BRB No. 13-0351 BLA

MARVIN LEE LAWRENCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITMANN COAL COMPANY c/o WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 04/22/2014
	)	
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 of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Emily Goldberg-Kraft (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-6156) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) awarding benefits on a claim filed on October 13, 2010, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with at least

16 years in underground coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. Although the administrative law judge found that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), he found that the evidence established total respiratory disability pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iv) and 718.204(b)(2) overall. The administrative law judge therefore found that claimant was entitled to the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this claim, and his finding that claimant invoked the presumption. Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of legal pneumoconiosis and total disability due to pneumoconiosis. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's assertion that the presumption does not apply, absent implementing regulations, and that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators.[1]

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.[2] 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to

[1] Because the administrative law judge's findings that claimant worked at least 16 years in underground coal mine employment, that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), and that employer established that claimant does not have clinical pneumoconiosis are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibit 3. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

pneumoconiosis arising out of coal mine employment. 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 entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

Initially, we will address employer's contention that the application of amended Section 411(c)(4) violated its due process rights. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-5 (2011), *aff'd sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013)(Niemeyer, J., concurring), and we reject it here for the reason set forth in that decision. *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 133 S.Ct. 127 (2012). Further, consistent with our reasoning in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), we reject employer's assertion that the administrative law judge erred in applying amended Section 411(c)(4) before the Department of Labor (the Department) promulgated new regulations.[3] *See also Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011). Additionally, employer's assertion that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator is substantially similar to the one that the Board rejected in *Owens*. *See Owens*, 25 BLR at 1-4. Moreover, the recently promulgated regulations by the Department make clear that the

[3] Employer asserts that the administrative law judge erred by referring to 20 C.F.R. §718.305 in applying the presumption of total disability due to pneumoconiosis. Specifically, employer argues that the pertinent regulation, by its own terms at 20 C.F.R. §718.305(e), provides that it is not applicable to claims, such as the present one, that were filed after January 1, 1982. Contrary to employer's assertion, the administrative law judge's citation of 20 C.F.R. §718.305 does not constitute reversible error because the portions of the pertinent regulation regarding invocation and rebuttal are virtually identical to the terms of amended Section 411(c)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Moreover, the Department of Labor (the Department) recently promulgated regulations implementing amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,114-15 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305), that reflect this change. Thus, we reject employer's assertion that the administrative law judge's reference to 20 C.F.R. §718.305 warrants reversal.

rebuttal provisions apply to responsible operators. *See* 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)). Thus, we reject employer's assertion that the rebuttal provisions do not apply to the miner's claim against it.

Next, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. 30 U.S.C. §921(c)(4) (2012).

We further address employer's contention that the administrative law judge erred in finding that the evidence established total respiratory disability. Employer contends that the administrative law judge erred in finding that the arterial blood gas study evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge considered the four arterial blood gas studies dated February 7, 2011, October 2, 2011, November 14, 2011, and May 22, 2012.[4] The February 7, 2011 study administered by Dr. Forehand produced qualifying[5] values at rest and during exercise. Director's Exhibit 8. The October 2, 2011 study administered by Dr. Gallai produced qualifying values at rest. Claimant's Exhibit 3. Similarly, the November 14, 2011 study administered by Dr. Klayton produced qualifying values at rest. Claimant's Exhibit 4. Lastly, the May 22, 2012 study administered by Dr. Castle produced non-qualifying values at rest. Employer's Exhibit 5.

The administrative law judge found that the February 7, 2011 and October 2, 2011 studies conducted by Drs. Forehand and Gallai, respectively, met the criteria for total respiratory disability. The administrative law judge also found that, although the November 14, 2011 study conducted by Dr. Klayton showed total respiratory disability, this study was not entitled to any probative weight, as "[Dr. Klayton] later repudiated his data because it was inconsistent with [c]laimant's other blood gas testing and pulmonary function results. (EX 9 at 24-26)." Decision and Order at 30. In addition, the administrative law judge stated that "Dr. Castle's data is also entitled to low probative weight because he obtained non-qualifying pO2 values in his resting [May 22, 2012] study, but failed to conduct an exercise test that conformed with the regulations." *Id*.

[4] The February 7, 2011 arterial blood gas study includes values produced both at rest and during exercise. Director's Exhibit 8. The October 2, 2011, November 14, 2011, and May 22, 2012 arterial blood gas studies include values produced at rest. Claimant's Exhibits 3, 4; Employer's Exhibit 5. However, none of these studies includes values produced during exercise. *Id*.

[5] A "qualifying" blood gas study yields values that are equal to or less than the applicable table values in Appendix C of Part 718. A "non-qualifying" study yields values exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge therefore found that the February 7, 2011 and October 2, 2011 studies conducted by Drs. Forehand and Gallai outweighed the May 22, 2012 study conducted by Dr. Castle. Hence, the administrative law judge found that the arterial blood gas study evidence established total respiratory disability.

Employer asserts that "[the administrative law judge] erred in discrediting Dr. Castle's arterial blood gas values on the basis that he elected to administer an exercise pulse oximetry as opposed to an exercise arterial blood gas test." Employer's Brief at 19 n.14. Specifically, employer argues that "Dr. Castle is not required to administer an [exercise] arterial blood gas test to perform a complete pulmonary evaluation." *Id*. We hold that employer's assertion has merit.

As discussed, *supra*, the May 22, 2012 arterial blood gas study conducted by Dr. Castle produced non-qualifying values at rest. Employer's Exhibit 5. In considering the May 22, 2012 arterial blood gas study, the administrative law judge noted that Dr. Castle conducted an exercise arterial blood gas study, but did not take a blood sample.[6] The administrative law judge, citing 20 C.F.R. §718.105(b), stated that "the regulations provide that if a miner's resting pO2 does not meet the criteria for total disability, an exercise blood gas test *must* be performed, unless medically contraindicated, by drawing blood while the miner exercises." Decision and Order at 30 (emphasis added). The administrative law judge further stated, "[w]ithout considering the exercise study, Dr. Castle's resting blood gas data, alone, presents an incomplete picture of [c]laimant's lung function in terms of gas exchange and does not comply with the regulations." Decision and Order at 30.

Contrary to the administrative law judge's finding, the pertinent regulation does not specifically state that an exercise arterial blood gas study must be administered when the resting arterial blood gas study produced non-qualifying values. 20 C.F.R. §718.105(b). Rather, the pertinent regulation provides that an exercise arterial blood gas study shall be *offered* to the miner if the resting arterial blood gas study was non-

[6] After noting that "[Dr. Castle] used a pulse oximeter to measure [c]laimant's oxygen saturation during exercise (EX 5)," Decision and Order at 31, the administrative law judge found that it could not be considered under 20 C.F.R. §718.204(b)(2)(ii), as it did not constitute a blood gas study. However, in considering Dr. Castle's report under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge concluded that Dr. Castle's opinion should not be discredited based on his partial reliance on pulse oximetry data. The administrative law judge, citing 20 C.F.R. §718.104(a)-(b), stated that "the regulations permit a reporting physician to rely on clinical tests other than those discussed in the regulations if the tests are medically acceptable and, in the physician's opinion, aid in the evaluation of the miner." *Id*. at 36.

qualifying. *Id*. Thus, the administrative law judge did not properly assess whether the May 22, 2012 arterial blood gas study complied with the regulations, as he found that an exercise study was essential to giving probative value to the blood gas study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987)(Levin, J., concurring). Consequently, we vacate the administrative law judge's finding that the arterial blood gas study evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii), and remand the case for further consideration of the arterial blood gas study evidence.

Furthermore, because the administrative law judge relied on his weighing of the arterial blood gas study evidence to conclude that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv),[7] we also vacate this finding and remand the case to the administrative law judge for further consideration of the medical opinion evidence.

Nevertheless, for the sake of judicial economy, we address employer's contention that the administrative law judge erred in finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Forehand, Gallai, Klayton, Ghio and Castle. Dr. Forehand opined that claimant has a totally disabling respiratory impairment. Director's Exhibit 8. Similarly, Dr. Gallai opined that claimant is completely impaired from working as a shuttle car operator as a result of his hypoxia. Claimant's Exhibits 3, 8 (Dr. Gallai's Depo. at 28). In a report dated November 18, 2011, Dr. Klayton opined that claimant's impairment is severe, based on resting arterial blood gases. Claimant's Exhibit 4. At a subsequent deposition dated October 16, 2012, however, Dr. Klayton indicated that he did not think that claimant would have been precluded from returning to his previous coal mine work, based on arterial blood gases. Employer's Exhibit 9 (Dr. Klayton's Depo. at 26-27). Dr. Klayton further stated, "My gut feeling is that he would not be able to but, you know, when you're looking for objective evidence where we're right at this crossroads, he also had to be able to lift 70 pounds. I don't know that he could lift 70 pounds now." Employer's Exhibit 9 (Dr. Klayton's Depo. at 33-34). Dr. Ghio opined that claimant does not have a respiratory impairment, based on claimant's pulmonary function, and that he retains the respiratory capacity to do his last coal mine work. Employer's Exhibits 1, 10 (Dr. Ghio's Depo. at 30-31). Lastly, Dr. Castle opined that claimant is not totally disabled, and that he retains the respiratory capacity to perform his previous coal mining employment duties. Employer's Exhibit 5.

[7] The administrative law judge found that "the probative value of [Dr. Castle's] opinion is diminished to the extent he relied on his blood gas study, which did not conform with 20 C.F.R. §718.105." Decision and Order at 36.

The administrative law judge gave substantial weight to the opinions of Drs. Forehand and Gallai because he found that they were documented and well-reasoned. The administrative law judge gave less weight to Dr. Klayton's opinion because he found that it was equivocal.[8] The administrative law judge also gave less weight to the opinions of Drs. Ghio and Castle because he found that they were not well-reasoned. Hence, based on the opinions of Drs. Forehand and Gallai, the administrative law judge found that claimant established total respiratory disability at Section 718.204(b)(2)(iv).

Employer asserts that the administrative law judge erred in discrediting Dr. Ghio's opinion. Specifically, employer argues that the administrative law judge substituted his opinion for that of Dr. Ghio by finding that Dr. Ghio's interpretation of Dr. Gallai's arterial blood gas study was not well-reasoned. In his report, Dr. Ghio reviewed the arterial blood gas studies administered by Drs. Forehand, Gallai, Klayton and Castle. Dr. Ghio concluded that the resting blood gas data obtained by Dr. Gallai showed normal pO2 values, based on the altitude, claimant's age and the guidelines for pulmonary impairment that were promulgated by the Intermountain Thoracic Society and American Thoracic Society. Employer's Exhibit 10 (Dr. Ghio's Depo. at 27, 38-39). The administrative law judge permissibly found that Dr. Ghio's interpretation of Dr. Gallai's arterial blood gas study was not well-reasoned, because "[Dr. Ghio] relied on guidelines from the Intermountain Thoracic Society and American Thoracic Society to conclude [that] Dr. Gallai's blood gas data did not qualify for total disability, [as] these are not the guidelines promulgated in the black lung regulations."[9] Decision and Order at 35; *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). Thus, we reject employer's assertion that the administrative law judge substituted his opinion for that of Dr. Ghio by finding that Dr. Ghio's interpretation of Dr. Gallai's arterial blood gas study was not well-reasoned.

Employer also asserts that the administrative law judge erred in discrediting Dr. Ghio's opinion because Dr. Ghio dismissed the exercise arterial blood gas study of Dr. Forehand. Employer maintains that Dr. Ghio provided a reasoned basis for finding that

[8] No party contests the administrative law judge's weighing of Dr. Klayton's opinion.

[9] The administrative law judge noted that, "[u]nder the applicable guidelines set forth in Appendix C to the black lung regulations, Dr. Gallai's blood gas data actually shows total disability, as previously noted in this opinion." Decision and Order at 35. The administrative law judge therefore stated that "Dr. Ghio thus relied on premises contrary to the regulatory guidelines to reach a conclusion that contradicts a prior finding made by this [administrative law judge]." *Id.* The administrative law judge's finding that the October 2, 2011 arterial blood gas study administered by Dr. Gallai produced qualifying values at rest was not challenged on appeal.

this arterial blood gas study was unreliable. We disagree. In considering Dr. Ghio's opinion, the administrative law judge noted that Dr. Ghio questioned the reliability of the exercise arterial blood gas study administered by Dr. Forehand. Specifically, the administrative law judge noted that Dr. Ghio believed that Dr. Forehand's exercise arterial blood gas study demonstrated an error and that these errors are common with arterial blood gas studies. The administrative law judge also noted that Dr. Ghio believed that Dr. Forehand's exercise arterial blood gas study was suspect because Dr. Ghio was neither familiar with Dr. Forehand's protocol, nor aware of the altitude of the test. Further, the administrative law judge noted that Dr. Ghio found that Dr. Forehand's exercise arterial blood gas study was called into question by the diffusing capacity data of the pulmonary function studies and by Dr. Castle's pulse oximetry study. The administrative law judge, however, determined that Dr. Ghio's dismissal of Dr. Forehand's exercise arterial blood gas study was "poorly" reasoned.

After noting that "Dr. Ghio testified that he had difficulty interpreting the data because he was unfamiliar with Dr. Forehand's protocol, but acknowledged the exercise study showed hypoxemia," the administrative law judge found that "[Dr. Ghio] did not provide a persuasive reason why he blithely dismissed this finding as error." Decision and Order at 35. The administrative law judge also found that "pulmonary function tests and arterial blood gas tests clearly do not measure the same aspects of lung function, as they are treated separately under the black lung regulations [at 20 C.F.R. §718.204(b)(2)]," and that "[t]he regulations do not indicate that pulse oximetry is an acceptable substitute for arterial blood gas testing." *Id*. In addition, the administrative law judge found that "Dr. Ghio's belief that errors are common in arterial blood gas testing is an insufficient reason to discredit a valid arterial blood gas study that was conducted and reported in compliance with the regulation at 20 C.F.R. §718.105, because the regulations clearly endorse the use of arterial blood gas testing to demonstrate pulmonary impairment." *Id*. Thus, the administrative law judge reasonably found that Dr. Ghio did not adequately explain why he dismissed Dr. Forehand's exercise arterial blood gas study. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155; (1989)(en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Consequently, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Ghio's opinion because Dr. Ghio dismissed Dr. Forehand's exercise arterial blood gas study.

Employer additionally asserts that the administrative law judge erred in discrediting Dr. Castle's opinion because Dr. Castle considered barometric pressure in interpreting the values produced by the arterial blood gas studies. Employer argues that "Dr. Castle's choice of a different set of predicted norms is not a sufficient basis to discredit his opinion." Employer's Brief at 14. In considering Dr. Castle's opinion, the administrative law judge noted that Dr. Castle relied on the arterial blood gas study that he conducted and his review of Dr. Forehand's arterial blood gas study. The

administrative law judge also noted that Dr. Castle believed that both arterial blood gas studies produced normal results, based on claimant's age and the barometric pressure.

An administrative law judge may properly consider a medical opinion detailing factors, such as a medical condition suffered by the miner, or circumstances surrounding the testing, that render a particular blood gas study unreliable for assessing total disability. *See Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1056 n.4, 13 BLR 2-372, 2-378-80 n.4 (10th Cir. 1990); *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Cardwell v. Circle B Coal Co.*, 6 BLR 1-788 (1984). However, the administrative law judge must provide a rationale for preferring the opinion of the consulting physician over that of an administering physician, as to the validity of a test. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the resolution of conflicting medical evidence, and the determination of whether a physician's opinion is sufficiently credible and reasoned, is for the administrative law judge, as the trier-of-fact, to determine. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999).

In this case, the administrative law judge stated that "the black lung regulations do not provide that blood gas data should be adjusted to account for barometric pressure, *see* 20 C.F.R. Part 718, *Appendix C – Blood Gas Tables*, and no evidence has been offered to explain how Dr. Castle adjusted the data or to support his contention that barometric pressure should be used for this purpose." Decision and Order at 36. The administrative law judge stated that "[i]t was also improper for Dr. Castle to determine that the blood gas values were normal based on [c]laimant's age, as [the Department] has already accounted for age in developing the tables designating blood gas values that qualify for disability." *Id*. Because the Department's disability standards are already adjusted for age and altitude, and, by extension, for barometric pressure,[10] 20 C.F.R. §718.204(b)(2)(ii); 45 Fed. Reg. 13,712 (Feb. 29, 1980), the administrative law judge permissibly found that Dr. Castle failed to provide an adequate explanation for why he

[10] Section 718.204(b)(2)(ii) provides that the arterial blood gas values listed in Appendix C shall establish a miner's total disability in the absence of contrary probative evidence. Regarding comments it received before Appendix C was promulgated, the Department acknowledged that altitude affects arterial blood gas values, but explained that there is not a "straight-forward linear lowering of arterial blood oxygen tension as the oxygen pressure in the atmosphere decreases with altitude." 45 Fed. Reg. 13,712 (Feb. 29, 1980). Consequently, the Department adopted a sliding scale that designated three levels of altitude. *Id*. The Department also changed the tables of Appendix C to establish a level of arterial oxygen tension below which a miner can be considered to be disabled regardless of age. Therefore, the values set forth in Appendix C were determined by the Department after consideration of elevation and the advanced age of many miners.

adjusted the arterial blood gas study data to find that claimant was not totally disabled from a respiratory impairment. *See Alley*, 897 F.2d at 1056 n.4, 13 BLR at 2-378-80 n.4; *Vivian*, 7 BLR at 1-361-62; *Cardwell*, 6 BLR at 1-789-90. Consequently, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Castle's opinion because Dr. Castle considered barometric pressure in interpreting the values produced by the arterial blood gas studies. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Mays*, 176 F.3d at 764, 21 BLR at 2-606.

Employer further asserts that the administrative law judge erred in discrediting the opinions of Drs. Ghio and Castle, because he applied an inconsistent level of scrutiny to the objective tests of Drs. Ghio and Castle, as compared to those of Drs. Forehand, Gallai, and Klayton. Specifically, employer argues that "[the administrative law judge] engaged in an exactingly critical analysis of Dr. Castle's and Dr. Ghio's objective testing [under 20 C.F.R. §§718.103 and 718.105], yet failed to consider the other objective testing under the same standards." Employer's Brief at 18. Employer maintains that, "[h]ad [the administrative law judge] uniformly applied these regulations, he would have determined that both the pulmonary function testing and arterial blood gas testing of Dr. Klayton and Dr. Gallai failed to comport to the regulations, as likely did the pulmonary function testing administered by Dr. Forehand." *Id*. at 16.

The quality standards for pulmonary function studies at 20 C.F.R. §718.103 and arterial blood gas studies at 20 C.F.R. §718.105 are not mandatory, but should be considered and used as guidelines. *See DeFore v. Alabama By-Products Corp*., 12 BLR 1-27, 1-29 (1988); *Orek*, 10 BLR at 1-55. It is for the administrative law judge, as the fact-finder, to determine whether an objective study that does not conform to the quality standards is nevertheless reliable. *See Orek*, 10 BLR at 1-54. The party challenging an objective study because it does not conform to the quality standards must demonstrate how this defect or omission renders the study unreliable and the administrative law judge can then explain the basis for his determination. *Id*. In addition, the administrative law judge is not limited to looking at only the four corners of the objective study report in determining its reliability, but may look at other supportive documents in the record in an attempt to cure any defects in the actual report. *See Orek*, 10 BLR at 1-54 n.4. Moreover, objective studies which do not meet the quality standards under the 20 C.F.R. Part 718 regulations must be challenged below, and such challenges will not be considered for the first time on appeal to the Board. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Orek*, 10 BLR at 1-54. Thus, because employer did not raise such a challenge when the case was before administrative law judge, we decline to address employer's assertion that the objective tests of Drs. Forehand, Gallai, and Klayton do not conform to the quality standards. *Id*. Consequently, we reject employer's assertion that the administrative law judge applied an inconsistent level of scrutiny to the

objective tests of Drs. Ghio and Castle, as compared to those of Drs. Forehand, Gallai, and Klayton.

In view of our decision to vacate the administrative law judge's finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii) and (iv), we also vacate the administrative law judge's finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

On remand, the administrative law judge must determine whether the weight of the evidence, like and unlike, is sufficient to establish a totally disabling respiratory or pulmonary impairment at Section 718.204(b), if reached. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc).

If, on remand, the administrative law judge determines that claimant has established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and is thereby entitled to invocation of the presumption at amended Section 411(c)(4), then the administrative law judge must determine whether the presumption is rebutted by employer establishing that claimant does not have legal pneumoconiosis. Employer bears the burden to disprove the existence of legal pneumoconiosis on rebuttal under amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). When weighing the medical opinions of the physicians on this issue, the administrative law judge must render a finding on each of the factors relevant to their probative value, including the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *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 (4th Cir. 1997). In so doing, the administrative law judge must set forth his findings on remand in detail, including the underlying rationale, as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer asserts that, in previously deciding the issue of rebuttal under amended Section 411(c)(4), the administrative law judge erred in discrediting the opinions of Drs. Ghio and Castle regarding the absence of legal pneumoconiosis "because these physicians did not find the existence of a totally disabling pulmonary or respiratory impairment." Employer's Brief at 25. Employer's assertion has merit. The administrative law judge stated that "the probative value of [Dr. Ghio's] opinion is

reduced to the extent he relied on his determination that [c]laimant had no respiratory impairment, a determination which overlooked [c]laimant's qualifying blood gas values and ignored the regulatory guidelines for interpretation of pulmonary function and arterial blood gas tests, as discussed above." Decision and Order at 42. The administrative law judge also stated that "[Dr. Castle's] opinion is poorly reasoned to the extent it relies on his finding that [c]laimant had no clinically significant pulmonary impairment, which is contrary to arterial blood gas evidence discussed above and to the findings of this Administrative Law Judge." *Id*. at 44. Contrary to the administrative law judge's findings, the existence of pneumoconiosis and the existence of a totally disabling pulmonary or respiratory impairment are two separate elements of entitlement. 20 C.F.R. §§718.202(a), 718.204(c); *see generally Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986) (Brown, J., concurring and dissenting); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). Thus, the administrative law judge erred in discrediting the opinions of Drs. Ghio and Castle that claimant does not have legal pneumoconiosis merely because they did not opine that claimant has a totally disabling pulmonary or respiratory impairment.

Employer also asserts that the administrative law judge erred in crediting the opinions of Drs. Gallai and Klayton regarding the absence of legal pneumoconiosis. Employer argues that "[they] are unreasoned and based simply on the generality that impairment is always due to coal mine dust exposure in sufficiently exposed miners." Employer's Brief at 24. Employer argues that "[the administrative law judge] provides the [c]laimant with an irrebuttable double presumption." *Id*. at 22. A review of the deposition testimony of Drs. Gallai and Klayton reveals that they agreed with employer's counsel's characterization that they would always attribute at least some of a patient's impairment to coal dust exposure *if the patient has a significant or sufficient coal mine dust exposure history*. Employer's Exhibits 8 (Dr. Gallai's Depo. at 30), 9 (Dr. Klayton's Depo. at 14). However, Drs. Gallai and Klayton also agreed that cigarette smoke exposure could contribute to a patient's impairment. Employer's Exhibits 8 (Dr. Gallai's Depo. at 25), 9 (Dr. Klayton's Depo. at 9). Thus, Drs. Gallai and Klayton did not opine that the mere exposure to coal dust always plays a role in the development of an impairment in every miner. In this case, Drs. Gallai and Klayton opined that claimant's exposure to coal dust and cigarette smoke contributed to his chronic lung disease. Employer's Exhibits 3, 4, 8 (Dr. Gallai's Depo. at 29), 9 (Dr. Klayton's Depo. at 8, 9). The administrative law judge permissibly found that "[Dr. Gallai's] opinion is adequately reasoned because he clearly explained how his diagnosis was consistent with the underlying data and with his accurate understanding of pneumoconiosis." Decision and Order at 40; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In addition, the administrative law judge permissibly found that "[Dr. Klayton's opinion] is also adequately reasoned because his conclusions are consistent with the underlying data and he clearly explained how he reached them." Decision and Order at 41; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Thus, we reject employer's assertion that the opinions of Drs. Gallai

and Klayton are unreasoned because they are based on generalities. Moreover, we reject employer's assertion that the administrative law judge provided claimant with "an irrebuttable double presumption" because, employer alleges, Drs. Gallai and Klayton relied on coal dust exposure alone to conclude that claimant's coal mine dust exposure contributed to his chronic lung disease.[11] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

If, on remand, the administrative law judge determines that employer has proven that claimant does not have legal pneumoconiosis, employer will have established rebuttal of the amended Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). If the administrative law judge finds that employer has not rebutted the presumed fact that claimant has pneumoconiosis, he must consider whether employer established rebuttal by proving that claimant is not totally disabled due to pneumoconiosis. *Id*.

[11] The administrative law judge stated that, "[i]n this case, however, Dr. Gallai did not base his diagnosis of pneumoconiosis on [c]laimant's blood gas abnormality in isolation but also relied on [c]laimant's symptoms, pulmonary function test results, and coal mining history." Decision and Order at 40. The administrative law judge further stated: "Clearly [Dr. Klayton] did not diagnose pneumoconiosis based merely on a generalized belief that every black lung claimant should receive compensation, as the [e]mployer suggests. Rather, he candidly admitted he was not completely sure [c]laimant was totally disabled, and he carefully explained the reasoning behind his pneumoconiosis diagnosis with reference to the underlying medical data in this particular case." *Id*. at 41.

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 proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge