

U.S. Department of Labor

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



BRB Nos. 19-0284 BLA
and 19-0285 BLA

WANDA J. WOODARD (o/b/o and
Widow of EDWARD C. WOODARD))

Claimant-Respondent)

v.)

STONE MOUNTAIN TRUCKING
COMPANY)

and)

TRAVELERS INDEMNITY COMPANY)

Employer/Carrier-
Petitioners)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 08/27/2020

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen,
Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City,
Tennessee, for Employer.

Kathleen H. Kim (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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier appeal Administrative Law Judge Dana Rosen's Decision and Order Awarding Benefits (2013-BLA-05124, 2016-BLA-05442) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on May 20, 2011, and a survivor's claim filed on December 29, 2015.¹ The Benefits Review Board has consolidated these appeals for purposes of decision only.

The administrative law judge found Employer is the responsible operator. She further found the Miner had nineteen and one-half years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act² and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309. She further determined Employer did not rebut the presumption and awarded benefits in the Miner's claim. In the survivor's claim, the administrative law judge found Claimant automatically entitled to benefits under Section 422(l) of the Act.³ 30 U.S.C. §932(l) (2018).

¹ On March 5, 1999, the district director denied the Miner's initial claim, filed on October 28, 1998, because he did not establish total disability due to pneumoconiosis. Decision and Order at 2. The Miner died while his current claim was pending before the administrative law judge. Claimant, the Miner's widow, is pursuing his claim on behalf of his estate and filed a survivor's claim. Miner's Claim (MC) Director's Exhibit 40; MC Employer's Exhibit 13; Survivor's Claim (SC) Director's Exhibits 1, 4.

² Section 411(c)(4) of the Act provides a rebuttable presumption a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

³ Section 422(l) of the Act provides that the survivor of a miner determined to be eligible to receive benefits at the time of his or her death is automatically entitled to

On appeal, Employer contends the administrative law judge lacked the authority to hear and decide the case because she had not been properly appointed in a manner consistent with the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2. Employer further asserts the administrative law judge erred in finding it is the responsible operator. It also contends the administrative law judge erred in finding the Miner had at least fifteen years of underground coal mine employment and was totally disabled so as to invoke the Section 411(c)(4) presumption. Employer therefore argues the administrative law judge also erred in finding Claimant entitled to derivative survivor's benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had authority to decide the case and the administrative law judge's responsible operator determination requires remand for reconsideration of that issue.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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 Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Appointments Clause Challenge

Employer alleges the administrative law judge did not have the authority to hear and decide this case, noting the United States Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), that Securities and Exchange Commission (SEC) administrative law judges were not properly appointed in accordance with the Appointments Clause⁴ of

survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

⁴ Article II, Section 2, Clause 2, sets forth the appointing powers:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

the Constitution.⁵ Employer’s Brief at 14-15. It argues the administrative law judge in this case similarly was improperly appointed. Employer acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,⁶ but maintains that action was insufficient to “cure the defect” in the administrative law judge’s initial appointment. Employer’s Brief at 15.

The Director responds that the administrative law judge had the authority to hear and decide this case because the Secretary’s ratification brought her appointment into compliance. Director’s Brief at 11-12. She also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. We agree with the Director’s position.

As the Director notes, an appointment by the Secretary need only be “evidenced by an open, unequivocal act.” Director’s Brief at 11, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, ratification “can remedy a defect” arising from the appointment of an official when an agency head “has the power to conduct an independent evaluation of the merits [of the appointment] and does so.” *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). In cases involving the Appointments Clause, ratification is permissible so long as the agency head: 1) had, at the time of ratification, the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016).

⁵ Employer raised this issue before the administrative law judge at the August 7, 2018 hearing. Hearing Transcript at 6.

⁶ The Secretary of Labor (the Secretary) issued a letter to the administrative law judge on December 21, 2017 stating:

In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department’s prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Administrative Law Judge’s Exhibit 3.

Further, under the “presumption of regularity,” courts presume public officers have properly discharged their official duties, with “the burden shifting to the attacker to show the contrary.” *Advanced Disposal*, 820 F.3d at 603, citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

The Secretary had, at the time of ratification of the administrative law judge’s appointment, the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603. Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; see also 5 U.S.C. §3105.

Under the presumption of regularity, we presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. In evaluating these factors, we note the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Rosen and indicated he gave “due consideration” to her appointment. Secretary’s December 21, 2017 Letter to Administrative Law Judge Rosen. The Secretary further stated he was acting in his “capacity as head of the Department of Labor” when ratifying the appointment of Judge Rosen “as an Administrative Law Judge.” *Id.* Employer does not assert the Secretary had no “knowledge of all the material facts” or did not make a “detached and considered judgment” when he ratified Judge Rosen’s appointment, and therefore does not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); see also *Butler*, 244 F.3d at 1340.

Thus, we hold the Secretary’s action constituted a proper ratification of the administrative law judge’s appointment.⁷ See *Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (the appointment of civilian members of the Coast Guard Court of Criminal Appeals was valid because the Secretary of Transportation issued a memorandum “adopting” the General Counsel’s assignments to the Coast Guard Court of Military Review “as judicial appointments of my own”); *Advanced Disposal*, 820 F.3d 592, 604-05 (a properly constituted National Labor Relations Board can retroactively ratify the

⁷ Employer notes the Secretary’s ratification letter was “clearly signed electronically.” Employer’s Brief at 15. Even if the Secretary used an autopen, this fact would not render the appointment invalid. See *Nippon Steel Corp. v. Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int’l Trade 2002).

appointment of a Regional Director with statement that it “confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc” all its earlier actions as an invalid Board).

Employer next argues *Lucia* precludes the administrative law judge from hearing this case, notwithstanding the Secretary’s ratification, because the administrative law judge took “significant actions . . . while not properly appointed,” including issuing a Notice of Hearing and receiving the Director’s Exhibits. Employer’s Brief at 11-12. We disagree.

The Supreme Court did not order reassignment to a new adjudicator in *Lucia* simply because the administrative law judge was improperly appointed during an early phase of the proceedings. Reassignment was necessary because the administrative law judge, while improperly appointed, “already both heard Lucia’s case and issued an initial decision on the merits” and thus could not “be expected to consider the matter as though he had not adjudicated it before.” *Lucia*, 138 S.Ct. at 2055. Accordingly, pre-ratification actions “not based on the merits of the case” do not require remand when they “would not be expected to color the administrative law judge’s consideration of the case” and therefore would not “taint the proceedings” with an Appointments Clause violation requiring remand. *Noble v. B & W Res., Inc.*, BLR , BRB No. 18-0533 BLA, slip op. at 4 n.5 (Jan. 15, 2020).

The administrative law judge issued a Notice of Hearing on October 4, 2017. The issuance of this Notice of Hearing alone did not involve any consideration of the merits, nor would it be expected to color the administrative law judge’s consideration of this case. The Notice of Hearing simply reiterated the statutory and regulatory requirements governing the hearing procedures.⁸

Thus, unlike the situation in *Lucia*, in which the judge had presided over a hearing and issued an initial decision while he was not properly appointed, the Notice of Hearing in this case would not be expected to affect this administrative law judge’s ability “to

⁸ The Notice of Hearing informed the parties of the date for a telephonic hearing, set time limits for completion of discovery and submission of evidence, provided general advice to parties proceeding without counsel, and addressed other routine hearing matters. *See* Notice of Telephonic Hearing and Scheduling Order, Oct. 4, 2017. Moreover, because the administrative law judge twice rescheduled the hearing initially set for February 17, 2018, she issued two new Notices of Hearing, which both came after the Secretary ratified her appointment. The hearing ultimately held on August 7, 2018, was governed by a Notice of Hearing and Prehearing Order the administrative law judge issued on July 19, 2018, which set forth new deadlines for discovery and evidence development and submission.

consider the matter as though [s]he had not adjudicated it before.”⁹ *Lucia*, 138 S.Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation requiring remand. Consequently, we decline to remand this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge. *Noble*, BRB No. 18-0533 BLA, slip op. at 4.

Responsible Operator

The responsible operator is the “potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner” for at least one year.¹⁰ 20 C.F.R. §§725.494(c), 725.495(a)(1). The Director bears the burden of proving the responsible operator is a potentially liable operator. 20 C.F.R. §725.495(b). Once designated, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. *See* 20 C.F.R. §725.495(c).

Employer argued before the administrative law judge that it did not employ the Miner for at least one year. Initially, the administrative law judge excluded liability evidence Employer submitted for the first time at the hearing. Decision and Order at 28. The administrative law judge then noted Employer’s argument that it did not have a one-year employment relationship with the Miner. Using a formula set forth at 20 C.F.R. §725.101(a)(32)(iii) based on the Miner’s reported earnings in the record, Employer

⁹ We also reject Employer’s argument that the administrative law judge’s receipt of the Director’s Exhibits tainted the case with an Appointments Clause violation requiring remand. The required transfer of the Director’s Exhibits to the administrative law judge does not involve any consideration of the merits and there is no apparent reason it would color the administrative law judge’s consideration of the case. *See* 20 C.F.R. §725.455(b) (administrative law judge “shall receive into evidence . . . the evidence submitted to the Office of Administrative Law Judges [(OALJ)] by the district director”); *see also* 20 C.F.R. §725.421 (district director shall transmit evidence and related documents to the OALJ in any case referred for a hearing). Employer has not shown anything indicating to the contrary.

¹⁰ In addition, the evidence must establish the miner’s disability or death arose out of coal mine employment with that operator; the entity was an operator after June 30, 1973; the miner’s employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

estimated the Miner worked for it for 231 days in 1982 and 1983. The administrative law judge found the calculation correct but declined to consider Employer's argument because Employer did not raise "the specifics of its argument" before the district director. *Id.* The administrative law judge instead found the district director's determination that the Miner's earnings with Employer in 1982 and 1983 established one year of employment to be reasonable. In so finding, she noted the Miner's earnings for each of the years 1982 and 1983 exceeded the coal mine industry average earnings for those years. *Id.* Finding "no basis for concluding the Miner worked less than one year," the administrative law judge found the district director properly named Employer as the responsible operator. *Id.* at 29.

Employer argues the administrative law judge erred in excluding its liability evidence that it did not first submit to the district director. Employer's Brief at 14-16. We disagree. Because the district director must resolve the identification of the responsible operator issue before a case is referred to the Office of Administrative Law Judges, the regulations require that, absent extraordinary circumstances, all liability evidence must be submitted to the district director.¹¹ 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). While we agree that, having admitted the evidence, the administrative law judge should have promptly advised the parties she was excluding it, rather than waiting to do so in her Decision and Order, Employer does not dispute the administrative law judge's characterization of it as documentary liability evidence subject to the requirements of the aforementioned regulations and sections. Employer did not submit the evidence in question to the district director or explain to the administrative law judge why extraordinary circumstances justified its failure to do so.

¹¹ Thus, "no documentary evidence pertaining to liability may be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director" 20 C.F.R. §725.414(d). If documentary evidence pertaining to the identification of a responsible operator or carrier is not submitted to the district director, it "shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence at the hearing. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (the evidentiary limitations in Section 725.414 are mandatory and, thus, are not subject to waiver). Thus, contrary to Employer's contention, the fact that the administrative law judge initially admitted Employer's Exhibit 29 at the hearing does not alter the analysis. Employer's Brief at 23-24.

Considering it on that basis, employer has not shown the liability evidence was improperly excluded.¹²

Employer next contends the administrative law judge erred in declining to address its argument that it did not employ the Miner for at least one year. Employer's Brief at 16-17, 20-23. Employer notes it timely contested its designation as a potentially liable operator before the district director and specifically challenged the district director's finding that it employed the Miner for one year. *Id.* The Director agrees, noting it is the Director's "burden to establish that [Employer] met the requirements of a potentially liable operator, and in particular, the one year of employment requirement." Director's Brief at 7, *citing* 20 C.F.R. §725.495(b); *RB & F Coal, Inc. v. Mullins*, 842 F.3d 279, 281-82 (4th Cir. 2016). The Director argues that because Employer "preserved its challenge to liability, it was free to raise any argument before the [administrative law judge] regarding why it believes the Director did not meet her burden." Director's Brief at 7.

We agree with the contentions of Employer and the Director. The record reflects Employer timely controverted its liability before the district director and specifically denied it employed the Miner for at least one year.¹³ MC Director's Exhibits 20, 21, 23, 27; *see* 20 C.F.R. §§725.408(a)(2), 725.412(a)(1). Because the Director bore the burden of proving Employer employed the Miner for at least one year, the administrative law judge erred in declining to address Employer's argument that the Director failed to carry her burden. *See* 20 C.F.R. §725.495(b). We must therefore remand this case for the administrative law judge to consider Employer's argument that the Miner's earnings with it in 1982 and 1983 do not establish at least one year of coal mine employment.

¹² The evidence in question consists of an excerpt from a District Director's calculation of a miner's length of coal mine employment in a different case. Because it is uncontested, we assume for these purposes that it is "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director" under 20 C.F.R. §725.456(b)(1). We note Employer has not explained how extraordinary circumstances exist for admission of this evidence. Certainly, as we agree *infra*, Employer could set forth its own calculations with an explanation as to why those should be adopted. Moreover, it could cite to a publicly-available decision containing comparable calculations.

¹³ In a supplement to its initial response to notification of the claim, Employer reiterated it did not employ the Miner for a year, noted it employed him in 1982 and 1983, and referenced his Social Security Administration (SSA) earnings records. MC Director's Exhibit 23 at 3.

Because the administrative law judge did not consider Employer's argument that the Miner's earnings records established less than one year of employment with Employer, the administrative law judge also erred in accepting the district director's finding that at least one year of the Miner's employment was with Employer. Further, we agree with the Director that the administrative law judge erred in concluding the district director's finding of one total year of employment was reasonable because the Miner's earnings in both 1982 and 1983 exceeded the average coal mine wages for each year. As the Director notes, for the year 1982 the average yearly earnings for coal miners for a 125-day period for 1982 as set forth in Exhibit 610 of the *Black Lung Benefits Act Procedure Manual* were \$12,698.75; the Miner's earnings with Employer in 1982 were only \$10,240.75. Director's Brief at 8; MC Director's Exhibit 7. Therefore, we must vacate the administrative law judge's finding that the Miner had one year of coal mine employment with Employer, *see Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016), and her determination that Employer is the responsible operator. On remand, the administrative law judge must reconsider whether Employer is the responsible operator and address its argument that it employed the Miner for less than one year.

Before determining whether the Miner worked at least one year with Employer, the administrative law judge should reconsider where the Miner's last coal mine employment occurred.

In finding the Miner's last coal mine employment occurred in Virginia and therefore the law of the United States Court of Appeals for the Fourth Circuit applied, the administrative law judge referenced Claimant's lay representative's and Employer's counsel's stipulation at the hearing that the Miner last worked in Virginia. Decision and Order at 27; Hearing Transcript at 7. The Director argues the administrative law judge "offered no explanation for her finding" other than their stipulation, whereas the Director believes "[t]here is good reason to suspect that [the Miner's] last coal mine employment was in Kentucky" and the law of the United States Court of Appeals for the Sixth Circuit therefore applies.¹⁴ Director's Brief at 8; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

¹⁴ The Director notes the Miner testified at his deposition that his last employment in the coal mining industry occurred with Robert and Tammy Trucking Co. MC Director's Exhibit 24 at 19-20. The Miner testified that while working for that company, he hauled coal from its Kentucky mine site to a "load out" facility located in Virginia, where the coal was loaded onto railroad cars for shipment. *Id.* In addition, the Miner testified that when he last worked for Robert and Tammy Trucking Co., he worked exclusively at this Virginia load out facility. *Id.* at 26-31; *see also* MC Director's Exhibit 30 at 3-4 (Miner describes his work at the load out facility to Dr. Rosenberg). The Director argues there is no evidence

The law of the two circuits differs with respect to establishing one year of coal mine employment. *Compare Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (4th Cir. 2007) (a one-year employment relationship must be established, during which the miner had 125 working days) *with Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-07 (6th Cir. 2019) (a finding of 125 working days establishes one year of coal mine employment). Further, the parties' stipulation that the Miner last worked in Virginia is not determinative of whether his work there constituted coal mine employment under the Act. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 643-44 (6th Cir. 2014). Therefore, on remand the administrative law judge should determine the location of the Miner's last coal mine employment, and then address whether the Miner had one year of coal mine employment with Employer under the applicable law. *See Shupe*, 12 BLR at 1-202.

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

Length of Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

We agree with Employer that the administrative law judge erred in calculating the length of the Miner's coal mine employment because she provided no explanation or analysis for her finding. Employer's Brief at 24-26. The Miner alleged twenty-two years of coal mine employment between 1970 and 1994 on his benefits application and

"the Virginia load out facility was a coal mine or that any extraction or preparation of coal took place there. Rather, it appears to be merely a transfer point for coal from trucks to rail cars and located away from the mine, and therefore not a covered situs." Director's Brief at 9, *citing Director, OWCP v. Consolidation Coal Co. [Krushansky]*, 923 F.2d 38, 41 (4th Cir. 1991) (work at dock house loading facility located away from preparation plant did not meet situs or function coal mine employment tests), *Eplion v. Director, OWCP*, 794 F.2d 935, 937 (4th Cir. 1986) (employment at river loading facility away from the mine was not covered coal mine employment), *Ray v. Brushy Creek Trucking, Inc.*, 50 F. App'x 659, 662 (6th Cir. 2002) (work on a barge at coal transfer station away from the mine was not coal mine employment).

employment history form. MC Director's Exhibits 3-4. The record also contains the Miner's Social Security Administration (SSA) earnings statement documenting his earnings in both coal mine employment and non-coal mine employment from 1952 to 2003.¹⁵ MC Director's Exhibit 7. The Miner also testified at a deposition regarding his coal mine employment, MC Director's Exhibit 24, as did Claimant at the hearing. Hearing Transcript at 27-28.

Without discussing or weighing the evidence, the administrative law judge stated "[i]n this claim, the [SSA] [e]arnings [r]eport includes 78 quarters of coal mine employment or 19 1/2 years of coal mine employment." Decision and Order at 29. It is not apparent how the administrative law judge determined the Miner had 78 quarters of coal mine employment based on his reported earnings¹⁶ or on what basis she credited the Miner with any particular quarter of coal mine employment. Moreover, the administrative law judge did not consider any of the other relevant evidence.

Because the administrative law judge did not consider all of the relevant evidence or explain her method of calculating the length of the Miner's coal mine employment, we cannot affirm her finding. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, 224 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, 315-16 (6th Cir. 2017); *Osborne*, 25 BLR at 1-204; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Therefore, we vacate the administrative law judge's finding of 19.5 years of coal mine employment and remand this case for her to reconsider the length of the Miner's coal mine employment under the applicable circuit's law. Consequently, we also vacate the administrative law judge's findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement.

On remand, the administrative law judge must determine the length of the Miner's qualifying¹⁷ coal mine employment, based on any reasonable, applicable method of

¹⁵ Employer argued to the administrative law judge that the Miner's earnings records were the best evidence of his coal mine employment and established at most 11.11 years of coal mine employment. Employer's Closing Argument at 10-11.

¹⁶ After 1977, the SSA did not report the Miner's earnings by quarter. MC Director's Exhibit 7.

¹⁷ Employer has not challenged the administrative law judge's finding that all the Miner's coal mine employment took place either underground or at surface mines in substantially similar conditions. Decision and Order at 29-30; *see* 30 U.S.C. §921(c)(4);

calculation and considering all relevant evidence.¹⁸ *Osborne*, 25 BLR at 1-205; *see Muncy*, 25 BLR at 1-27. She must fully explain her findings, as the Administrative Procedure Act requires.¹⁹ *See Wojtowicz*, 12 BLR at 1-165.

If Claimant fails to establish the Miner had at least fifteen years of qualifying coal mine employment, the administrative law judge must consider whether Claimant can establish entitlement under 20 C.F.R. Part 718 without the benefit of the Section 411(c)(4) presumption.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.²⁰ *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor

20 C.F.R. §718.305(b)(2). We therefore affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

¹⁸ The administrative law judge must first determine whether the evidence establishes the beginning and ending dates of the Miner's coal mine employment and may determine the dates and length of coal mine employment by any credible evidence, including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. 20 C.F.R. §725.101(a)(32)(ii); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016). Where the administrative law judge cannot determine the beginning and ending dates of the Miner's employment, she may divide the Miner's yearly reported income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). A copy of the BLS table must be made a part of the record if the administrative law judge uses this method to establish the length of the Miner's coal mine employment. *Id.*; *Osborne*, 25 BLR at 1-204 n.12.

¹⁹ The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include 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).

²⁰ The administrative law judge found the Miner's usual coal mine work required "heavy manual labor as established by his statements to the . . . examining physicians." Decision and Order at 32, *citing* MC Director's Exhibits 11, 30; MC Employer's Exhibit 6. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

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 and determine whether Claimant established total disability by a preponderance of the evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge first considered four pulmonary function studies conducted on November 30, 2011, May 17, 2012, July 10, 2012, and August 29, 2013. Decision and Order at 9-12, 31-32. The November 30, 2011 and May 17, 2012 studies produced qualifying²¹ values, while the July 10, 2012 and August 29, 2013 studies produced non-qualifying values. MC Director's Exhibits 11, 30; MC Employer's Exhibits 1, 6. The administrative law judge found the November 30, 2011²² and May 17, 2012 studies invalid based on Dr. Long's and Dr. Castle's pulmonary function study review reports and Dr. Rosenberg's medical opinion. Decision and Order at 11, 31. Because the July 10, 2012 and August 29, 2013 studies were non-qualifying, she found the pulmonary function studies did not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 31-32.

The administrative law judge then considered three arterial blood gas studies conducted on November 30, 2011, May 17, 2012, and August 29, 2013. Decision and Order at 12; 32; MC Director's Exhibits 11, 30; MC Employer's Exhibit 6. Because all three studies were non-qualifying, she found the blood gas studies did not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 32. She further found Claimant could not establish total disability under 20 C.F.R. §718.204(b)(2)(iii) because there was no evidence the Miner had cor pulmonale with right-sided congestive heart failure.

Next, the administrative law judge weighed Dr. Alam's opinion that the Miner was totally disabled and Dr. Rosenberg's and Dr. Sargent's opinions that he was not totally disabled. Decision and Order at 12-21; 32-34. Dr. Alam examined the Miner on November 11, 2011, and diagnosed severe obstruction based on his pulmonary function

²¹ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

²² As we will discuss, *infra*, Dr. Alam conducted the November 30, 2011 pulmonary function study as part of his examination of the Miner. MC Director's Exhibit 11.

study and a “mild to moderate reduction in PO₂” on his blood gas study. MC Director’s Exhibit 11 at 14-15. Dr. Alam opined the Miner was totally disabled because of his pulmonary function study FEV₁ value of 44% of predicted, his resting PO₂ value of 68% of predicted, and because of wheezing, cough, and shortness of breath on examination. *Id.* at 15. In a later supplemental report,²³ Dr. Alam noted the Miner’s pulmonary function study “me[t] the criteria for disability,” while his resting blood gas study²⁴ did not. MC Director’s Exhibit 43. Dr. Alam explained that he therefore based his assessment of total disability “on the [pulmonary function study] that the patient has performed” *Id.* Dr. Alam also pointed to the Miner’s coal mine work history of 17.81 years, severe obstruction, chronic bronchitis, and his “significant problem with meeting the daily chores at home.” *Id.* Dr. Alam concluded the Miner was unable to perform his prior coal mine work “because of his limited FEV₁ and his significant pulmonary symptoms which will exacerbate if he is exposed to . . . coal dust” *Id.*

Conversely, Drs. Rosenberg and Sargent opined the Miner was not totally disabled because his valid pulmonary function studies and his blood gas studies were normal²⁵ and reflected he had no respiratory impairment of any kind. MC Director’s Exhibit 30; MC Employer’s Exhibits 1, 6, 21, 22, 28.

The administrative law judge credited Dr. Alam’s opinion, finding it well-reasoned and persuasive. Decision and Order at 34. Although she found Dr. Alam’s “conclusion . . . not well-supported by the pulmonary function test results he obtained since [they] were out-weighed by more recent non-qualifying results,” she found his disability opinion overall to be supported by his examination findings, the Miner’s treatment records,²⁶ and

²³ On April 18, 2016, Administrative Law Judge Larry S. Merck remanded the Miner’s claim to the district director for Dr. Alam to clarify his opinion regarding total disability and for the district director to submit a legible copy of Dr. Alam’s medical report. MC Director’s Exhibit 41 at 3. On remand, the district director provided a typed copy of Dr. Alam’s original report and Dr. Alam submitted a supplemental report dated January 30, 2017. MC Director’s Exhibits 43-45.

²⁴ Dr. Alam noted the Miner was “handicapped to do any exercise blood gas” study. MC Director’s Exhibit 43.

²⁵ Dr. Rosenberg reported the Miner’s diffusion capacity was also normal. MC Employer’s Exhibit 1 at 1-2.

²⁶ The administrative law judge noted when the Miner had follow-up visits after treatment for coronary artery disease in 2012 and 2013, “chronic obstructive pulmonary [disease] was listed as one of the Miner’s diagnoses.” Decision and Order at 33. She

his consideration of the Miner's coal mine work history. *Id.* at 33. The administrative law judge found neither Dr. Rosenberg's nor Dr. Sargent's opinion well-reasoned or persuasive because neither physician discussed the Miner's treatment records, which noted the Miner's treatment for chronic obstructive pulmonary disease and coal workers' pneumoconiosis. Decision and Order at 33-34. She further found neither physician addressed that the Miner was able to exercise for only two minutes and twenty seconds during the only exercise blood gas study in the record.²⁷ *Id.* The administrative law judge found neither doctor explained how that study, which was terminated due to the Miner's shortness of breath, supported his opinion that the Miner had no respiratory impairment and could perform heavy labor. *Id.* Thus she found Dr. Alam's opinion established total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 34.

Weighing all the relevant supporting evidence against all the relevant contrary evidence, the administrative law judge found Dr. Alam's "well-reasoned and well-documented reports" outweighed the non-qualifying pulmonary function studies and blood gas studies. Decision and Order at 34. She therefore found Claimant established the Miner was totally disabled. 20 C.F.R. §718.204(b)(2); Decision and Order at 34.

Employer contends the administrative law judge erred in finding Dr. Alam's disability opinion well-reasoned without reconciling that determination with her finding Dr. Alam's pulmonary function study invalid. Employer's Brief at 31-32. Employer also alleges the administrative law judge did not adequately explain her reliance on the Miner's treatment records as support for Dr. Alam's opinion, as they do not contain "obvious evidence of total disability." *Id.* at 34. Employer's contentions have merit.

The administrative law judge's crediting of Dr. Alam's opinion was inconsistent with her determination that the pulmonary function study he cited as objective evidence of total disability was invalid. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639-40 (3d Cir. 1990) (a medical opinion based on invalid testing may be unreliable); MC Director's

further noted the Miner's primary care physician referred him to a pulmonologist, and that physician, Dr. Girish, listed diagnoses of chronic obstructive pulmonary disease and coal workers' pneumoconiosis, and reported that when the Miner took a six-minute walk test, he experienced dyspnea and fatigue. *Id.*

²⁷ Dr. Sargent conducted the blood gas study in question on August 29, 2013. MC Employer's Exhibit 6 at 1. Dr. Sargent reported the Miner was able to exercise for two minutes and twenty seconds at 1.5 miles per hour on a treadmill and that exercise was terminated due to dyspnea. *Id.* He noted the Miner reached 80% of his maximum heart rate and that blood gases drawn during exercise were normal. *Id.*

Exhibits 11, 43. In considering whether an opinion is reasoned and documented, the administrative law judge must evaluate the documentation underlying the opinion. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The administrative law judge stated Dr. Alam's opinion was not well-supported by the pulmonary function study he conducted because it was "out-weighted by more recent non-qualifying results." Decision and Order at 33. But this statement does not address the administrative law judge's crediting the reviewing physicians' opinions that Dr. Alam's pulmonary function study was invalid. Absent adequate explanation, an invalid study cannot be accepted as an accurate representation of an individual's respiratory capability. See *Siwiec*, 894 F.2d at 639-40, citing *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1319 (3d Cir. 1987). Thus, without proper explanation, an invalid test cannot constitute the basis for a valid judgment that a claimant is totally disabled. *Id.* Although the administrative law judge did not cite Dr. Alam's pulmonary function study as supporting his opinion, the record reflects Dr. Alam himself reported he relied upon the pulmonary function study to conclude the Miner had severe obstruction and was totally disabled. MC Director's Exhibits 11 at 15; 43. Having determined the November 30, 2011 pulmonary function study was invalid, the administrative law judge did not adequately explain why she nonetheless considered Dr. Alam's opinion reasoned and documented. See *Wojtowicz*, 12 BLR at 1-165. This must be addressed in assessing the documentation and reasoning of Dr. Alam's opinion.

While the administrative law judge also cited the Miner's treatment records as supporting Dr. Alam's opinion, she did not adequately explain her determination. She noted diagnoses of coal workers' pneumoconiosis and chronic obstructive pulmonary disease contained in those records, but the diagnosis of a disease is not necessarily reflective of the presence of an impairment, which refers to a loss of function.²⁸ See *Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129 n.4 (1987); *Clay v. Director, OWCP*, 7 BLR 1-82, 8 (1984); *Webb v. Armco Steel Corp.*, 6 BLR 1-1120 (1984); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). And while the treating pulmonologist the administrative law judge referred to, Dr. Girish, diagnosed chronic obstructive pulmonary disease and noted a walk test induced dyspnea and fatigue, he did not offer an opinion as to the existence, or severity, of any impairment. MC Employer's Exhibit 11. Further, the administrative law judge did not explain how Dr. Alam's examination findings or his consideration of the Miner's work history supported his opinion. We must therefore vacate the administrative

²⁸ Moreover, the fact that the treatment records reflect a diagnosis does not give that diagnosis validity absent a showing that it is reasoned and documented or that other evidence supports it is likely correct.

law judge's finding that Dr. Alam's opinion established total disability and instruct her to reconsider his opinion on remand. 20 C.F.R. §718.204(b)(2).

Employer argues further that the administrative law judge shifted the burden of proof to Employer to establish the Miner was not totally disabled when she faulted the reasoning of its physicians' opinions. Employer's Brief at 35-37. We disagree. The administrative law judge has the authority to assess the documentation and reasoning of a medical opinion.²⁹ See *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Rowe*, 710 F.2d at 255. Doing so does not constitute a shift of the burden of proof. Consequently, Employer has not shown error in this regard.³⁰ See *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Rowe*, 710 F.2d at 255. On remand, however, the administrative law judge must apply the same level of scrutiny in determining the credibility of Dr. Rosenberg's, Dr. Sargent's, and Dr. Alam's opinions and in assessing the medical evidence generally. See *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc).

For the foregoing reasons, we vacate the administrative law judge's finding Claimant established total disability. On remand, the administrative law judge must reconsider Dr. Alam's medical opinion and determine whether it establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). She must then weigh all relevant supporting evidence against all relevant contrary evidence to determine whether Claimant has established the Miner was totally disabled. 20 C.F.R. §718.204(b)(2); see *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If on remand the administrative law judge finds Claimant establishes the Miner had at least fifteen years of qualifying coal mine employment and was totally disabled, Claimant will invoke the Section 411(c)(4) presumption and establish a change in an applicable condition of entitlement. If so, the administrative law judge may reinstate the

²⁹ We note Employer does not contest the validity of the administrative law judge's specific findings that the opinions were inadequate in particular regards or her authority to make her specific findings; rather it contends in making those findings she reversed the burden of proof. Employer's Brief at 35-37.

³⁰ The administrative law judge has the authority to determine the credibility of medical opinions. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). In so doing, the administrative law judge addresses the explanations the physicians have provided for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *Id.*

award of benefits, as Employer does not challenge the administrative law judge's finding that it failed to rebut the presumption.³¹ If Claimant does not establish total disability, a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

The Survivor's Claim

In light of our decision to vacate the administrative law judge's award of benefits in the Miner's claim, we also vacate the administrative law judge's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l). On remand, if the administrative law judge awards benefits in the Miner's claim, Claimant is entitled to survivor's benefits. 30 U.S.C. §932(l). Should the administrative law judge deny benefits in the Miner's claim, she must consider whether Claimant can establish entitlement to survivor's benefits by establishing the Miner's death was due to pneumoconiosis, either under Section 411(c)(4)³² or under 20 C.F.R. Part 718 without the benefit of the presumption. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

³¹ We affirm, as unchallenged, the administrative law judge's finding Employer did not rebut the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711; Decision and Order at 35-41. Additionally, we decline to address Employer's argument that the administrative law judge erred in determining the extent of the Miner's smoking history. Employer's Brief at 28-30. Employer maintains further factual findings are necessary "given the importance of the [M]iner's smoking history in determining the causation of any . . . lung disease . . ." *Id.* at 30. However, as just discussed, we have affirmed the administrative law judge's determination that Employer failed to rebut the Section 411(c)(4) presumption. That determination included findings that Employer failed to rebut legal pneumoconiosis and disability causation. Decision and Order at 38-41. Under the circumstances, Employer has not explained how any alleged error in determining the miner's smoking history would affect this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

³² Section 411(c)(4) of the Act provides a rebuttable presumption the Miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge