that his time as a mine safety trainer can be counted toward invocation of the Section 411(c)(4) presumption, claimant notes that the Board has held that a federal coal mine inspector is a miner under the Act. *Bartley v. Director, OWCP*, 12 BLR 1-89, 1-90-91 (1988) (Tait, J., concurring); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2, 1-43-44 (1981). Specifically, claimant notes the Board's holding that, because a federal mine inspector's duties ensure safe working conditions and prevent delays or interruptions in mining due to non-compliance with health and safety standards, those duties are an integral function of the operation of coal mines. *Moore*, 4 BLR at 1-43-44. Claimant argues that because his work as a state mine safety trainer was similarly focused on mine safety, it should likewise be viewed as integral to the process of coal production. Claimant's Reply Brief at 6-8.

Although claimant is correct that the Board held in *Bartley* and *Moore* that a federal coal mine inspector is a miner, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has disagreed with that view. In an unpublished decision, *McGraw v. OWCP*, 908 F.2d 967 (Table), 1990 WL 101412 (4th Cir. July 10, 1990), the Fourth Circuit agreed with the Director's position that federal mine inspectors do not fall within the Act's definition of "miner."[7] Moreover, the United States Court of Appeals for the Sixth Circuit recently deferred to the Director's position when it held that federal coal mine inspectors do not satisfy the function requirement and therefore do not meet the statutory definition of a miner. *Navistar, Inc. v. Forester*, 767 F.3d 638, 645-47, 25 BLR 2-659, 2-670-73 (6th Cir. 2014). The Sixth Circuit reasoned that, unlike private mine security guards or inspectors who may perform tasks related to the maintenance and daily operation of the mines at which they work, a federal mine inspector is not involved in the daily operation of any particular mine, but instead serves "a purely regulatory function" by ensuring compliance with federal health and safety standards. *Forester*, 767 F.3d at 646, 25 BLR at 2-672. The court therefore concluded that a federal mine inspector's enforcement duties are "incidental regulatory duties [that] are not an integral or necessary part of the coal mining process." *Id.*

Zavora also bears some similarity to this case and is instructive. There, the Board held that a federal training specialist who conducted courses on mine health and safety and took pictures in underground coal mines to prepare training materials was not a miner because he did not perform work integral to the extraction or preparation of coal. *Zavora*, 2 BLR at 1-1209-10. The Board noted in *Zavora* that no coal extraction or preparation occurred during the claimant's trips to mines. *Id*. In the case now before the

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[7] In *McGraw*, the Fourth Circuit concluded that "[f]ederal mine inspectors do not meet [the] definition [of a miner] for the purposes of establishing eligibility for black lung benefits." *McGraw v. OWCP*, 908 F.2d 967 (Table), 1990 WL 101412 at *1 (4th Cir. July 10, 1990), *citing Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989). In *Kopp*, the Fourth Circuit held that it did not have jurisdiction over a claim filed by a miner who worked for a mine operator in Pennsylvania before working as a federal mine inspector in Virginia. *Kopp*, 877 F.2d at 309, 12 BLR at 2-301-02. The court reasoned that the United States Court of Appeals for the Third Circuit had jurisdiction because "all of [the] claimant's coal mine employment and coal dust exposure occurred in Pennsylvania[.]" *Id*. In a footnote, the Fourth Circuit explained that any coal dust exposure the claimant suffered while working as a federal mine inspector in Virginia could not qualify as an injury under the Act, citing *Eastern Associated Coal Corp. v. Director, OWCP* [*Patrick*], 791 F.2d 1129, 1131 (4th Cir. 1986), which held that the Federal Employees' Compensation Act was a federal mine inspector's exclusive remedy for occupational coal dust exposure. *Kopp*, 877 F.2d at 309 n.1, 12 BLR at 2-302 n.1.

Board, claimant testified that when he and the rescue teams he trained went underground, they did not do work related to coal production. Tr. at 34.

The Fourth Circuit's acceptance of the Director's position in *McGraw*, and the Board's holding in *Zavora*, are enough to reject claimant's contention that, because his job duties were focused on safety, they were integral to coal production. Although claimant performed important work as a mine safety trainer, claimant's job duties were not integral or necessary to the extraction or preparation of coal. *See Krushansky*, 923 F.2d at 42, 14 BLR at 2-145; *Whisman*, 8 BLR at 1-97; *Zavora*, 2 BLR at 1-1209-10. We therefore conclude that claimant was not working as a miner, as defined by the Act and its implementing regulations, when he worked for the State of West Virginia as a mine safety trainer.

Moreover, in light of our holding in this case that a state mine safety trainer is not a miner, and the Sixth Circuit's holding in *Forester* that a federal mine inspector is not a miner, logic compels us to conclude that, as a general rule, government employees, whether federal or state workers, are not miners for purposes of the Act and the regulations. As we have explained, with the exception of coal mine construction and transportation workers, the Act and its function requirement limit the definition of "miner" to those individuals who perform work integral or necessary to the extraction or preparation of coal. *See* 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202(a); *Krushansky*, 923 F.2d at 42, 14 BLR at 2-145; *Whisman*, 8 BLR at 1-97.

We note that in *Moore*, the Board held that a federal coal mine inspector was a miner, concluding that the claimant's duties—conducting inspections at various mines and taking air quality samples—were "an integral function of the operation of the coal mines in which he worked." *Moore*, 4 BLR at 1-43-44. Those duties were integral, the Board explained, because legally mandated, regular inspections ensured safe working conditions, and dangerous conditions could delay or halt the mining process. *Id*. at 1-44. Upon review of the issues raised in this case, however, we conclude that the Board's analysis in *Moore* did not account for the regulatory function of the federal inspector's duties. Taking into consideration the regulatory function of government employees, such as claimant, who perform their duties in or around coal mines, and in light of the decisions of the Fourth and Sixth Circuits, we are compelled to depart from *Moore*'s reasoning.

Unlike employees of mine operators, and private entities like construction and transportation companies that do business within the coal mining industry, government employees such as claimant carry out "purely regulatory" functions.[8] *See Forester*, 767

[8] The state agency that employed claimant was charged with enforcing mine health and safety requirements, and his activities were performed in furtherance of that charge.

F.3d at 645-46, 25 BLR at 2-670-72. They are not involved in, or responsible for, daily operations at particular mines. *See Forester*, 767 F.3d at 646, 25 BLR at 2-672. As a general rule, federal and state regulatory agencies focus not on maximizing coal production and revenues, but on promulgating and enforcing standards for health and safety. *Id*. Although compliance with government safety standards may yield better health among miners and safer conditions at mines, and those improvements may in turn yield benefits in coal extraction and preparation, the benefits in coal production are secondary and incidental to the government agency's purpose. *Id*.

The distinction we have drawn, between private companies and government agencies, is consistent with 20 C.F.R. §725.491, which defines "operator" for purposes of the Act and specifies that "[n]either the United States, nor any State, nor any instrumentality or agency of the United States or any State, shall be considered an operator." 20 C.F.R. §725.491(f). The Sixth Circuit also recognized a distinction between coal production and regulation in *Forester*, noting that Congress "intended to separate inspection duties from any nexus to production" when it shifted responsibility for enforcing federal mining safety regulations from the Department of the Interior to the Department of Labor. *Forester*, 767 F.3d at 646, 25 BLR at 2-672.

Claimant contends that "mine safety and coal production go hand-in-hand," and that the Sixth Circuit's decision in *Forester* "is based on a fundamental misunderstanding of the synergistic relationship between mine safety and mine production." Claimant's Reply Brief at 6-8. Claimant urges the Board not to adopt "a position that assumes safety functions are separate from production functions." *Id*. at 8. Mine safety can affect coal production, and our decision here does not preclude private employees who perform safety-related tasks for operators from being considered miners under the Act. *See, e.g., Wackenhut Corp. v. Hansen*, 560 F. App'x 747 (10th Cir. 2014). However, the "inherent conflict" between the disparate goals of "maximizing coal production *and* enforcing safety regulations," *Forester*, 767 F.3d at 646, 25 BLR at 2-672, makes it difficult to envision how government employees' work related to regulation could be integral or necessary to coal production. *Id.*; *see Krushansky*, 923 F.2d at 42, 14 BLR at 2-145.

The statutory purpose of the West Virginia Office of Miners' Health Safety and Training, for which claimant worked from 1991 to 2006, is "the supervision of the execution and enforcement of the provisions of [Chapter 22A of the West Virginia Code ("Miners' Health, Safety and Training")] and, in carrying out the aforesaid purposes, it shall give prime consideration to the protection of the safety and health of persons employed within or at the mines of this state. In addition, the division shall, consistent with the aforesaid prime consideration, protect and preserve mining property and property used in connection therewith." W. Va. Code §22A-1-1(b) (2002).

We therefore hold that individuals who work at coal mines on behalf of federal or state agencies not charged with the function of extracting, preparing, or transporting coal, or performing coal mine construction, do not perform work integral or necessary to the extraction or preparation of coal, and therefore do not work as "miners" under the Act.[9] *See* 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202(a); *Krushansky*, 923 F.2d at 42, 14 BLR at 2-145; *Whisman*, 8 BLR at 1-97. It follows, moreover, that such work, i.e., work that is not the work of a miner, even if it occurs in or around coal mines or production facilities, is not "coal mine employment," "coal mine work," or "employment in a mine or mines" under the Act and regulations. As a result, this work cannot be used to establish that a claimant has legal pneumoconiosis,[10] that a claimant's clinical pneumoconiosis[11] arose out of coal mine employment, or when determining whether a claimant is totally disabled, or to invoke the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.201(a), 718.203, 718.204(b)(1), 718.305; *see also Forester*, 767 F.3d at 647, 25 BLR at 2-673.

In his reply brief, claimant contends that, because the Act defines "miner" to include anyone who "has worked" in or around a coal mine, 30 U.S.C. §902(d), he became a miner upon his first day of underground coal mine work for employer and maintained that status "regardless of his subsequent employment." Claimant's Reply Brief at 3. Thus, claimant argues that there is no need for his state mine safety trainer work to satisfy the "function" requirement to be qualifying coal mine employment under Section 411(c)(4). *Id*. at 2-3. However, claimant ignores the plain words of the statutory definition of "miner," which require the individual who works in or around a coal mine to

[9] We recognize that this holding deviates from the line of cases that includes *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2 (1981), *Mansell v. Republic Steel Corp.*, 5 BLR 1-842 (1983), *Lynch v. Director, OWCP*, 6 BLR 1-1088 (1984), *Mounts v. Director, OWCP*, 8 BLR 1-425 (1985), and *Bartley v. Director, OWCP*, 12 BLR 1-89 (1988) (Tait, J., concurring). To the extent those cases are inconsistent with our decision here, they are no longer good law.

[10] "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).

[11] "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).

engage "in the extraction or preparation of coal."[12] 30 U.S.C. §902(d). While claimant is correct that the statute enables individuals who are not currently miners to submit claims based on their past work as miners, claimant sets forth no support for his proposition that because he qualified as a miner when he worked for Consolidation Coal Company, he can be considered to be a miner for purposes of counting subsequent work that does not meet all the requirements of the statutory definition.[13] We therefore reject claimant's contention.

Accordingly, we vacate the administrative law judge's finding that claimant had 17.8 years of qualifying coal mine employment. Because his work as a mine safety trainer for West Virginia state agencies from 1982 to 2006 cannot legally be credited as coal mine employment, claimant may only be credited with seven years of coal mine employment from his time working for employer. Consequently, we vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); *Forester*, 767 F.3d at 647, 25 BLR at 2-673; Decision and Order at 8, 16, 18. We also vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption, and vacate the award of benefits.[14] *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i)-(ii); Decision and Order at 13-16, 21-27.

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[12] The statutory definition of "miner" also specifically includes "an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. §902(d).

[13] Claimant sets forth no statutory support for this argument and cites no cases from the Board or the circuit courts to support such an interpretation of the Act. The United States Court of Appeals for the Sixth Circuit implicitly rejected claimant's interpretation, when it held that a claimant's work as a federal mine inspector did not satisfy the function test and therefore could not be counted as "qualifying coal mine employment" for purposes of the Section 411(c)(4) presumption. *Navistar, Inc. v. Forester*, 767 F.3d 638, 647, 25 BLR 2-659, 2-673 (6th Cir. 2014).

[14] Employer's arguments that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption are now moot, and we need not consider them. Employer's Brief at 21-31. We note employer's contention that the administrative law judge admitted into evidence, but failed to consider, Dr. Tarver's interpretation of an analog x-ray taken on April 25, 2011, and claimant's contention that the administrative law judge considered more of employer's x-ray interpretations than permitted under 20 C.F.R. §725.414. Employer's Brief at 23 n.6; Claimant's Brief at 10-11. If the existence of pneumoconiosis is reached on remand, the administrative law

Our decision, however, does not prevent claimant from establishing entitlement to benefits under the Act based on his time working for employer.[15] On remand, the administrative law judge must determine whether claimant can establish entitlement to benefits under 20 C.F.R. Part 718 by establishing that he has pneumoconiosis, that it arose out of his seven years of coal mine employment, that he has a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Total Disability

In the interest of judicial economy, we consider employer's argument that the administrative law judge erred in finding that claimant has a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). A miner is totally disabled if his or her respiratory or pulmonary impairment, standing alone, prevents the miner from performing his or her usual coal mine employment. 20 C.F.R. §718.204(b)(1). Employer contends that the administrative law judge failed to consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. Employer's Brief at 18-21. This contention has merit.

Although the administrative law judge cited the requirement that he consider and weigh all of the relevant evidence, he found total disability established without considering the arterial blood gas study evidence, pursuant to 20 C.F.R.

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judge must address the parties' evidentiary designations of their analog and digital x-ray readings, address the admissibility of the readings, and consider them, as appropriate, in determining whether claimant has established the existence of pneumoconiosis.

[15] Nor does our decision leave federal and state workers without legal remedies for pneumoconiosis developed as a result of their government employment. As noted above, the Federal Employees' Compensation Act provides the appropriate remedy for injuries suffered during federal employment. *See Patrick*, 791 F.2d at 1131. State employees may pursue claims for state disability-related benefits. The record in this case indicates that, in 1997, a West Virginia administrative law judge affirmed a 1992 order from the West Virginia Workers' Compensation Division, granting claimant a twenty-five percent permanent partial disability award as a result of occupational pneumoconiosis. Director's Exhibit 8.

§718.204(b)(2)(ii), and the medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv).[16] Decision and Order at 16-18. Instead, the administrative law judge discussed only the pulmonary function study evidence, pursuant to 20 C.F.R. §718.204(b)(2)(i), noting that seven of the ten studies, including the four most recent studies, were qualifying[17] and thus found that claimant established the existence of a totally disabling respiratory or pulmonary impairment. *Id*. at 17-18. A claimant may establish total disability using just one of the four types of evidence at 20 C.F.R. §718.204(b)(2), but only "[i]n the absence of contrary probative evidence[.]" 20 C.F.R. §718.204(b)(2); *Lane v. Union Carbide Corp*., 105 F.3d 166, 171, 21 BLR 2-34, 2-42 (4th Cir. 1997). In this case, the administrative law judge failed to consider whether the record contained contrary probative evidence.

We disagree with claimant's suggestion that the error was harmless. Claimant's Brief at 47-48. The administrative law judge could have reasonably determined that either the blood gas study evidence, or the medical opinion evidence, or both, failed to support a finding of total disability. Drs. Celko, Basheda, Rasmussen, and Bellotte conducted resting arterial blood gas studies, all of which were non-qualifying.[18] Director's Exhibits 11, 33; Claimant's Exhibit 2; Employer's Exhibit 9 at 21. Drs. Celko and Rasmussen also conducted exercise blood gas studies; Dr. Celko's exercise study was non-qualifying, while Dr. Rasmussen's was qualifying. Director's Exhibit 11; Claimant's Exhibit 2. The medical opinion evidence was conflicting. Dr. Sood opined that claimant is totally disabled, Drs. Basheda and Celko opined that he is not totally disabled, while Drs. Rasmussen and Bellotte offered varying statements in their reports

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[16] The record contains no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[17] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i). The record contains five pulmonary function studies, each of which includes a pre-bronchodilator and post-bronchodilator study. Director's Exhibits 11, 33; Claimant's Exhibits 2, 8; Employer's Exhibit 9. When the administrative law judge considered the pulmonary function study evidence, he counted the pre-bronchodilator and post-bronchodilator results as ten pulmonary function studies. Decision and Order at 18.

[18] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

and depositions as to whether claimant is totally disabled.[19] Director's Exhibits 11, 33; Claimant's Exhibits 2, 7; Employer's Exhibits 9, 12, 13, 18.

Moreover, as employer notes, weighing of the medical opinion evidence requires consideration of the physicians' different assumptions about which job—claimant's work for employer, or his work for the state as a mine safety trainer—was claimant's "usual coal mine work," pursuant to 20 C.F.R. §718.204(b)(1). Here, the administrative law judge failed to consider the physicians' opinions in light of the exertional requirements of claimant's usual coal mine work. *See Eagle v. Armco Inc.*, 943 F.2d 509, 512-13, 15 BLR 2-201, 2-205-06 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 183-84, 15 BLR 2-16, 2-21-22 (4th Cir. 1991); Employer's Brief at 20-21; Employer's Reply Brief at 8-11. As we explained above, claimant's usual coal mine work was not his work as a mine safety trainer for West Virginia, but his work as a miner for employer from 1975 to 1982.

Because the administrative law judge failed to weigh all of the relevant evidence and consider it in light of the exertional requirements of claimant's last coal mine employment as a supply motorman, Director's Exhibit 5 at 1-2, we must vacate the

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[19] Dr. Rasmussen, in his report, identified claimant's work "as a State Coal Mine Inspector" [*sic*] as his last coal mine employment, and opined that claimant "does not retain the pulmonary capacity to perform his regular coal mine employment." Claimant's Exhibit 2 at 2-3. Dr. Rasmussen provided a slightly different answer, however, when asked during his deposition if claimant could perform the duties of his last coal mine employment:

> Certainly not the duties of his coal mine work. I would — I'm not sure how much work he had to do if he were instruction [*sic*]. If he had to go underground carrying the gear that rescue workers have to carry, he would probably not be able to do that.

Employer's Exhibit 13 at 25. Dr. Bellotte determined that claimant is totally disabled "by his many medical conditions" and unable to perform "his last coal mining job as a State Coal Mine Inspector [*sic*] or work requiring similar effort," but concluded that if claimant's "other medical conditions were not present, he would have the pulmonary capacity to perform his last coal mining job or work requiring similar effort." Employer's Exhibit 9 at 7. In his deposition, Dr. Bellotte said that claimant's "last coal mine job was a mine inspector [*sic*] and [that] he could possibly do that job . . . ." Employer's Exhibit 18 at 23. However, Dr. Bellotte added that claimant was disabled "as a whole man," but that he did not have a pulmonary disability and "retain[ed] the pulmonary ability to do his last coal-mining duties[.]" *Id*. at 23-24.

administrative law judge's finding that claimant has a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). On remand, the administrative law judge must consider all of the relevant evidence, weigh the medical opinions in light of their reasoning and documentation, and determine whether the weight of the evidence, like and unlike, establishes total respiratory disability at 20 C.F.R. §718.204(b)(2). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-34, 21 BLR 2-323, 2-334-37 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181, 1-189-91 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

Disability Causation

The administrative law judge noted that if claimant had not invoked the Section 411(c)(4) presumption, he would not have been able to establish that his pneumoconiosis is a "substantially contributing cause" of his total disability, pursuant to 20 C.F.R. §718.204(c)(1). Decision and Order at 27. Drs. Rasmussen and Sood both concluded that claimant has legal pneumoconiosis, and that it contributes to his disabling pulmonary impairment, but the administrative law judge discredited their opinions and remarked that the opinions "would have been insufficient for [claimant] to meet his prerequisite burden of proof" under 20 C.F.R. §718.204(c)(1). *Id.* Dr. Celko, who examined claimant on behalf of the Department of Labor, diagnosed claimant with both clinical and legal pneumoconiosis, but concluded that claimant's moderate obstructive impairment and mild hypoxemia are not sufficient to be totally disabling. Director's Exhibit 11 at 4. Because Dr. Celko opined that cigarette smoking was the primary cause of claimant's respiratory impairment, the administrative law judge found that his opinion "favors [e]mployer . . . ."[20] Decision and Order at 27.

The administrative law judge's analysis suggests there may be no reason to remand this case in light of our holding that claimant cannot invoke the Section 411(c)(4) presumption, because claimant will not be able to establish the essential element of disability causation, pursuant to 20 C.F.R. §718.204(c)(1). The Director, however, argues that remand is necessary for the administrative law judge to apply the proper legal standard when analyzing Dr. Celko's opinion. Director's Brief at 4-5. We agree.

In considering Dr. Celko's opinion that claimant's coal mine dust exposure and legal pneumoconiosis "contributed to his obstruction," Director's Exhibit 32 at 26, the administrative law judge erred when he found that Dr. Celko's opinion could not support

[20] The administrative law judge ultimately found that Dr. Celko's opinion did not meet employer's Section 411(c)(4) rebuttal burden because Dr. Celko opined that coal mine dust exposure also contributed to claimant's obstruction. Decision and Order at 27.

a disability causation finding because Dr. Celko also stated that smoking was the primary cause of claimant's impairment. Decision and Order at 27. Contrary to the administrative law judge's conclusion, pneumoconiosis need not be the primary cause of a miner's totally disabling respiratory or pulmonary impairment; it need only be a "substantially contributing cause" of that disability.[21] 20 C.F.R. §718.204(c)(1).

On remand, if pneumoconiosis and total disability are established, and consequently the issue of disability causation is reached, the administrative law judge must reassess the medical opinions in light of their reasoning and documentation, and determine whether claimant has established by a preponderance of the evidence that pneumoconiosis is a substantially contributing cause of the totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(c)(1). *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372-73 (4th Cir. 2006); *Hicks*, 138 F.3d at 532-34, 21 BLR at 2-334-37; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

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[21] Under 20 C.F.R. §718.204(c), pneumoconiosis is a substantially contributing cause of the miner's total disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
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> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge