

BRB No. 07-0743 BLA

L.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOUBLE M COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/31/2008
	)	
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 on Remand Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ashby Dickerson (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand Awarding Benefits (2003-BLA-06133) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This is the second time that this case has been before the Board. In her initial Decision and Order, the administrative law judge credited claimant with thirty-one years of coal mine employment and found that the newly submitted evidence was sufficient to establish a totally disabling pulmonary impairment and, therefore, a change in one of the applicable conditions of entitlement

under 20 C.F.R. §725.309. The administrative law judge then considered all of the evidence of record and found it sufficient to establish the existence of pneumoconiosis arising out of claimant's coal mine employment and total disability due to pneumoconiosis. Accordingly, benefits were awarded. Employer appealed to the Board, which affirmed the administrative law judge's determination under Section 725.309, but vacated the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203(b), total disability at 20 C.F.R. §718.204(b)(2), and total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). [*L.K.*] v. *Double M Mining Co., Inc.*, BRB No. 05-0562 BLA (Mar. 16, 2006) (unpub.). The Board also vacated the administrative law judge's determination that claimant was entitled to benefits beginning on January 1, 2002 and remanded the case to the administrative law judge. *Id.*

On remand, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that his pneumoconiosis arose out of coal mine employment at Section 718.203(b). The administrative law judge further determined that claimant established total disability under Section 718.204(b)(2)(ii) and (iv), and total disability due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits effective January 1, 2002.

Employer argues on appeal that the administrative law judge did not properly weigh the x-ray and medical opinion evidence of record under Section 718.202(a)(1) and (a)(4). Employer also contends that the administrative law judge erred in finding that claimant established total disability pursuant to Section 718.204(b)(2) and total disability due to pneumoconiosis at Section 718.204(c). In addition, employer maintains that the administrative law judge did not properly identify the date from which claimant is entitled to benefits. Claimant has responded, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a response brief unless requested to do so.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

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<sup>1</sup> We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), or total disability under 20 C.F.R. §718.204(b)(2)(i), (iii), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.<sup>2</sup> 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).

### **Section 718.202(a)(1)**

Pursuant to Section 718.202(a)(1), the administrative law judge reviewed the x-ray evidence of record, noting initially that “the overwhelming weight of the x-ray evidence in the prior claims was negative for pneumoconiosis.” Decision and Order at 4. The administrative law judge then considered the interpretations of the four x-rays obtained subsequent to the filing of the most recent claim. With respect to the film dated May 5, 2002, the administrative law judge found it to be negative for pneumoconiosis, as the negative reading by Dr. Scott, a Board-certified radiologist and B reader, outweighed the positive reading by Dr. Forehand, a B reader. Decision and Order at 5; Director’s Exhibits 11, 34. The administrative law judge determined that the x-ray obtained on September 30, 2002, was negative because the negative reading by Dr. Halbert, a Board-certified radiologist and B reader, outweighed the positive interpretation by Dr. Rosenberg, a B reader. Decision and Order at 5; Employer’s Exhibit 1. The administrative law judge also noted that the Board had instructed her to determine, on remand, whether Dr. Rosenberg’s reading was properly admitted into the record. The administrative law judge found that it was, as claimant had designated Dr. Rosenberg’s interpretation of the September 30, 2002 film as part of his affirmative case evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii). Decision and Order at 4, 5 n.3. The administrative law judge stated that “my finding that this x-ray is negative would be the same, whether or not I considered Dr. Rosenberg’s reading.” *Id.* at 5. Regarding the film dated April 3, 2003, the administrative law judge determined that it was neither positive nor negative because two equally qualified physicians provided conflicting readings. *Id.*; Claimant’s Exhibit 1; Employer’s Exhibit 6. The administrative law judge found that the x-ray obtained on September 23, 2003, was negative in light of the uncontradicted negative reading by Dr. Wheeler, a Board-certified radiologist and B reader. Decision and Order at 5; Employer’s Exhibit 4. Based upon her determination that three of the four newly submitted x-rays were read as negative and that the vast majority of the previously submitted x-rays were also interpreted as negative, the administrative law judge concluded that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 5.

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<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant’s coal mine employment was in Virginia. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 5.

Employer has alleged error in the administrative law judge's admission and consideration of Dr. Rosenberg's positive reading of the September 30, 2002 film, but does not challenge the administrative law judge's ultimate finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). We affirm, therefore, the administrative law judge's finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

#### **Section 718.202(a)(4)**

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Kanwal, Sargent, Forehand, Rosenberg, Rasmussen, and Dahhan. Dr. Kanwal examined claimant at the request of the Department of Labor (DOL) in conjunction with claimant's 1983 and 1995 claims. In his report of his examination of claimant on August 28, 1984, Dr. Kanwal indicated that claimant had early radiological evidence of pneumoconiosis caused by coal dust exposure, but was not suffering from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. After examining claimant again on October 24, 1996, Dr. Kanwal read claimant's x-ray as 0/1 and diagnosed a mild restrictive impairment related to coal dust exposure. *Id.*

Dr. Sargent examined claimant on November 27, 1996 and concluded that he had simple coal workers' pneumoconiosis based on his chest x-ray, but was not totally disabled. *Id.* Dr. Forehand examined claimant on May 2, 2002 at the request of the DOL. Director's Exhibit 11. On the DOL Report of Medical History and Examination form, Dr. Forehand reported that claimant has coal workers' pneumoconiosis and identified the bases for his diagnosis as claimant's history, the physical examination, and claimant's blood gas studies. *Id.* In the section of the form regarding the cause of the diagnosed condition, Dr. Forehand identified coal dust exposure. With respect to the existence of an impairment, Dr. Forehand indicated that the results of claimant's exercise blood gas study (BGS) demonstrated "a significant impairment of a gas-exchange nature" that would prevent claimant from returning to his last coal mine job. *Id.* Dr. Forehand stated that coal workers' pneumoconiosis was the sole factor causing claimant's impairment, as claimant's smoking history was too minimal to have any effect on his condition. *Id.*

Dr. Rosenberg examined claimant on September 30, 2002, and reviewed the medical reports of Drs. Kanwal, Sargent, and Forehand. Dr. Rosenberg diagnosed coal workers' pneumoconiosis based upon his own positive x-ray reading and determined that the pulmonary function study and resting BGS that he obtained revealed no impairment. Employer's Exhibit 1. Dr. Rosenberg indicated that he did not obtain a post-exercise BGS because of claimant's history of angina. *Id.*

Dr. Rasmussen examined claimant on April 3, 2003 and noted that claimant's chest x-ray was read as positive for pneumoconiosis by Dr. Patel. Claimant's Exhibit 1. Dr. Rasmussen determined that claimant is suffering from a moderate loss of lung function as evidenced by the results of his exercise BGS. *Id.* Dr. Rasmussen concluded that claimant is unable to perform his last coal mine job due to coal mine dust induced lung disease. *Id.* Dr. Dahhan examined claimant on September 24, 2003 and reviewed numerous medical records, including the report of Dr. Forehand. Dr. Dahhan determined that claimant does not have coal workers' pneumoconiosis or any respiratory or pulmonary impairment. Employer's Exhibit 4.

The administrative law judge considered the medical opinions and resolved the conflict in the evidence "by according the greatest probative weight to the opinions of Drs. Forehand and Rasmussen." Decision and Order at 14. The administrative law judge stated that:

Although neither has the specialist qualifications of Dr. Dahhan, I find their reasoning and explanations in support of their conclusions more complete and thorough than that provided by Dr. Dahhan. Drs. Forehand and Rasmussen better explained how all of the evidence they developed supported their conclusions. I also find the opinions of Drs. Forehand and Rasmussen to be in better accord with the evidence underlying their opinions and the medical evidence of record. Further, additional credibility is lent to their findings that the claimant has pneumoconiosis by the positive diagnoses of Drs. Rosenberg, Sargent, and Kanwal. All of the physicians who examined the claimant diagnosed him to have pneumoconiosis except Dr. Dahhan. Thus, the weight of the medical opinion evidence supports a finding of pneumoconiosis.

*Id.* at 14-15.

Employer asserts that the administrative law judge erred in crediting the opinions of Drs. Forehand and Rasmussen and in finding that Dr. Dahhan's opinion was entitled to less weight. Employer also argues that the administrative law judge erred in determining that the reports in which Drs. Rosenberg, Sargent, and Kanwal diagnosed pneumoconiosis based upon positive x-ray interpretations support the diagnoses of pneumoconiosis contained in the reports of Drs. Forehand and Rasmussen. Employer further maintains that the administrative law judge erred in admitting and considering Dr. Rosenberg's positive interpretation of the x-ray dated September 30, 2002. These contentions have merit, in part.

We initially hold that the administrative law judge did not err in finding that the opinions of Drs. Forehand and Rasmussen contained reasoned and documented diagnoses

of legal pneumoconiosis under Section 718.202(a)(4). With respect to the opinion of Dr. Forehand, the administrative law judge indicated that:

[Dr. Forehand] did not distinguish between clinical and legal pneumoconiosis, and to the extent his opinion rested on the positive x-ray reading, it is undermined by my determination that the x-ray was negative. However, he also based his diagnosis on the presence of a lung impairment, and thus I construe his opinion to encompass both legal and clinical pneumoconiosis. I find his opinion to be documented and reasoned. I also give his opinion probative weight on the issue of whether the Claimant has pneumoconiosis.

Decision and Order at 13. In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit indicated that if an administrative law judge discredits the basis for a physician's diagnosis of clinical pneumoconiosis, that diagnosis cannot properly be credited as supportive of a finding of pneumoconiosis under the Act. *Compton*, 211 F.3d at 211-12, 22 BLR at 2-175. Nevertheless, because Dr. Forehand's diagnosis of an impairment caused by coal dust exposure meets the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2), the administrative law judge's crediting of Dr. Forehand's opinion as reasoned and documented and supportive of a finding of pneumoconiosis at Section 718.202(a)(4) is proper under applicable law.<sup>3</sup> See *Compton*, 211 F.3d at 212, 22 BLR at 2-176.

Regarding Dr. Rasmussen's diagnosis of legal pneumoconiosis, the administrative law judge stated that:

Dr. Rasmussen relied on Dr. Patel's positive reading of the x-ray taken as part of his examination in diagnosing pneumoconiosis, and emphasized the positive x-ray in reaching his determination that, given the Claimant's significant history of exposure to coal mine dust, "[i]t is medically reasonable to conclude that [he] has coal workers' pneumoconiosis." This portion of his report seems to be referring to clinical pneumoconiosis. However, he also reported an abnormal chest examination, minimal resting hypoxia, and moderate impairment in oxygen transfer with exercise. He said that the Claimant was disabled, and went on to state that "[t]he only

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<sup>3</sup> Contrary to employer's argument, Dr. Forehand's report contains an explanation of his diagnosis, as the doctor indicated that claimant's exercise blood gas study (BGS) revealed a significant respiratory impairment and stated that it was entirely due to coal dust exposure in light of claimant's minimal smoking history. Director's Exhibit 11.

risk factor for this patient's disabling lung disease (considering his brief smoking history) is his coal mine dust exposure. The pattern of impairment is quite consistent with coal mine dust induced lung disease ...." Hence, although Dr. Rasmussen did not distinguish between clinical and legal pneumoconiosis, I find his opinion to be sufficiently broadly based to encompass both, i.e., that the Claimant had pneumoconiosis within the meaning of the Act and the regulations.

Decision and Order at 14. Because the administrative law judge accurately found that Dr. Rasmussen diagnosed a pulmonary impairment and attributed it to coal dust exposure, she permissibly determined that Dr. Rasmussen's opinion constituted a reasoned and documented diagnosis of legal pneumoconiosis pursuant to Section 718.202(a)(4).<sup>4</sup> See *Compton*, 211 F.3d at 212, 22 BLR at 2-176.

With respect to the administrative law judge's weighing of Dr. Dahhan's opinion, however, employer is correct in asserting that the administrative law judge applied a stricter standard of review to Dr. Dahhan's opinion than she applied to the opinions of Drs. Forehand and Rasmussen. The administrative law judge accorded less weight to Dr. Dahhan's opinion than to the opinions of Drs. Forehand and Rasmussen because Dr. Dahhan did not comment upon the qualifying exercise BGS that Dr. Forehand obtained. Decision and Order at 14-15; Employer's Exhibit 4. Because Drs. Forehand and Rasmussen offered their opinions without being aware of the non-qualifying exercise BGS obtained by Dr. Dahhan, which was the most recent of record, the same rationale exists for discrediting their opinions. This does not constitute a valid rationale, particularly in light of the fact that the administrative law judge's reasoning – that failure to address earlier qualifying BGSs detracts from the credibility of a physician's otherwise reasoned and documented medical opinion – could be applied to the opinions of Drs. Forehand and Rasmussen, who did not comment upon the non-qualifying exercise BGS obtained by Dr. Dahhan. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Shelosky v. Consolidation Coal Co.*, 8 BLR 1-303 (1985); *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985); *Casey v. Director, OWCP*, 7 BLR 1-873 (1985); *Bates v. Director, OWCP*, 7 BLR 1-113 (1984); *Strunk v. Monarch Coal Inc.*, 7 BLR 1-49 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877 (1984).

We vacate, therefore, the administrative law judge's finding with respect to Dr. Dahhan's opinion, as she selectively analyzed his diagnoses. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We must also vacate the administrative law judge's finding that claimant established the existence of legal

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<sup>4</sup> Employer's argument, that the administrative law judge erred in finding that Dr. Rasmussen reported an abnormal chest examination, is without merit, as Dr. Rasmussen noted that claimant's breath sounds were reduced on examination. Claimant's Exhibit 1.

pneumoconiosis pursuant to Section 718.202(a)(4). On remand, the administrative law judge must reconsider her weighing of the medical opinions of Drs. Dahhan, Forehand, and Rasmussen and render a finding as to the probative value of each opinion based upon “the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.” *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). The administrative law judge must also set forth her findings in detail, including the underlying rationale, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In so doing, the administrative law judge cannot treat the positive x-ray interpretations of Drs. Rosenberg, Sargent, and Kanwal as giving “additional credibility” to the diagnoses of legal pneumoconiosis contained in the opinions of Drs. Forehand and Rasmussen. Decision and Order at 15. The Fourth Circuit indicated in *Compton* that an administrative law judge cannot credit a physician’s diagnosis of pneumoconiosis under Section 718.202(a)(4) if the sole basis for the diagnosis is a positive x-ray reading that is contrary to the administrative law judge’s finding under Section 718.202(a)(1). *Compton*, 211 F.3d at 211-12, 22 BLR at 2-175. In light of this holding, and our affirmance of the administrative law judge’s finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, we decline to address employer’s argument regarding the administrative law judge’s admission and consideration of Dr. Rosenberg’s positive x-ray reading at Section 718.202(a)(1) and (4).

#### **Section 718.204(b)(2)(ii)**

The administrative law judge determined in her 2005 Decision and Order Awarding Benefits that “while none of the resting arterial blood gas studies yielded values qualifying to establish disability, two out of three exercise blood gases submitted in connection with the current claim did produce qualifying values.” 2005 Decision and Order at 16. On appeal, the Board rejected employer’s assertion that the administrative law judge’s finding was in error, as the qualifying studies were “barely qualifying.” [*L.K.*] *v. Double M Coal Co., Inc.*, BRB No. 05-0562 BLA, slip op. at 8 (Mar. 16, 2006) (unpub.). The Board also determined that there was no merit in employer’s argument that the administrative law judge was required to explain why she did not accord greatest weight to the most recent BGS, which produced non-qualifying results at rest and after exercise. *Id.* The Board held that although the administrative law judge could find the most recent evidence to be the most probative, she was not required to do so. *Id.*, *citing Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The Board further held, however, that the

administrative law judge “did not make any specific finding pursuant to Section 718.204(b)(2)(ii),” and remanded the case to the administrative law judge “to render conclusive findings on the issue of whether the [BGS] evidence demonstrates total disability pursuant to Section 718.204(b)(2)(ii).” *Id.*

On remand, the administrative law judge considered seven sets of BGSs. The exercise studies obtained by Dr. Forehand on May 5, 2002, and by Dr. Rasmussen on April 3, 2003 produced qualifying values. Director’s Exhibit 11; Claimant’s Exhibit 1. The resting and exercise studies that claimant performed for Dr. Dahhan on September 24, 2003 were non-qualifying. Employer’s Exhibit 4. The administrative law judge found that:

Two out of three of the recent exercise blood gas studies resulted in qualifying values. I give the greatest weight to Dr. Forehand’s May 2002 study, which contains all of the information required by 20 CFR § 718.105(c), and has been independently validated. The studies taken during treatment, which I infer to be resting studies, did not meet the requirements of the regulation, and did not result in qualifying values. Nonetheless, as they showed results below the reference range for normal, they also support an inference that the Claimant has an impairment in oxygen transfer. I find that the preponderance of the arterial BGS evidence supports a finding of disability.

Decision and Order at 16.

Employer argues that the administrative law judge’s finding at Section 718.204(b)(2)(ii) is in error because the values of the qualifying studies were “barely qualifying.” Employer’s Brief at 26. Employer also asserts that the administrative law judge should have accorded greatest weight to the most recent studies, which were non-qualifying. Lastly, employer maintains that the administrative law judge erred in failing to consider that the BGSs obtained by Drs. Forehand, Rasmussen, and Dahhan are not contemporaneous. *Id.*

We find no merit in employer’s contention that the administrative law judge should have addressed the fact that the qualifying studies produced values that were marginally below the table values set forth in Appendix C to Part 718, as this same argument was rejected in our most recent Decision and Order and employer has not identified any reason for altering our prior holding. [*L.K.*] *v. Double M Coal Co., Inc.*, BRB No. 05-0562 BLA, slip op. at 8 (Mar. 16, 2006)(unpub.); *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). However, we agree with employer that the administrative law judge’s weighing of the BGSs of record cannot be affirmed, as the

administrative law judge did not provide an adequate rationale for her finding that claimant established total disability pursuant to Section 718.204(b)(2)(ii).

Pursuant to Section 718.204(b)(2), claimant is required to establish that he is permanently and totally disabled. Under Section 718.204(b)(2)(ii), total disability can be established by BGSs, which measure the extent of impairment in the process of gas exchange in the lungs.<sup>5</sup> 20 C.F.R. §718.204(b)(2)(ii), §718.105(a). Pursuant to Section 718.204(b)(2)(ii), a BGS that meets the PO<sub>2</sub> and PCO<sub>2</sub> values specified in Appendix C to 20 C.F.R. Part 718 is sufficient to establish the existence of a totally disabling impairment “[i]n the absence of contrary probative evidence” or “rebutting evidence.” 20 C.F.R. §718.204(b)(2); 20 C.F.R. Part 718, Appendix C. Because the claimant bears the burden of proving that the BGS evidence is sufficient to establish total disability, the administrative law judge is required to weigh the qualifying and non-qualifying studies at Section 718.204(b)(2)(ii), and resolve any conflicts in the evidence, prior to determining whether the claimant has met his burden of proof.<sup>6</sup> See *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987) (*en banc*); see also *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987). The administrative law judge must also assess the BGS evidence in light of the fact that total disability is measured by the claimant’s physical condition at the time of the hearing. See *Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233 (Table), 20 BLR 2-67 (4th Cir. 1996), *citing Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147 (6th Cir. 1988) and *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). In the present case, the administrative law judge’s resolution of the conflicts in the BGS evidence did not conform to these precepts.

In support of her determination that total disability was established under Section 718.204(b)(2)(ii), the administrative law judge cited the fact that “[t]wo out of three of the recent exercise blood gas studies resulted in qualifying values,” and gave greatest

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<sup>5</sup> A defect in gas exchange manifests itself primarily as a reduction in arterial oxygen tension (PO<sub>2</sub>), either at rest or during exercise. 20 C.F.R. §718.105(a).

<sup>6</sup> Because Section 718.204(b)(2) does not contain a presumption of total disability that is invoked once total disability is established under Section 718.204(b)(2)(i)-(iv) nor shifts the burden of proof to employer, we disagree with our dissenting colleague that the decisions in *Beavan v. Bethlehem Mines Corporation*, 741 F.2d 689, 6 BLR 2-101 (4th Cir. 1984) and *Micheli v. Director, OWCP*, 846 F.2d 632, 636, 11 BLR 2-171, 2-180 (10th Cir. 1988) are instructive in this case.

weight to Dr. Forehand's May 2, 2002 study because it conformed to the quality standards set forth in 20 C.F.R. §718.105(c) and was independently validated. Decision and Order at 16. The administrative law judge also determined that the BGSs in the treatment records, which reflected results below "normal," supported a finding of total disability under Section 718.204(b)(2)(ii). *Id.*

However, the administrative law judge did not find, nor do any of the parties allege, that the non-qualifying exercise BGS obtained by Dr. Dahhan was not valid pursuant to Section 718.105(c). In addition, the administrative law judge's reliance upon the BGSs in the treatment records to corroborate Dr. Forehand's qualifying exercise BGS conflicts with the administrative law judge's determination that the studies were entitled to "little weight" because "they were introduced into evidence without any accompanying treatment notes or any explanation for their significance" and do not "contain the information required by [Section] 718.105(c)."<sup>7</sup> *Id.*

Although, as our dissenting colleague emphasizes, the Fourth Circuit held in *Adkins* that the "later is better" principle does not apply when the more recent evidence supports a finding that the miner's condition has improved, the Fourth Circuit also stated in *Adkins* that resolving a conflict in the evidence by "counting heads" is "as hollow as 'later is better'." *Adkins*, 958 F.2d at 51, 16 BLR at 2-65-66. Accordingly, we vacate the administrative law judge's finding that the BGS evidence was sufficient to establish total disability pursuant to Section 718.204(b)(2)(ii). On remand, the administrative law judge must resolve the conflict in the BGS evidence by considering the BGS evidence in its entirety and making a finding as to whether this evidence supports a finding that claimant was permanently and totally disabled as of the date of the hearing.<sup>8</sup> In so doing,

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<sup>7</sup> Moreover, the administrative law judge relies on the treatment studies as supporting a finding of total disability, although the source of the classification of "below reference range" is not stated. Director's Exhibit 34. The relevant concern at 20 C.F.R. §718.204(b)(2)(ii) is whether the reported values are below those set forth in Appendix C to 20 C.F.R. Part 718. All of the resting results in this case are below these values.

<sup>8</sup> The BGS obtained by Dr. Sargent in 1996 was a resting study that produced a PCO<sub>2</sub> of 38 and a PO<sub>2</sub> of 69, the latter of which Dr. Sargent described as at "the lower limits of normal for [claimant's] age." Employer's Exhibit 21. The studies obtained in 1999, 2001, and 2002 that appear in claimant's treatment records were conducted at rest and produced PCO<sub>2</sub>s of 41.8, 44.0, and 39.5 respectively. The PO<sub>2</sub>s values were 67.5, 65.4, and 78.2. Director's Exhibit 34. The study obtained by Dr. Rosenberg on September 30, 2002, and described by him as revealing "normal oxygenation," produced a PCO<sub>2</sub> of 41.1 and a PO<sub>2</sub> of 75.9. Employer's Exhibit 1. The resting and exercise studies that Dr. Rasmussen conducted on April 3, 2003, resulted in PCO<sub>2</sub> values of 39 and PO<sub>2</sub> values of 63 and 61, the latter of which Dr. Rasmussen characterized as showing

the administrative law judge must set forth her findings in detail, including the underlying rationale, in accordance with the APA.<sup>9</sup> *Wojtowicz*, 12 BLR at 1-165.

**Section 718.204(b)(2)(iv)**

Employer next argues that the administrative law judge should have discredited the diagnoses of total disability contained in the opinions of Drs. Forehand and Rasmussen pursuant to Section 718.204(b)(2)(iv), as neither physician had an accurate understanding of the exertional requirements of claimant's usual coal mine job. This contention has merit.

Dr. Forehand stated that claimant's exercise BGS indicates that he has a significant impairment in gas-exchange that renders him "unable to work." Director's Exhibit 11. Dr. Rasmussen reported that the results of claimant's exercise BGS showed an impairment in oxygen transfer, causing a moderate loss of lung function that disables claimant from performing "his last regular coal mine job with its requirement for significant heavy manual labor." Claimant's Exhibit 1. Drs. Kanwal, Sargent, Rosenberg and Dahhan opined that claimant does not have a respiratory or pulmonary impairment and is able to perform his usual coal mine employment. Director's Exhibit 2; Employer's Exhibits 1, 4. The administrative law judge stated that:

Considering all of the medical opinion evidence together, I find that the opinions of Drs. Forehand and Rasmussen that the Claimant is disabled, outweigh the contrary opinions of Drs. Kanwal, Sargent, Rosenberg and Dahhan. The opinions of Drs. Kanwal and Sargent, although supported by

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"minimal resting hypoxia" and "moderate impairment in oxygen transfer with exercise." Claimant's Exhibit 1. A study obtained on September 9, 2002 Dr. Dahhan's resting and exercise studies, performed on September 24, 2003, produced PCO<sub>2</sub> values of 41.9 and 42.6 and PO<sub>2</sub> values of 73.9 and 84.7. Employer's Exhibit 4.

<sup>9</sup> Our dissenting colleague indicates that the unpublished decision of the United States Court of Appeals for the Fourth Circuit in *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, 93 Fed. Appx. 551, 2004 WL 720254 (4th Cir. Apr. 5, 2004), supports the administrative law judge's rationale. We disagree. The court in *Frye* indicated that because the non-qualifying blood gas study that the physician failed to account for did not conform to the quality standards, the administrative law judge acted within his discretion in crediting the physician's opinion. The facts in this case are distinguishable, as there is no allegation that the non-qualifying studies obtained by Drs. Dahhan and Rosenberg are non-conforming.

the evidence available at the time they were formed, are out-of-date. The opinions of Drs. Rosenberg and Dahhan fail to address the qualifying blood gas study obtained by Dr. Forehand. They were not aware that Dr. Rasmussen also obtained qualifying values with exercise. Drs. Forehand and Rasmussen better explained how all of the evidence they developed supported their conclusions. The opinions of Drs. Forehand and Rasmussen are in better accord both with the evidence underlying their opinions, and the overall weight of the medical evidence of record. I find that the preponderance of the medical opinion evidence supports a finding of total disability.

Decision and Order at 18.

In the remand instructions set forth in the Board's most recent Decision and Order, the Board directed the administrative law judge to "consider all of the relevant evidence" and make "a specific finding regarding the exertional requirements of claimant's usual coal mine employment. [*L.K.*] v. *Double M Coal Co., Inc.*, BRB No. 05-0562 BLA, slip op. at 7 (Mar. 16, 2006)(unpub.). The evidence of record concerning this issue consists of claimant's written descriptions of his last coal mine job as a shuttle car operator. In conjunction with his 1995 claim, claimant indicated that he worked from 1973 to 1995 on the shuttle car, which hauls coal from the miner to the belt feeder, and that his job required sitting for eight hours per day. Director's Exhibit 2 at Director's Exhibit 8. In conjunction with his 2002 claim, claimant stated that his last coal mine employment as a shuttle car operator required him to sit for eight hours per day. Claimant also indicated that he would "set on the machine and work levers – if we were broke down, I had to rock dust, shovel, work on the machinery." Director's Exhibit 5.

The administrative law judge summarized this evidence and stated:

I find that rock dusting, shoveling and working on machinery, were all requirements of [claimant's] job as a shuttle operator, and that the exertion required by all of those tasks exceeded the sedentary work of operating the shuttle.

Decision and Order at 3. With respect to whether the medical opinion evidence of record was sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge determined that the opinions in which Drs. Forehand and Rasmussen indicated that claimant could not perform his usual coal mine employment outweighed the contrary opinions of Drs. Rosenberg and Dahhan. The administrative law judge acknowledged that Dr. Forehand did not comment on the degree of exertion required by claimant's usual coal mine employment and that Dr. Rasmussen's description of heavy manual labor appeared to overstate the exertional requirements of claimant's job as a shuttle driver, "even taking into account the other tasks besides operating the shuttle

I have found he was required to perform.” Decision and Order at 18-19; Director’s Exhibit 11; Claimant’s Exhibit 1. The administrative law judge nevertheless credited the diagnoses of Dr. Forehand and Dr. Rasmussen of a totally disabling respiratory impairment because they were based upon qualifying BGSs. *Id.*

As employer indicates, because the physicians of record did not have an accurate understanding of the exertional requirements of claimant’s last coal mine work, the administrative law judge was required to compare the physicians’ conclusions regarding the extent, if any, of claimant’s impairment to the exertional requirements of his work as a shuttle car operator to determine whether claimant is totally disabled from performing that job. *See McMath*, 12 BLR at 1-6; *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1985)(*en banc*), *aff’d on recon.*, 9 BLR 1-104 (1986) (*en banc*); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991). The administrative law judge determined that there was no need for her to perform this comparison, however, as “the qualifying arterial blood gas studies support the conclusion that [claimant] was disabled without regard to the exertion required by his job as a shuttle car operator.” Decision and Order at 19. In so doing, the administrative law judge found, in essence, that the medical opinions regarding the extent of claimant’s impairment were irrelevant.

As an initial matter, in light of our holding vacating the administrative law judge’s finding that the BGSs of record were sufficient to establish total disability at Section 718.204(b)(2)(ii), we must also vacate the administrative law judge’s finding under Section 718.204(b)(2)(iv). In addition, as indicated previously, the administrative law judge’s determination, that the opinions in which Drs. Rosenberg and Dahhan stated that claimant is not suffering from a respiratory impairment were of little value because Drs. Rosenberg and Dahhan did not comment upon the qualifying exercise BGSs obtained by Drs. Forehand and Rasmussen, does not constitute a valid rationale for discrediting their opinions. *See McMath*, 12 BLR at 1-6; *Shelosky*, 8 BLR at 1-303; *Merashoff*, 8 BLR at 1-105; *Casey*, 7 BLR at 1-873; *Bates*, 7 BLR at 1-113; *Strunk*, 7 BLR at 1-49; *Winters*, 6 BLR at 1-877. Lastly, contrary to the administrative law judge’s finding, the assessment of claimant’s ability to perform his usual coal mine work in light of the exertional requirements of that work may still be required, even when there are qualifying objective studies in the record. *See Lane*, 105 F.3d at 172, 21 BLR at 2-45-46; *Eagle*, 943 F.2d at 511, 15 BLR at 2-203-05; *McMath*, 12 BLR at 1-9; Decision and Order at 19. We vacate, therefore, the administrative law judge’s determination that the medical opinion evidence was sufficient to establish total disability under Section 718.204(b)(2)(iv).

On remand, the administrative law judge must reconsider the medical opinions of Drs. Rosenberg, Dahhan, Rasmussen, and Forehand regarding the extent to which

claimant is suffering from a respiratory or pulmonary impairment. The administrative law judge must render a finding as to the probative value of each opinion based upon “the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.”<sup>10</sup> *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Hicks*, 138 F.3d at 533, 21 BLR at 2-335.

Once the administrative law judge has assessed the merit of the respective physicians’ opinions regarding the existence of an impairment, she must compare the findings she has credited to the exertional requirements of claimant’s usual coal mine work.<sup>11</sup> The administrative law judge should be mindful of her determination that claimant’s job as a shuttle car operator involved both sedentary and more strenuous work and the fact that the qualifying BGSs in this case were obtained while claimant was exercising and the last exercise blood gas test was non-qualifying. The administrative law judge must also set forth her findings in detail, including the underlying rationale, as required by the APA. *Wojtowicz*, 12 BLR 1-165.

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<sup>10</sup> It is not clear from the record that Dr. Rosenberg was aware of the specific values claimant produced on the qualifying exercise BGS that he performed for Dr. Forehand, but failed to comment upon them. Dr. Rosenberg’s summary of the medical evidence that he reviewed includes Dr. Forehand’s report. Employer’s Exhibit 1. Dr. Forehand indicated in his report, recorded on Form CM-988, that the exercise BGS performed by claimant showed hypoxemia, a conclusion acknowledged by Dr. Rosenberg, but Dr. Forehand did not set forth the values produced on the study. Director’s Exhibit 11; Employer’s Exhibit 1.

<sup>11</sup> In her dissent, our colleague cites several circuit court decisions in support of the proposition that a physician’s knowledge of the exertional requirements of the miner’s coal mine work is relevant only when the physician states that a miner with a respiratory impairment is not totally disabled, or when a physician states that a miner whose objective studies are non-qualifying is totally disabled. These cases involve the factual situations described, but the courts did not hold that these are the only circumstances under which a doctor’s understanding of the exertional requirements of the miner’s job is relevant. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *see also Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The extent to which the physicians’ opinions regarding the existence and extent of any impairment are reasoned and documented is particularly significant in a case, such as the present one, in which the objective evidence is conflicting.

### Weighing of All Relevant Evidence

Upon weighing the evidence relevant to the issue of total disability together, the administrative law judge determined that it was sufficient to establish total disability at Section 718.204(b)(2), stating:

...[W]eighing like and unlike evidence together, the preponderance of both the qualifying blood gas study evidence, and the medical opinion evidence, support[s] a finding of total disability. Although the pulmonary function tests did not result in qualifying values, I note that they do not contradict the blood gas studies, as they measure a different aspect of lung function. Moreover, I find that the qualifying arterial blood gas studies support the conclusion that [claimant] was disabled without regard to the exertion required by his job as a shuttle car operator. I find that [claimant] has established that he is totally disabled by a pulmonary or respiratory impairment based on the exercise blood gas studies, and the medical opinion evidence.

Decision and Order at 18-19. Employer argues that the administrative law judge's finding must be vacated because the administrative law judge's consideration of the BGS and medical opinion evidence was improper. We agree. In light of our holdings vacating the administrative law judge's finding that claimant established total disability under Section 718.204(b)(2)(ii) and (iv), we must also vacate the administrative law judge's finding that the relevant evidence, when considered together, demonstrates that claimant is totally disabled pursuant to Section 718.204(b)(2). On remand, after the administrative law judge renders findings under Section 718.204(b)(2)(ii) and (iv), she must weigh all of the relevant evidence together to determine if the evidence supportive of a finding of total disability outweighs the contrary probative evidence of record. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198. The presence in the record of qualifying objective studies does not automatically establish that the evidence of record, as a whole, is supportive of a finding of total disability. The administrative law judge must set forth her findings in detail, including the underlying rationale, as required by the APA. *Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge reaches the issue of total disability causation pursuant to Section 718.204(c) on remand, the administrative law judge must reconsider whether claimant has established that he is totally disabled due to pneumoconiosis in light of her reweighing of the medical opinions under Sections 718.202(a)(4) and 718.204(b)(2).

### Date of Onset

The administrative law judge found that because the first qualifying BGS was obtained on May 2, 2002 by Dr. Forehand, claimant was already totally disabled by that date. Decision and Order at 20. The administrative law judge further determined that, in light of the fact that there was no credible evidence demonstrating that claimant was not disabled subsequent to that date, claimant was entitled to benefits as of January 1, 2002 - the first day of the month in which he filed his most recent claim. Employer argues that the administrative law judge erred in finding that claimant was entitled to benefits any earlier than May 1, 2002.

In general, benefits are payable beginning from the date upon which the miner became totally disabled due to pneumoconiosis. If the administrative law judge cannot ascertain this date, then the miner is entitled to benefits as of his filing date, unless credited medical evidence establishes that claimant was not totally disabled at some point subsequent to his filing date. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In the present case, the administrative law judge rationally found that the existence of a qualifying exercise BGS dated May 2, 2002, did not conclusively prove that claimant became totally disabled on that date. *See Merashoff*, 8 BLR at 1-105; *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985). However, because we have vacated the administrative law judge's discrediting of medical opinions indicating that claimant was not totally disabled at some point subsequent to the date of filing of his January 7, 2002 claim, we must also vacate the administrative law judge's designation of January 1, 2002, as the date from which claimant is entitled to benefits. *Edmiston*, 14 BLR at 1-65; *see also Gardner*, 12 BLR at 1-184; *Lykins*, 12 BLR at 1-181. If the administrative law judge determines on remand that claimant has established entitlement to benefits, she must reconsider her identification of the date from which benefits are payable.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

I concur.

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JUDITH S. BOGGS  
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to vacate the award of benefits in this case. I would affirm the administrative law judge's decision in all respects. Specifically, I disagree with the majority's opinion that the administrative law judge erred in finding the exercise blood gas study (BGS) evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii) and that she improperly discredited the medical opinions of Drs. Dahhan and Rosenberg on the existence of pneumoconiosis and total disability pursuant to 20 C.F.R §§718.202(a)(4) and 718.202(b)(2)(iv). Neither reason nor law supports the majority's determinations.

The majority asserts that the administrative law judge erred in finding that the weight of the BGS evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(ii), but the majority does not identify any specific error in the administrative law judge's consideration of the blood gas study evidence. The administrative law judge clearly stated that the weight to the BGS evidence established total disability, since two of the three exercise studies resulted in qualifying values and the only exercise study to be independently validated was one of those two qualifying studies. The majority's attempt to disparage claimant's evidence by characterizing it as a "mere preponderance of qualifying exercise studies" cannot undermine the validity of the administrative law judge's finding that it is sufficient to establish total disability at Section 71.204(b)(2)(ii). The majority cannot hold otherwise.

The majority misreads the administrative law judge's decision to find that the administrative law judge relied upon the BGS evidence in the treatment records to corroborate Dr. Forehand's qualifying exercise study. A glance at the administrative law judge's decision belies this assertion. The administrative law judge stated:

Two out of three of the recent exercise blood gas studies resulted in qualifying values. I give the greatest weight to Dr. Forehand's May 2002 study, which contains all of the information required by 20 C.F.R. §718.105(c), and has been independently validated. The studies taken during treatment, which I infer to be resting studies, did not meet the requirements of the regulation, and did not result in qualifying values. Nonetheless, as they showed results below the reference range for normal, they also support an inference that Claimant has an impairment in oxygen transfer. I find that the preponderance of the arterial blood gas study evidence supports a finding of disability.

Decision and Order at 16. It is clear that the administrative law judge found that the weight of the exercise BGS evidence established total disability at Section 718.204(b)(2)(ii) and that she stated, as an observation, that the studies during treatment "support an inference that the Claimant has an impairment in oxygen transfer." It is a plain misreading of the record to suggest that the administrative law judge relied on these studies to find that the BGS evidence established total disability.

The majority directs the administrative law judge on remand to resolve the conflict in the BGS evidence by considering it in its entirety, citing at rest and exercise BGSs performed between 1996 and 2003. This direction is an invitation to error in two different ways. The majority's statement could reasonably be interpreted as an indication the administrative law judge should weigh the at rest BGS results against the exercise study results. That would be wrong. The Fourth Circuit has explained that these are "separate tests entitled to independent weight..." *Hale v. Island Creek Coal Co.*, 14 F.3d 594 (Table), 1993 WL 25594 (4th Cir. Dec. 20, 1993) (unpub.). Accordingly, the Fourth Circuit has held that an administrative law judge erred in finding that total disability was not established because he weighed two non-qualifying at rest studies against a qualifying exercise study. *Kidwell v. Cedar Coal Co.*, 110 F.3d 59, 1997 WL 158113 (4th Cir. Apr. 4, 1997)(unpub.).

The majority also appears to suggest that the administrative law judge should consider BGS evidence dating back to 1996, in the record from earlier proceedings. This is puzzling because earlier in its decision the majority stated the administrative law judge's resolution of the conflict in the BGS evidence had not conformed to two precepts, one of which was that the BGS evidence must be considered in light of its relevance to claimant's condition at the time of the hearing. The hearing in this case was held in 2003

and the administrative law judge properly considered the exercise BGS evidence obtained in 2002 and in 2003. The majority does not identify any exercise BGS evidence the administrative law judge failed to consider. In sum, the majority's contention that the administrative law judge violated the first precept is specious.

Similarly devoid of merit is the majority's contention that the administrative law judge violated its other precept, *i.e.*, that she failed to require claimant to bear the burden of proving total disability at Section 718.204(b)(2)(ii) by a preponderance of the evidence. The majority does not even attempt to substantiate its charge. The majority does not dispute that the administrative law judge properly credited the opinions of Drs. Forehand and Rasmussen, each of whom had relied in part upon his qualifying exercise study. The majority holds, however, that the administrative law judge improperly discounted the opinions of Drs. Dahhan and Rosenberg because neither discussed Dr. Forehand's qualifying exercise study although both doctors were aware of it. Analysis of the record in light of the regulations and caselaw reveals that the administrative law judge was entirely correct.

The regulation at 20 C.F.R. §718.204(b)(2) provides that “[i]n the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i)(ii), (iii), or (iv) of this section *shall* establish a miner's total disability.” 20 C.F.R. §718.204(b)(2) (emphasis supplied). Under 20 C.F.R. §718.204(b)(2)(ii), the standards to establish total disability by blood gas tests are set forth in Appendix C to Part 718. The preamble to Appendix C to 20 C.F.R. Part 718, which sets forth the table values used to determine whether a BGS produces qualifying values under Section 718.204(b)(2)(ii), provides that “[a] miner who meets the following medical specifications *shall* be found to be totally disabled in the absence of rebutting evidence, if the values specified in one of the following tables are met[.]” 20 C.F.R. Part 718, Appendix C (emphasis supplied). The import of this language is that an administrative law judge may rely upon qualifying BGSs to find total disability established pursuant to Section 718.204(b)(2), provided that there is no contrary probative evidence or rebutting evidence.

In the present case, the administrative law judge acted rationally in declining to treat the opinions of Drs. Rosenberg and Dahhan as contrary probative evidence, or rebutting evidence, under Section 718.204(b)(2)(ii) and Appendix C, because neither physician discussed the qualifying BGS results obtained by Dr. Forehand. Although they were unaware of Dr. Rasmussen's study, both doctors had reviewed Dr. Forehand's report and both omitted any reference to his qualifying exercise BGS. Decision and Order at 18. The administrative law judge noted that in Dr. Rosenberg's discussion of the relevant medical evidence, he referenced a non-qualifying exercise BGS, which had been performed seven years earlier, whereas he overlooked Dr. Forehand's qualifying

study performed four months earlier.<sup>12</sup> *Id.* The administrative law judge found Dr. Dahhan's report similarly unenlightening because he did not discount Dr. Forehand's results or attempt to explain why the results obtained in his exercise BGS were different. *Id.*

It is noteworthy that the majority does not attempt to argue that the administrative law judge erred in failing to find that the opinions of Drs. Dahhan and Rosenberg constitute contrary probative evidence at Section 718.204(b)(2)(ii), which could undermine the persuasive force of the qualifying exercise study evidence. In order to constitute contrary probative evidence under Section 718.204(b)(2), the evidence must be seen "as being in direct offset or 'contrary' to the findings of [the qualifying evidence]." *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1041, 17 BLR 2-16, 2-22 (6th Cir. 1993). In *Tussey*, the pulmonary function evidence was qualifying but the blood gas evidence was not. Because the different studies measure different kinds of impairment, the court held that the blood gas evidence was not "contrary" to the findings of the pulmonary function evidence. However, medical opinion evidence has been held to be "contrary probative evidence" to qualifying blood gas evidence when the medical opinion explains in detail the medical reasons for considering the blood gas tests to be inaccurate. *See Lane v. Union Carbide Corporation*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Essentially the same rationale underlies the Fourth Circuit's decision in *Beavan v. Bethlehem Mines Corporation*, 741 F.2d 689, 6 BLR 2-101 (4th Cir 1984). In *Beavan*, the Board had reversed an administrative law judge's decision awarding benefits and the court reversed the Board. The court declared that where the presumption of total disability due to pneumoconiosis arising out of coal mine employment was invoked by blood gas evidence at Section 727.203(a)(3), employer's medical opinions stating that

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<sup>12</sup> The majority attempts to excuse Dr. Rosenberg's omission, stating: "It is not clear from the record that Dr. Rosenberg was aware of the specific values claimant produced on the qualifying blood gas study..." performed by Dr. Forehand. Slip op. at 12 n.9. The doctor reported "exercise induced hypoxemia" in an arterial blood gas study and that this shows that "a significant respiratory impairment of a gas exchange nature exists. Insufficient oxygen-transfer capacity remains to return to last coal mine job. Unable to work. Totally and permanently disabled." Director's Exhibit 11 at 3, 4. Thus, Dr. Forehand made clear the significance of the qualifying exercise study.

I note that the majority does not try to excuse Dr. Dahhan's omission of any discussion of Dr. Forehand's exercise study since Dr. Dahhan acknowledged the specific results obtained. Employer's Exhibit 4. It seems unlikely that Dr. Rosenberg was not provided the same material as Dr. Dahhan.

claimant was not disabled could not rebut the presumption of total disability at Section 727.203(b)(2), because neither doctor had discussed the BGS which “independently established disability.” *Id.* at 692, 6 BLR at 2-109. The court also held that the third medical opinion in the record could not rebut the presumption of total disability because the doctor “only speculates about the inconsistencies in the objective evidence and the cause of the abnormal blood gas results.” *Id.*; accord *Micheli v. Director, OWCP*, 846 F.2d 632, 636, 11 BLR 2-171, 2-180 (10th Cir. 1988). In *Micheli*, the Tenth Circuit expressed total agreement with the Fourth Circuit’s decision in *Beavan*, declaring, “an opinion which fails to account for contrary objective evidence is not sufficiently reasoned to constitute substantial evidence.” 846 F.2d at 636, 11 BLR at 2-180. This analysis is the same as that used to determine whether a medical opinion constitutes “contrary probative evidence” at Section 718.204(b)(2), that is, an opinion that fails to account for the qualifying objective evidence is not “in direct offset or ‘contary’ to the findings of [the qualifying objective evidence].” *Tussey*, 982 F.2d at 1041, 17 BLR at 2-22. Hence, review of the relevant law demonstrates that the administrative law judge was entirely correct in discounting the opinions of Drs. Dahhan and Rosenberg for failing to discuss the qualifying BGS evidence. Although the majority implicitly acknowledges that these opinions cannot constitute contrary probative rebutting evidence under Section 718.204(b)(2) and Appendix C, the majority irrationally insists that these opinions should be considered to detract from the persuasive force of the BGS evidence.

Citing a few old Board decisions, without any discussion of their possible relevance, the majority asserts that the administrative law judge cannot discredit the opinions of Drs. Dahhan and Rosenberg for failing to discuss Dr. Forehand’s qualifying study because she did not discount the opinions of Drs. Forehand and Rasmussen for failing to discuss Dr. Dahhan’s non-qualifying exercise study (of which they were unaware). The majority contends that the administrative law judge selectively analyzed the evidence. Again, review of the relevant case law belies this assertion. As discussed *supra*, the administrative law judge properly discounted the opinions of Drs. Dahhan and Rosenberg for failing to discuss the blood gas evidence which established total disability at Section 718.204(b)(2)(ii). See *Beavan*, 741 F.2d at 692, 6 BLR at 2-109; *Tussey*, 982 F.2d at 1041, 17 BLR at 2-22. She did not err in refusing to similarly discount the opinions of Drs. Forehand and Rasmussen for failing to discuss Dr. Dahhan’s non-qualifying exercise study. That study had been outweighed by the two qualifying studies. Because it could not be considered a reliable indicator of claimant’s condition, it was not probative evidence. Hence, omission of the discussion of such evidence cannot undermine the credibility of the doctors’ opinions.

This analysis is supported by the Fourth Circuit’s rejection of a similar argument in *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, 93 Fed. Appx. 551, 2004 WL 720254 (4th Cir. Apr. 5, 2004). The employer in *Frye* contended that the administrative law judge erred in crediting Dr. Rasmussen’s opinion because the doctor had not

considered a 1996 non-qualifying blood gas study. The court declared that because the 1996 non-qualifying study did not conform to the regulations, the administrative law judge had properly found it less probative than the 1995 qualifying blood gas study. The court held that it was entirely appropriate for the administrative law judge to credit Dr. Rasmussen's report. The words of the *Frye* court are equally applicable to the case at bar: "The failure of a physician to consider or reference a non-probative medical test does not mean his report was poorly reasoned." *Frye*, at 93 Fed. Appx. at 561.

The majority attempts to evade the force of *Frye* by stating that the case at bar does not involve non-conforming studies. This is distinction without a difference. The relevant point is that when a non-qualifying study does not constitute probative evidence, a doctor's omission of it from discussion does not render his medical opinion defective. The majority cites no authority for its contrary position because there is no such authority. In the instant case, Dr. Dahhan's non-qualifying study does not constitute probative evidence of claimant's condition because it was outweighed by two qualifying studies, one of which, unlike Dr. Dahhan's study, had been independently validated. In sum, both reason and law confirm the administrative law judge's wisdom in crediting the disability opinions of Drs. Forehand and Rasmussen, and in discrediting the opinions in which Drs. Dahhan and Rosenberg found no total disability, while choosing to ignore the blood gas study evidence of total disability.

The majority repeats today the mistake the Board made in *Beavan*, overruling an administrative law judge's determination to discredit medical opinions that do not address BGS evidence establishing total disability. Based upon that error, the majority instructs the administrative law judge that she must determine the exertional requirements of claimant's usual coal mine work in order to find whether claimant has established total disability at Section 718.204(b)(2). It is true that the administrative law judge did not determine the exertional requirements of claimant's usual coal mine employment and that she acknowledged that neither the opinion of Dr. Forehand nor of Dr. Rasmussen reflected a good understanding of claimant's work. The administrative law judge explained that "the qualifying arterial blood gas studies support the conclusion that the Claimant was disabled without regard to the exertion required by his job as a shuttle car operator." Decision and Order at 19. Again, the administrative law judge is correct. The majority holds that claimant is required to produce medical opinion evidence finding him unable to perform his usual coal mine employment, even if the blood gas study evidence establishes total disability at Section 718.204(b)(2)(ii). The regulations make clear that this holding is flatly wrong. Section 718.204(b)(2)(iv) provides:

*Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on*

medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv) (emphasis added). In other words, claimant is required to produce medical opinion evidence of total disability only if he is unable to establish total disability with qualifying pulmonary function evidence at Section 718.204(b)(2)(i), qualifying blood gas evidence at section 718.204(b)(2)(ii), or evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii).

In holding that claimant is required to provide medical opinion evidence, even if he has established total disability at Section 718.204(b)(2)(ii), the majority overlooks the regulation which clearly contradicts this holding and cites, as authority, three irrelevant cases: *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). In *Lane*, the court considered the medical opinion evidence after it held that claimant's one qualifying exercise BGS failed to establish total disability at Section 718.204(b)(2)(ii), because the administrative law judge had correctly determined that employer had submitted contrary probative evidence in the form of a subsequent, non-qualifying exercise study and two medical opinions invalidating the qualifying study. In *Eagle*, the only issue raised on appeal was whether claimant had established total disability by medical opinion evidence pursuant to Section 718.204(c). Likewise, in *McMath*, the issue was whether the medical opinion evidence was sufficient to invoke the interim presumption at Section 727.203(a)(4). There is no authority for the proposition declared here by the majority that claimant cannot prove entitlement without medical opinion evidence of total disability.

Without reference to any relevant authority, the majority insists that the administrative law judge may not credit a physician's opinion finding claimant totally disabled, based upon qualifying studies, unless the physician knows the exertional requirements of claimant's last coal mine employment. The relevant cases on this issue identify only two situations in which knowledge of exertional requirements is relevant: when a physician opines that a miner with a respiratory impairment is not totally disabled, and when a physician opines that a miner, whose objective studies are non-qualifying, is totally disabled. *See Lane*, 105 F.3d at 172, 21 BLR at 2-45-46; *Eagle*, 943 F.2d at 511, 15 BLR at 2-203-05; *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *see also Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Thus, the administrative law judge properly credited medical opinion evidence of total disability based upon BGS evidence establishing total disability at Section 718.204(b)(2)(ii).

In directing the administrative law judge to determine the exertional requirements of claimant usual coal mine employment, the majority again invites the administrative law judge to err in two different ways. The majority instructs:

The administrative law judge should be mindful of her determination that claimant's job as a shuttle car operator involved both sedentary and more strenuous work and the fact that the qualifying BGSs in this case were obtained while claimant was exercising and the last exercise blood gas test was non-qualifying.

Slip op. at 15. In *Eagle*, the Fourth Circuit made clear that in determining the exertional requirements of claimant's usual coal mine employment, the administrative law judge should ascertain the exertional requirements of the most difficult job that claimant performed during the previous year. *Eagle*, 943 F.2d at 512 n.4, 15 BLR at 2-205 n.4. The administrative law judge cannot base a finding of exertional requirements on the less demanding aspects of a job. *Id.*

In addition, in directing the administrative law judge to consider that the last exercise BGS was non-qualifying, the majority instructs the administrative law judge to consider unreliable evidence of claimant's condition. As the Fourth Circuit explained in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), the most recent evidence is not the most reliable evidence of claimant's condition if it indicates that the miner has improved:

Either the earlier or the later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier. The reliability of irreconcilable items of evidence must therefore be evaluated without reference to their chronological relationship.

*Adkins*, 958 F.2d at 52, 16 BLR at 2-64-65. The administrative law judge properly resolved the conflict in finding that the weight of the exercise BGS evidence was qualifying. For the administrative law judge to rely on the most recent exercise study, notwithstanding the weight of the evidence, would be clear error. *Id.*

Lastly, I address the majority's determination to vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section 718.202(a). The administrative law judge found pneumoconiosis established based upon the weight of the medical opinion evidence of record – five of the six medical opinions having diagnosed pneumoconiosis – and after considering the weight of the x-ray evidence. The majority faults the administrative law judge's decision in two respects. The majority considers that the administrative law judge selectively analyzed the medical opinion evidence because she discredited the opinions of Drs. Dahhan and Rosenberg for

failing to discuss Dr. Forehand's qualifying exercise study, but she did not discount the opinions of Drs. Forehand and Rasmussen for failing to discuss Dr. Dahhan's non-qualifying exercise study. As discussed *supra*, the Fourth Circuit explained in *Frey* that an administrative law judge may properly credit a physician's opinion, which omits discussion of non-probative evidence. Since Dr. Dahhan's study was properly held to be outweighed by the qualifying exercise studies, it could not be deemed probative of claimant's condition.

Similarly baseless is the majority's other criticism of the administrative law judge's finding that the existence of pneumoconiosis was established. The majority charges that the administrative law judge improperly treated the positive x-ray interpretations of Drs. Rosenberg, Sargent, and Kanwal as giving additional credibility to the diagnoses of legal pneumoconiosis contained in the opinions of Drs. Forehand and Rasmussen. The majority hold that the administrative law judge disobeyed the Fourth Circuit's teaching in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that:

An administrative law judge cannot credit a physician's diagnosis of pneumoconiosis under Section 718.202(a)(4) if the sole basis of the diagnosis is a positive x-ray reading that is contrary to the administrative law judge's finding under Section 718.202(a)(1).

Slip op. at 8, citing *Compton*, 211 F.3d at 211-12, 22 BLR at 2-175. Review of the administrative law judge's decision establishes that this criticism is unfounded. The administrative law judge stated:

After weighing all of the medical opinions of record, I resolve the conflict in the evidence by according the greatest probative weight to the opinions of Drs. Forehand and Rasmussen. Although neither has the specialist qualifications possessed by Dr. Dahhan, I find their reasoning and explanations in support of their conclusions more complete and thorough than that provided by Dr. Dahhan. Drs. Forehand and Rasmussen better explained how all of the evidence they developed supported their conclusions. I also find the opinions of Drs. Forehand and Rasmussen to be in better accord both with the evidence underlying their opinions, and the overall weight of the medical evidence of record. Further, additional credibility is lent to their findings that the Claimant has pneumoconiosis by the positive diagnoses of Drs. Rosenberg, Sargent and Kanwal. All of the physicians who examined the Claimant diagnosed him to have pneumoconiosis except Dr. Dahhan. Thus the weight of the medical opinion evidence supports a finding of pneumoconiosis.

In addition, I must also weigh the x-ray and medical opinion evidence together. As the regulations allow, I conclude that the well reasoned and documented medical opinions outweigh the negative x-ray readings, as the former are based on thorough clinical evaluations and objective testing. Thus I find that the Claimant has established that he has pneumoconiosis within the meaning of the Act and the regulations based on the medical opinion evidence.

Decision and Order at 14-15. First, it is readily apparent that the portion of *Compton* referenced by the majority has no bearing on the case at bar because the positive x-ray was not the sole basis of the pneumoconiosis diagnoses at Section 718.202(a)(4) by Drs. Forehand and Rasmussen. Second, the administrative law judge's analysis shows that she followed the Fourth Circuit's teaching in *Compton*, in considering that the x-ray evidence was not entirely irrelevant to the medical opinion evidence. Accordingly, the administrative law judge properly determined that claimant established the existence of pneumoconiosis at Section 718.202(a).

In sum, a review of the record, in light of the applicable law, reveals that the majority's allegations of error are baseless. Substantial evidence supports the administrative law judge's determination that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability pursuant to Section 718.204(b)(2) based on the BGS evidence and the medical opinion evidence. Decision and Order at 18-19. Because the administrative law judge's determinations are rational and supported by substantial evidence, I would affirm the administrative law judge's finding that claimant established both the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b)(2). Consequently, I would also affirm the administrative law judge's finding that the opinions in which Drs. Forehand and Rasmussen diagnosed a totally disabling impairment and attributed it to coal dust exposure were sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, I would affirm the administrative law judge's decision awarding benefits and the date of onset for commencement of benefits.

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REGINA C. McGRANERY  
Administrative Appeals Judge