U.S. Department of Labor

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

BRB Nos. 19-0229 BLA
and 19-0231 BLA

OCIE OWENS (Widow of and o/b/o JIMMY D. OWENS) Claimant v. HARMAN MINING CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/28/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim on Remand, and Decision and Order Awarding Benefits under the Automatic Provision of the Black Lung Benefits Act of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenburg Traurig LLP), Washington, D.C., for employer/carrier.

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

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Subsequent Claim on Remand (2009-BLA-05914) and Decision and Order Awarding Benefits Under the Automatic Provision of the Black Lung Benefits Act (2014-BLA-05574) of Administrative Law Judge Joseph E. Kane on claims filed under the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on August 28, 2008,[1] and a survivor's claim[2] filed on September 20, 2013. This is the second time the miner's case has been before the Board.

In the Board's prior decision, the Board noted that the administrative law judge found the miner invoked the Section 411(c)(4) presumption,[3] 30 U.S.C. §921(c)(4) (2012) and employer failed to rebut it.[4] After considering employer's arguments on appeal, the Board vacated the administrative law judge's findings that the miner established total disability by the pulmonary function studies and medical opinions, and remanded the case for reconsideration of this evidence. The Board affirmed, however, the administrative law judge's determination employer did not rebut the Section 411(c)(4) presumption, and

[1] The miner filed three previous claims, dated December 22, 1987, January 25, 1994, and July 26, 2002. Director's Exhibits 1-3. The miner's 2002 claim was denied because the miner did not establish any element of entitlement. Director's Exhibit 3.

[2] The miner died on September 8, 2013. Survivor's Claim Director's Exhibit 6. Claimant is his surviving spouse and is pursuing the miner's claim on behalf of his estate and her own claim for survivor's benefits. Survivor's Claim Director's Exhibit 1.

[3] Section 411(c)(4) provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or employment in substantially similar conditions, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1).

[4] Because the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge also found that the miner established a change in an applicable condition of entitlement. 20 C.F.R. §725.309; Decision and Order Awarding Benefits in a Subsequent Claim (2014 Decision and Order) at 23.

instructed him that the miner would be entitled to benefits if he found the miner invoked the Section 411(c)(4) presumption on remand. *Owens v. Harman Mining Corp.*, BRB No. 14-0292 BLA, slip op. at 5-8, 11 (Mar. 24, 2015) (unpub.).

On remand, the administrative law judge concluded that the preponderance of the pulmonary function study evidence and medical opinion evidence established total disability, invocation of the Section 411(c)(4) presumption, and a change in applicable condition of entitlement. He therefore awarded benefits in the miner's claim and determined claimant was derivatively entitled to survivor's benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2012).[5]

On appeal, employer requests this case be held in abeyance pending the decision by the United States Court of Appeals for the Fifth Circuit on the appeal of the district court's decision in *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018). Employer also argues that excessive procedural delays and changes in applicable law deprived it of due process.[6] On the merits, employer argues the administrative law judge erred in finding total disability, invocation of the Section 411(c)(4) presumption, and awarding benefits in both claims. Employer further contends the administrative law judge's findings are not in

[5] Section 422(*l*) provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[6] Employer also observes for the first time in a footnote in its brief that under the holding of the United States Supreme Court in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), the administrative law judge in this case was not constitutionally appointed and, therefore, did not have the authority to adjudicate the miner's claim and the survivor's claim. Employer's Brief in Support of Petition for Review (Employer's Brief) at 4 n.2. Employer further notes that the removal provisions applicable to the Department of Labor's administrative law judges violate the Appointments Clause of the United States Constitution. *Id.* To the extent employer's observations in this footnote constitute arguments on appeal, they are rejected as forfeited because employer did not raise them before the administrative law judge. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (internal citation omitted).

accordance with the Administrative Procedure Act (APA).[7] The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief in response, asking the Board to reject employer's due process argument and its request to hold this case in abeyance. Claimant has not responded. Employer filed a reply brief, reiterating its arguments.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's findings and conclusions if they are rational, supported by substantial evidence, and in accordance with applicable law.[8] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. The Miner's Claim

A. Constitutionality of the Affordable Care Act

Citing *Texas v. United States*, 340 F.Supp. 3d 579, *decision stayed pending appeal*, 352 F.Supp. 3d 665, 690 (N.D. Tex. 2018), employer contends the Affordable Care Act (ACA), Pub. L. No. 111-148 (2010), which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer asserts the district court in *Texas* ruled that the ACA individual mandate is unconstitutional and that the remainder of the legislation is not severable. Employer's Brief at 5-6; Employer's Reply Brief at 4. The Director responds the district court stayed its ruling striking down the ACA, *Texas*, 352 F.Supp. 3d at 690; thus, she argues the decision does not preclude application of the amendments to the Act in the ACA. Director's Brief at 1-2.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the individual mandate is unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA is inseverable. *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at *27-28 (5th Cir. Dec. 18, 2019) (King, J.,

[7] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 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, 1-165 (1989).

[8] Because the miner's last coal mine employment occurred in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; H. Tr. at 14.

dissenting). Moreover, the Fourth Circuit has held that the ACA amendments to the Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case. Accordingly employer's request that the case be held in abeyance is also rejected.

B. Deprivation of Due Process

Employer argues it was deprived of due process because the ten years it took to adjudicate the miner's claim prevented it from meaningfully defending both claims. Consequently, employer contends it should be dismissed as a party and liability for benefits should be transferred to the Black Lung Disability Trust Fund. Employer's Brief at 12-14: Employer's Reply Brief at 2-4. We disagree.

To establish a core due process violation, employer must show it was deprived of a fair opportunity to mount a meaningful defense against the miner's claim or the survivor's claim. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). As the Director contends, because employer cannot establish it did not receive timely notice of the proceedings or timely receive evidence in either claim, it has not established a core due process violation. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998); Director's Brief at 3. Moreover, with respect to the handling of these claims, the administrative law judge has broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark*, 12 BLR at 1-153. Because employer does not identify any specific findings or actions by the administrative law judge that constitute error in adjudicating these claims, it has failed to establish an abuse of his discretion. *See Dempsey*, 23 BLR at 1-63.

Having failed to establish a core violation, employer must establish the claim proceedings included a "prejudicial, fundamentally unfair element." *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009), *citing Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 501 (4th Cir. 1999). Employer asserts the prolonged pendency of the miner's 2008 claim allowed the miner and claimant to benefit from the 2010 enactment of the ACA, which reinstated the presumption of total disability due to pneumoconiosis for certain miners, 30 U.S.C. § 921(c)(4), and reinstated automatic entitlement for certain survivors, 30 U.S.C. § 932(l). Pub. L. No. 111-148, § 1556. The miner's claim was filed on August 28, 2008, however, and the ACA was enacted less than nineteen months later, on March 23, 2010. *Id.*

The action delaying adjudication of the claim – the 2015 remand for Dr. Forehand to clarify his opinion – occurred after the passage of the ACA, and did not affect its application to the miner's claim and the survivor's claim. Nor did the retroactive application of the change in the law resulting from the ACA's enactment create a due process violation. *See Vision Processing, LLC v. Groves*, 705 F.3d 551, 556-557 (6th Cir. 2013) (retroactive application of reinstated presumptions does not violate procedural or substantive due process); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388 (4th Cir. 2011), *cert. denied*, 133 S.Ct. 127 (2012) (retroactive application of revived provision allowing derivative entitlement for surviving spouses does not violate substantive due process). We therefore hold employer has failed to establish a core due process violation or a fundamentally unfair process deprived it of a meaningful opportunity to defend the claims at issue in this case.

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

A miner is totally disabled if a pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Total disability can be established based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987). In this case, the administrative law judge determined the miner established total disability by pulmonary function studies and medical opinions. Decision and Order Awarding Benefits in a Subsequent Claim on Remand (Decision and Order on Remand) at 7-9.

1. Pulmonary Function Studies

On appeal of the initial award of benefits in the miner's claim, employer argued the administrative law judge erred in finding the October 16, 2008 pulmonary function study valid and qualifying, and studies administered on November 9, 2009, and January 18, 2012, qualifying.[9] Employer maintained the administrative law judge did not adequately

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values. The qualifying values are set forth by gender, height, and age, and are sixty-percent of normal predicted values. *See* 43 Fed. Reg. 17,722, 1729-31 (Apr. 25, 1978), *citing* R.J. Knudson, *et al., The Maximal Expiratory Flow-volume Curve: Normal Standards, Variability, and Effects of Age*, 113 Am. Rev. Respir. Dis. 587-660 (May 1976); 45 Fed.

consider the opinions of Drs. Fino and Rosenberg that the new pulmonary function studies, all of which were administered when the miner was over age 71,[10] are non-qualifying when the Knudson formula is applied.[11] The Board agreed with employer's contentions, vacated the administrative law judge's findings, and remanded the case to the administrative law judge for reconsideration of the pulmonary function studies. *Owens*, BRB No. 14-0292 BLA, slip op. at 5-6.

On remand, the administrative law judge initially determined that Dr. Fino's opinion invalidating the October 16, 2008 pulmonary function study Dr. Forehand administered was uncontradicted and therefore established the study was invalid.[12] Decision and Order Remanding Claim for Complete Pulmonary Examination at 2. Because Dr. Forehand provided the miner's Department of Labor examination, the administrative law judge remanded the case to the district director on September 21, 2015, "so that the [miner] can receive another pulmonary function study and so Dr. Forehand can provide an opinion on the [miner's] condition based on this new study consistent with the statutory and regulatory requirements." *Id*. He further stated "[w]hen providing his opinion, Dr. Forehand should also clarify his opinion on the relationship between the [miner's] age and the pulmonary function results." *Id*. at 3.

Because the miner died on September 8, 2013, Dr. Forehand could not administer a new pulmonary function study. Survivor's Claim Director's Exhibit 6. Instead, he submitted an opinion explaining why the October 16, 2008 study is valid and contesting the view that the miner's pulmonary function studies are not qualifying when the Knudson formula is used for his advanced age exceeding 71 years old. Director's Exhibit 3 at 1-9.

In his decision and order awarding benefits on remand, the administrative law judge found the October 16, 2008 pulmonary function study valid based on Dr. Forehand's second supplemental opinion. Decision and Order on Remand at 6. He further found the

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Reg. 13,711 (Feb. 29, 1980). The maximum age for which values are reported is 71. 20 C.F.R. Part 718, Appendix B.

[10] The miner was 75 when the October 16, 2008 pulmonary study was administered; 76 when the November 9, 2009 study was conducted; and 78 when the January 8, 2012 study was performed. Director's Exhibit 3; Claimant's Exhibit 6; Employer's Exhibit 1.

[11] The Knudson formula provides for the calculation of predicted values for miners older than 71. R.J. Knudson, *et al.*, *supra* n.9, at 587-660.

[12] Dr. Gaziano checked a box on a Department of Labor form dated October 30, 2008, indicating the October 16, 2008 "vents are acceptable." Director's Exhibit 13.

November 9, 2009 study valid, but the studies dated February 26, 2009, and January 18, 2012, invalid. *Id*. at 6. He then discredited the opinions of Drs. Fino and Rosenberg that application of the Knudson formula establishes that the results of the valid studies are not qualifying. *Id*. at 7. The administrative law judge therefore concluded the pulmonary function studies support a finding of total disability. *Id*. at 8.

Employer initially argues the administrative law judge exceeded the Board's instructions, and his own discretion, on remand by obtaining a second supplemental opinion[13] from Dr. Forehand. Employer's Brief at 10, 15-16. We disagree.

Administrative law judges exercise broad discretion in resolving procedural and evidentiary matters. *See Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR at 1-153. To overturn an administrative law judge's disposition of a procedural or evidentiary issue, a party must establish an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). While this case was before the administrative law judge, employer objected to remanding the claim to the district director for Dr. Forehand to submit a second supplemental report. Based on his determination that Dr. Forehand's second supplemental report is "more in-depth" on the validity of the October 16, 2008 pulmonary function study than his prior reports, the administrative law judge allowed employer to submit additional opinions from Drs. Fino and Rosenberg. Decision and Order on Remand at 5 & n.21; Employer's Exhibits 4, 5. Because employer was able to respond to Dr. Forehand's second supplemental opinion, it has not established the administrative law judge committed an abuse of discretion. *See Blake*, 24 BLR at 1-113.

Employer next alleges the administrative law judge erred in crediting Dr. Forehand's opinion that the October 16, 2008 pulmonary function study was valid over Dr. Fino's contrary opinion. Employer's Brief at 16-17. This contention does not have merit. The administrative law judge observed that Dr. Forehand countered Dr. Fino's view that the miner took the test with a "lot of hesitancy" and "never exhaled all of his air" by explaining "in great detail his disagreement with Dr. Fino's findings." Decision and Order on Remand at 5; Director's Exhibit 3; Employer's Exhibit 4 at 1, 6-8. The administrative law judge also observed Dr. Forehand "provided specific examples of flow volume curves showing early termination," "compared them to the flow volumes of the Miner," and

[13] On December 16, 2010, Administrative Law Judge Larry S. Merck remanded the present claim to the district director to obtain clarification from Dr. Forehand on the issue of legal pneumoconiosis, in order to provide the complete pulmonary evaluation the miner was entitled to under 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406. 2010 Order of Remand at 5.

"found no evidence of early termination."[14] Decision and Order on Remand at 5. Lastly, the administrative law judge agreed with Dr. Forehand's view that he is "in the best position to judge [the miner's] effort, understanding and cooperation," as "he observed the testing." *Id*. at 5-6; Director's Exhibit 3 at 7. Based on Dr. Forehand's direct observation of the October 16, 2008 study and his detailed explanation of why the flow volumes represent valid testing, the administrative law judge permissibly granted his opinion more weight than Dr. Fino's contrary opinion.[15] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); Decision and Order on Remand at 6. We therefore affirm the administrative law judge's determination that the October 16, 2008 pulmonary function study is valid.

Employer further argues that because the Board instructed the administrative law judge to accept "uncontradicted opinions on the effect of [the miner's] aging on his pulmonary function studies," he erred by discrediting the opinions of Drs. Fino and Rosenberg. Employer's Brief at 17. We disagree.

Contrary to employer's contention, the administrative law judge was not bound by these opinions simply because they are uncontradicted. The administrative law judge, in his role as fact-finder, is required to determine whether a medical opinions is reasoned and documented, even if there are no contrary medical opinions in the record. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 211 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). In this case, he permissibly gave "little weight" to the opinions of Drs. Fino and Rosenberg "because the record contains no testing or studies illustrating the reliability of the Knudson formula beyond 71 years of age[.]"[16] Decision

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[14] Dr. Forehand's second supplemental report included graphs illustrating his opinion that the miner's volume time curves and flow volume loops showed no evidence of early termination of exhalation, or lack of reproducibility or variable effort. Director's Exhibit 3 at 4-7.

[15] Although employer is correct in alleging the administrative law judge erred in attributing Dr. Forehand's opinion that the October 16, 2008 pulmonary function study is valid to Dr. Rosenberg, this error is harmless as the administrative law judge provided permissible independent rationales for according determinative weight to Dr. Forehand's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 16-17; Decision and Order on Remand at 5-6; Director's Exhibit 3 at 7; Employer's Exhibit 5 at 2.

[16] Because the administrative law judge provided a valid rationale for discrediting the opinions of Drs. Fino and Rosenberg, we need not address employer's allegations of error regarding his finding that they did not properly apply the Knudson formula to the

and Order on Remand at 7; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-34 (4th Cir. 1998); Employer's Exhibits 4, 5 at 25. We therefore affirm the administrative law judge's application of the table values for a 71 year old male to find that the preponderance of the pulmonary function tests are qualifying and support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i).[17] Appendix B to 20 C.F.R. Part 718; *see K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008) (pulmonary function studies of a miner over the age of 71 are qualifying if they are qualifying for a 71 year old, unless credible evidence establishes otherwise).

2. Medical Opinions

In its prior Decision and Order, the Board instructed the administrative law judge to reconsider the medical opinions in light of his findings on remand with respect to the pulmonary function study evidence. *Owens*, BRB No. 14-0292 BLA, slip op. at 6. The administrative law judge determined Dr. Forehand's diagnosis of total disability was documented by the pulmonary function study evidence and, therefore, entitled to greater weight than the contrary opinions of Drs. Fino and Rosenberg. Decision and Order on Remand at 9. Employer argues the errors the administrative law judge made in addressing the pulmonary function studies on remand require the Board to again vacate his findings on the medical opinion evidence. Employer's Brief at 18-21. This contention is without merit. Contrary to employer's assertion, the administrative law judge permissibly determined the opinions of Drs. Fino and Rosenberg were entitled to little weight based on their view that the pulmonary function studies do not establish total disability for a man between the ages of 76 and 78. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order on Remand at 9. Accordingly, we affirm the administrative law judge's finding that Dr. Forehand's opinion established total disability at 20 C.F.R. §718.204(b)(2)(iv).

November 9, 2009 study and his use of the Knudson formula to calculate the qualifying values for the October 16, 2008 study. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order on Remand at 7; Employer's Brief at 18.

[17] We therefore decline to address employer's contention the administrative law judge erred in not giving any weight to the invalid, non-qualifying February 26, 2009 study which, according to employer, represented the miner's true pulmonary condition. Employer's Brief in Support of Petition for Review (Employer's Brief at 17). Any error in the administrative law judge's consideration of this study is harmless, as even if he credited this study, the preponderance of the studies, including a more recent study, is qualifying. *See Larioni*, 6 BLR at 1-1278.

3. Weighing of Evidence Together

The administrative law judge reweighed the evidence supportive of a finding of total disability against the contrary probative evidence and determined the evidence as a whole established total disability. Decision and Order on Remand at 8, 9. Employer asserts the administrative law judge should have credited the non-qualifying arterial blood gas study evidence over the pulmonary function study evidence. Employer's Brief at 19. This argument is without merit. The administrative law judge permissibly observed that although the arterial blood gas study tests were not qualifying, they measure a different aspect of lung function and therefore do not contradict the qualifying pulmonary function study evidence. *See Sheranko v. Jones and Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984); Decision and Order at 8, 9-10. He therefore rationally determined that when considered together, the new evidence establishes total respiratory disability at 20 C.F.R. §718.204(b). *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753 (4th Cir. 1999); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). We therefore affirm the administrative law judge's finding that the pulmonary function study evidence and Dr. Forehand's opinion establish total respiratory disability.

In light of our affirmance of the administrative law judge's finding that the new evidence established total respiratory disability, we further affirm his finding it established a change in a condition of entitlement and invocation of the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1)(iii), 725.309; *see White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 3, 9.

As the Board previously affirmed the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption, that holding constitutes the law of the case. *Owens*, BRB No. 14-0292 BLA, slip op. at 11; *see Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990). In this appeal, employer reiterates the arguments the Board rejected in its prior Decision and Order. Employer's Brief at 19-23. We therefore decline to disturb our prior holding and further affirm the award of benefits in the miner's claim.

II. The Survivor's Claim

Relying on the award of benefits in the miner's claim, the administrative law judge issued a separate decision and order finding claimant satisfied the prerequisites for automatic entitlement under Section 422(*l*) of the Act: She filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was found to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order Awarding Benefits Under the Automatic Entitlement

Provisions of the Black Lung Benefits Act at 4. Employer does not challenge claimant's entitlement to survivor's benefits, other than reiterating the same procedural due process and abeyance arguments rejected in the miner's claim. *See* Employer's Brief in Survivor's Claim at 3-5. We therefore affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the Decision and Order Awarding Benefits in a Subsequent Claim on Remand, and Decision and Order Awarding Benefits under the Automatic Provision of the Black Lung Benefits Act are affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge