U.S. Department of Labor

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

BRB Nos. 22-0024 BLA
and 22-0024 BLA-A

JEWELL MULLINS o/b/o GERALD B. KINCAID	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 11/17/2023
Employer-Respondent Cross-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

Before: BOGGS, BUZZARD, and ROLFE, Administrative Appeals Judges.

BUZZARD and ROLFE, Administrative Appeals Judges:

Claimant[1] appeals and Employer cross-appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Denying Benefits (2019-BLA-05998) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a subsequent claim filed on April 15, 2011.[2]

In a February 2, 2017 Decision and Order Denying Benefits, ALJ Carrie Bland credited the Miner with forty-five years of qualifying coal mine employment but found he failed to establish he had a totally disabling pulmonary or respiratory impairment, and thus failed to establish a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.204(b)(2), 725.309. Consequently, she denied benefits. On appeal, the Benefits Review Board affirmed ALJ Bland's findings that the Miner failed to establish total disability and a change in an applicable condition of entitlement, and thus affirmed the denial of benefits. *Kincaid v. Island Creek Coal Co.*, BRB No. 17-0255 BLA (Apr. 9,

[1] Claimant is the daughter of the Miner. On March 29, 2022, Claimant's counsel notified the Benefits Review Board that the Miner died on January 8, 2022, and moved to substitute the Miner's daughter, the executor of his estate, as a party in this case. Motion to Substitute Party (Mar. 29, 2022). The Board granted Claimant's motion on May 17, 2022. Order (May 17, 2022).

[2] The Miner filed three prior claims for benefits, all of which were denied. Director's Exhibits 1-3. The district director denied his most recent prior claim, filed on February 21, 2008, determining he established pneumoconiosis arising out of coal mine employment but failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3 at 5-6.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner failed to establish total disability in his prior claim, Claimant had to submit new evidence establishing this element to obtain a review of the subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

2018) (unpub.). On September 17, 2018, the Miner timely requested modification of that denial and submitted additional evidence.[4]

In a September 24, 2021 Decision and Order Denying Benefits, the subject of the current appeal, ALJ Ramaley (the ALJ) credited the Miner with forty-five years of underground coal mine employment. After determining that granting modification would render justice under the Act, the ALJ found the Miner failed to establish total disability and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[5] 30 U.S.C. §921(c)(4) (2018). 20 C.F.R. §§718.204(b)(2), 718.305. Therefore, he concluded the Miner did not establish a basis for modification and denied benefits. 20 C.F.R. §718.310.

On appeal, Claimant contends the ALJ erred in finding the Miner failed to establish total disability. Employer responds in support of the denial of benefits. On cross-appeal, Employer argues the ALJ erred in failing to consider Dr. Zaldivar's August 6, 2020 deposition testimony.[6] Claimant responds, urging rejection of Employer's arguments. The Director, Office of Workers' Compensation Programs, has not filed a response brief in either appeal.

[4] When evaluating a request for modification, the ALJ "must consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact." 20 C.F.R. §725.310(c). Because the Miner did not submit additional evidence in the time period allowed, the district director interpreted his request for modification as a contention that the Board's April 9, 2018 Decision and Order was based on a mistake in a determination of fact rather than a change in condition. 20 C.F.R. §725.310(c); Director's Exhibit 90. At the hearing, ALJ Ramaley (the ALJ) noted the Miner alleged both a change in condition and a mistake of fact in this request for modification and accepted additional evidence from both parties. Hearing Transcript at 6-8.

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

[6] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had forty-five years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Modification and Justice Under the Act

Before considering the merits of the Miner's request for modification, the ALJ stated he was required to first determine whether granting modification would render justice under the Act. Decision and Order at 6 (citing *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007) (*Sharpe I*)). However, while *Sharpe I* held an ALJ must consider the question before ultimately granting *the relief* requested in a modification petition, *see Sharpe I*, 495 F.3d at 131-33, nothing in *Sharpe I* establishes an ALJ may make the determination at the outset, before *considering the merits* of the petition. While it might make sense to make a threshold determination in cases of obvious bad faith, it does not follow that a threshold determination is appropriate in cases where there is no indication of improper motive. Rather, because accuracy is a relevant factor, it follows that an ALJ must consider the evidence and render findings on the merits to properly assess whether modification is warranted. *See* 65 Fed. Reg. 79,920, 79,975 (Dec. 20, 2000) (rejecting limits on modification because Congress's overriding concern in enacting the Act was to ensure miners who are totally disabled due to pneumoconiosis arising out of coal mine employment receive compensation); *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 329-30 (4th Cir. 2012) (The statute demonstrates a "preference for accuracy over finality," although finality can carry a great deal of weight where the party requesting modification acts with a patently improper motive. (quoting *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 541 (4th Cir. 2002))). Moreover, as previously discussed, *see supra* note 4, the controlling regulation states the ALJ "must consider" the merits of a modification request, i.e., whether the evidence demonstrates a change in condition or a mistake in a determination of fact. 20 C.F.R. §725.310(c). An ALJ who simply dismisses the modification request as a threshold matter without considering the accuracy of the underlying decision does not satisfy this provision.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

Invocation of the Section 411(c)(4) Presumption: Total Disability

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based upon pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found none of the pulmonary function studies of record established total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 20-21. We affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Arterial Blood Gas Studies

At issue in this claim are three arterial blood gas studies, dated November 29, 2011, March 21, 2012, and November 6, 2012. Decision and Order at 10, 20; Director's Exhibits 14 at 3; 63 at 19, 136. The November 29, 2011 study, administered by Dr. Rasmussen, produced non-qualifying values at rest but qualifying values during exercise.[8] Director's Exhibit 14. In contrast, the March 21, 2012 study, administered by Dr. Zaldivar, produced non-qualifying values both at rest and during exercise, and the November 6, 2012 study, administered by Dr. Castle only at rest, produced non-qualifying values. *Id.*

When the claim was initially before ALJ Bland, she noted Dr. Rasmussen's critiques of Dr. Zaldivar's non-qualifying exercise study as well as Dr. Zaldivar's responses to those critiques.[9] Director's Exhibit 76 at 31-32. She further observed that, despite Dr.

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

[9] Dr. Rasmussen asserted his November 29, 2011 arterial blood gas exercise study better reflected the Miner's ability to perform his last coal mining job than Dr. Zaldivar's March 21, 2012 study because the Miner exercised harder in his own study, based on the Miner's oxygen consumption, heart rate, and changes in bicarbonate levels. Director's Exhibit 62 at 55-61. Dr. Zaldivar rejected Dr. Rasmussen's criticisms, asserting the Miner's oxygen consumption was actually higher during the March 21, 2012 study, and

Rasmussen's criticisms, no physician suggested the March 21, 2012 study is invalid. *Id.* at 34. Thus, declining to give reduced weight to the March 21, 2012 study and noting "only the exercise study performed by Dr. Rasmussen produced qualifying results," whereas the remaining studies were all non-qualifying, ALJ Bland concluded the arterial blood gas testing did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.* at 30, 34-35.

On modification, the ALJ considered the deposition of Dr. Cohen, the medical report and deposition of Dr. Spagnolo, and the supplemental report of Dr. Zaldivar. Decision and Order at 14-17, 20-22. Dr. Cohen opined Dr. Rasmussen's November 29, 2011 exercise study better reflected the Miner's ability to perform "heavier work" and more accurately represented his ability to exchange gas with a heavy workload than did the resting studies or Dr. Zaldivar's March 21, 2012 exercise study.[10] Claimant's Exhibit 2 at 13. Dr. Spagnolo opined the blood gas studies do not demonstrate total disability because only one exercise study produced qualifying results whereas all three resting studies and the other exercise study produced non-qualifying results. Employer's Exhibit 4 at 25-26. Dr. Zaldivar reiterated his critiques of the November 29, 2011 exercise study. Employer's Exhibit 2.

Weighing the arterial blood gas studies together, the ALJ stated "[ALJ] Bland accorded more weight to the more recent, non-qualifying exercising blood gases and

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that he limited the duration and intensity of his exercise study based on his concerns related to the Miner's heart rate. Director's Exhibit 71 at 15-17. Dr. Zaldivar further asserted Dr. Rasmussen misspoke regarding bicarbonate levels when he was actually referring to the level of carbonic acid, and that any differences measured were due to his ending the exercise testing earlier due to the Miner's high heart rate and not due to any pulmonary or respiratory impairment. *Id.* at 17-21.

[10] Dr. Cohen opined the heart rate is the "most important" measurement because it determines how much time red blood cells spend in the lungs' capillary bed, and that a significant diffusion impairment limits the capacity of blood to equilibrate with oxygen. Claimant's Exhibit 2 at 11. He further asserted Dr. Zaldivar's discussions of the Miner's oxygen consumption in his prior opinions were actually referring to the Miner's oxygen consumption divided by his body weight, explaining that the Miner's weight loss in the time between Dr. Rasmussen's November 29, 2011 study and Dr. Zaldivar's March 21, 2012 study made the oxygen consumption per kilogram appear higher in the later study. *Id.* at 11-12. Thus, because Dr. Rasmussen exercised the Miner to a higher heart rate during the November 29, 2011 study than did Dr. Zaldivar during the March 21, 2012 study, Dr. Cohen opined Dr. Rasmussen's study better reflected the Miner's ability to perform heavy work. *Id.* at 11-13.

determined that [the Miner was] not totally disabled based on arterial blood gases." Decision and Order at 20. He stated he agreed with this rationale, and discredited Dr. Cohen's opinion that the November 29, 2011 study best reflects the Miner's ability to perform his most recent coal mining job because he did not rely on the most recent studies. Decision and Order at 22. Therefore, he found no mistake of fact in ALJ Bland's finding that the arterial blood gas studies did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Claimant asserts the ALJ erred in finding the arterial blood gas studies did not establish total disability. Claimant's Brief at 7-14. We agree.

In finding no mistake in fact, the ALJ mischaracterized ALJ Bland's rationale for finding the arterial blood gas studies did not establish total disability. As discussed above, ALJ Bland discussed Drs. Rasmussen's and Zaldivar's critiques of each other's exercise studies, declined to discredit the March 21, 2012 exercise study, and concluded that, as only the November 29, 2011 exercise study produced qualifying results, the arterial blood gas studies did not establish total disability. Director's Exhibit 76 at 30, 34-35. Thus, contrary to the ALJ's characterization of ALJ Bland's findings, Decision and Order at 20, 22, she did not give greater weight to the March 21, 2012 exercise study on the basis that it is more recent.

Further, to the extent the ALJ credited the March 21, 2012 exercise study over the November 29, 2011 study solely on the basis of its recency, he erred, as the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, has held it irrational to credit later evidence solely on the basis of recency if that evidence shows a miner's condition has improved.[11] *Adkins v. Director, OWCP*, 958 F.2d 49, 51-

[11] The Board's decision in *Noble v. B & W Resources, Inc.*, 25 BLR 1-267 (2020), is not to the contrary and should not be read to suggest an ALJ can credit a more recent objective study showing improvement in a miner's condition based on its recency. Although the Board "summarize[d]" the ALJ's conclusion that "the later [non-qualifying] study is the most current representation of [the] claimant's condition as of the time of the hearing," 25 BLR at 1-273 (citing *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (4th Cir. 1988)), it did not affirm the ALJ's finding that the claimant did not establish total disability based on the recency of the non-qualifying test. Rather, the Board affirmed the ALJ's finding that the claimant failed to establish disability on alternate grounds -- because the studies were, at best, in equipoise, and thus failed to meet the claimant's burden to affirmatively establish a totally disabling respiratory impairment. *Id.* Thus, even if *Noble's* lack of comment on the ALJ's recency finding could be viewed as a tacit acceptance thereof, it would be, at best, non-binding dicta.

52 (4th Cir. 1992); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) ("A bare appeal to recency" in evaluating medical opinions "is an abdication of rational

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Regardless, *Cooley* relied entirely on the Board's holding in *Coffey v. Director OWCP*, 5 BLR 1-404 (1982), for authority, 845 F.2d at 624, and *Coffey* simply is no longer good law on this point. The interim presumption at issue in *Coffey* was repealed in 1980 and only applied to claims filed prior to that date. *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 888 (7th Cir. 2002). Under it, eligible miners who had ten or more years of coal mine employment and who met certain medical requirements were presumed to be entitled to benefits. 20 C.F.R. §727.203. The presumption, however, could be rebutted through any of four methods, including establishing the miner "[was] doing his usual coal mine work," or "[was] able" to do such work. 20 C.F.R. §727.203(b)(1), (2). The Board first held that the question of whether a miner *was* doing his usual coal mine work under (b)(1) was a strictly factual matter determined by whether he was employed at the time of the hearing: "At the outset, we note that, since claimant was not employed at the time of the hearing, the [ALJ] erred in finding the presumption rebutted under 727.203(b)(1), and his finding is therefore reversed." *Coffey*, 5 BLR at 1-405. As a corollary, the Board then held the question of whether he *was able* to perform his usual coal mine work under (b)(2), since he was not employed, similarly had to be assessed at the same time. *Id.* at 1-407.

Coffey's holding thus does not extend past explaining two practical methods of rebuttal under a regulation that has long since been repealed, and it has never been appropriately cited as establishing that evidence relating to disability should be evaluated solely according to its temporal proximity to the hearing. Instead, a long line of circuit court cases provides that ALJs must evaluate disability evidence both qualitatively and quantitatively, without resorting to mechanically crediting later evidence and, when a miner's condition improves, without reference to its chronological order. *See, e.g., Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (given the progressive nature of pneumoconiosis an ALJ must resolve conflicting evidence when the miner's condition improves "without reference to their chronological relationship"); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) ("A bare appeal to recency" in evaluating medical opinions "is an abdication of rational decisionmaking."); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (same); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJs must do a qualitative analysis of conflicting disability evidence, noting that *Woodward* permitted "the consideration of quantitative differences in the evidence *so long as qualitative differences were also considered*.") (emphasis added).

decisionmaking.");[12] *see also Greer v. Director, OWCP*, 940 F.2d 88, 90 (4th Cir. 1991) (because pneumoconiosis is a "slowly-progressing" disease, tests conducted two months

[12] We reject our concurring colleague's assertion that there is a contradiction between our holding *Coffey's* analysis (on which *Cooley* relied) inapplicable while simultaneously relying on *Thorn*, since these cases arose under the same (since-repealed) interim presumption. Rather, we simply read *Coffey's* statement that disability must be determined as of the time of the hearing, *see supra* note 10, and *Thorn's* admonition against a bare appeal to recency, in their proper context. Although both cases arose under the same presumption, they involved separate analyses on different points of law: *Coffey's* "time of the hearing" analysis has no bearing on present-day claims because it arose predominantly in the context of a rebuttal method that no longer exists—whether the evidence shows claimant was, "in fact," still working as a miner at the time the claim was decided. 5 BLR at 1-405. *Thorn*, on the other hand, involved the factually distinct issue of whether the ALJ erred by crediting, based on their alleged recency, medical opinions that were actually contemporaneous with, or based on the same evidence as, the other medical opinions of record. *Thorn*, 3 F.3d at 718. In finding the ALJ erred, *Thorn* simply reaffirmed the holding in *Adkins* which spoke to the erroneous practice of ascribing more weight to evidence based on its recency when it shows the miner's condition has improved—an admonition that remains relevant to present-day claims. *Adkins*, 958 F.2d at 51-52.

Moreover, *Coffey*, *Cooley*, *Adkins*, and *Thorn*, read together, are *consistent with* the prohibition on crediting evidence based on recency unless, consistent with the progressive nature of pneumoconiosis, it shows the miner's condition has worsened. In *Coffey*, the ALJ erred in finding total disability rebutted based on earlier evidence that the miner had been working, or was previously disabled by non-respiratory causes, while ignoring later evidence that the miner was no longer working and suffered from a respiratory impairment. 5 BLR at 1-405-06. In *Cooley*, the ALJ found the presumption invoked based on a positive x-ray, but then irrationally found the presumption rebutted by earlier evidence, consisting of "examinations conducted a year or more prior to that x-ray," showing that the miner was not disabled. 845 F.2d at 624. In *Adkins*, the ALJ erred in applying a "later is better" analysis by crediting two later x-rays showing only simple pneumoconiosis over an earlier x-ray showing the disease in its more severe, complicated stage. 958 F.2d at 51-52. Finally, in *Thorn*, the ALJ erred by crediting, as more recent, medical opinions that were actually contemporaneous with the other evidence. 3 F.3d at 718.

None of these cases support our colleague's suggestion that *Coffey's* and *Cooley's* assessing disability at the "time of the hearing" permit reliance on a "later is better" finding that runs afoul of the holdings in *Adkins* and *Thorn*. The Act's regulations require parties to submit evidence prior to or at the hearing, and obviously prior to the ALJ issuing their decision. *See* 20 C.F.R. §§725.456(b), 725.475, 725.476. Some of that evidence is

developed well before the hearing when the claim is still before the district director, including the miner's Department of Labor-sponsored complete pulmonary evaluation. *See* 20 C.F.R. §§725.404, 725.406. Thus, at its core, when our colleague asserts that later evidence showing an improvement in the miner's condition can be credited because it was developed closer to the "time of the hearing," she necessarily advocates for an impermissible "later is better" analysis.

Nor is it apparent why our colleague insists our analysis of these cases is dicta. Dicta, by definition, are statements "not necessary to decide the case." *United States v. Pasquantino*, 336 F.3d 321, 328-29 (4th Cir. 2003) (en banc). Our analysis of this line of cases necessarily explains our holding, avoids any confusion that may stem from the Board's reference to *Cooley* in *Noble*, and provides important guidance to ALJs who, with some frequency, credit evidence solely based on recency—e.g., because that evidence is more recent it represents the miner's "current condition" or condition at the "time of the hearing"—in violation of *Thorn*, *Adkins*, and the Sixth Circuit's decisions in *Keathley* and *Woodward*. *See, e.g.*, *Bruce v. Keokee Mining, LLC*, BRB No. 22-0222 BLA, 2023 WL 5348611, at *3 (July 24, 2023) (unpub.) (crediting non-qualifying pulmonary function test over qualifying test solely because it is more recent violates *Thorn* and *Adkins*); *Blevins v. Clinchfield Coal Co.*, BRB No. 22-0212 BLA, 2023 WL 4683378, at *3 n.10 (May 8, 2023) (unpub.) (ALJ's error in crediting non-qualifying pulmonary function tests over qualifying tests based on recency was harmless in light of ALJ's alternate equipoise findings); *Daugherty v. Stoney Ridge Coal Co.*, BRB No. 22-0006 BLA, 2023 WL 4683348, at *3 (May 3, 2023) (unpub.) (ALJ's summary crediting of non-qualifying pulmonary function studies over qualifying tests because they "showed improvement over time" violates *Woodward* and *Keathley*); *Ooten v. Pittston Coal Mgmt. Co.*, BRB Nos. 18-0066 BLA and 18-0066 BLA-A, 2022 WL 9863984, at *9 (Sept. 30, 2022) (unpub.) (ALJ erred by relying on *Coffey* to reject earlier evidence of severe, deadly, and totally disabling black lung disease solely because later evidence showed his condition improved by the time of the hearing due to a lung transplant); *Jones v. Shenandoah Coal Co.*, BRB No. 21-0123 BLA, 2022 WL 2116106, at *3 (May 31, 2022) (unpub.) (ALJ erred by relying on *Coffey* to reject earlier evidence of disability solely because more recent evidence of no disability was developed in closer proximity to the hearing).

Put simply, regardless of when a miner's condition is measured, binding circuit authority and persuasive Board precedent both unambiguously establish that, when the miner's condition allegedly improves, logic requires that more recent evidence cannot be credited just because of its recency. *Adkins*, 958 F.2d at 51-52; *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14, 2023 WL 5375627 at *8 (June 27, 2023).

apart "should be considered contemporaneous"); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14, 2023 WL 5375627 at *8 (June 27, 2023). We must, therefore, vacate the ALJ's determination that the arterial blood gas study evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii), and further vacate his determination that Claimant did not establish a mistake of fact.[13] *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).[14]

[13] Claimant further asserts the ALJ should have found the arterial blood gas studies established total disability because Drs. Rasmussen's and Cohen's opinions are better documented and reasoned, and thus entitled to more weight, than those of Drs. Spagnolo, Castle, and Zaldivar. Claimant's Brief at 7-14. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility, and the ALJ shall perform this function on remand. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012).

[14] Our concurring colleague asserts that, when recency is considered, it must be rationally rather than mechanically applied. That is undeniably true. But it must be rationally applied within the parameters set down by binding precedent. That precedent unambiguously establishes that recency can only be used as a factor to evaluate evidence when it shows a deterioration consistent with the progressive nature of pneumoconiosis:

> In a nutshell, the theory is: (1) pneumoconiosis is a progressive disease; (2) therefore, claimants cannot get better; (3) therefore, a later test or exam is a more reliable indicator of the miner's condition than an earlier one.
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> This logic only holds where the evidence is consistent with premises (1) and (2)-i.e., the evidence, on its face, shows that the miner's condition has worsened. In that situation, it is possible to reconcile the pieces of proof. All may be reliable; they do not necessarily conflict, though they reach different conclusions. All other considerations aside, the later evidence is more likely to show the miner's current condition.
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> On the other hand, if the evidence, taken at face value, shows that the miner has improved, the "reasoning" simply cannot apply. *It is impossible to reconcile the evidence.* 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

Medical Opinions and the Evidence as a Whole

The ALJ considered the medical opinions submitted prior to modification of Drs. Rasmussen and Sood that the Miner had a totally disabling respiratory or pulmonary impairment and those of Drs. Zaldivar and Castle that he did not. Decision and Order at 21-22; Director's Exhibits 14, 62, 63, 66. The ALJ agreed with ALJ Bland's determination to accord more weight to Dr. Zaldivar's and Dr. Castle's opinions than to Dr. Rasmussen's opinion. Decision and Order at 21. He also agreed with ALJ Bland's finding that Dr. Sood's opinion was not well reasoned because it was based on generalities and an assumption that the Miner had died before his report dated May 27, 2016. *Id.*

Turning to the medical opinions submitted on modification, the ALJ considered the opinions of Drs. Gaziano, Cohen, Spagnolo, and Zaldivar. Decision and Order at 21-22. Dr. Gaziano diagnosed a moderate diffusion impairment based on the April 18, 2019 pulmonary function study. Claimant's Exhibit 2. Dr. Cohen testified the Miner was totally

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> reliability of irreconcilable items of evidence must therefore be evaluated without reference to their chronological relationship.

Woodward, 991 F.2d at 319 (discussing *Adkins*, 958 F.2d at 51-52). Our colleague's suggestion that this rationale only applies to x-rays and not other objective tests of disability clearly ignores the plain language, facts, and logic of this line of cases.

This, of course, does not mean that newer evidence showing an improvement cannot ever be credited over older conflicting evidence, that newer evidence showing a deterioration must always be credited as establishing disease or disability, or that pulmonary function test results cannot fluctuate depending on a number of factors. It simply means that a factfinder may, consistent with the progressive nature of pneumoconiosis, credit newer evidence showing a deterioration in a miner's condition over older evidence based on chronological order if enough time has passed for the disease to have progressed. *Greer v. Director, OWCP*, 940 F.2d 88, 90 (4th Cir. 1991); 20 C.F.R. §718.201. The evidence does not conflict in those circumstances. *See Adkins*, 958 F.2d at 51-52. Conversely, if the newer evidence shows an improvement, the factfinder must provide a reason other than the date the test or exam was performed to credit it over older conflicting evidence. *Id.* And, regardless of whether the objective testing shows deterioration, an ALJ is not free to ignore relevant evidence that bears upon its probative value. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010). Here, the ALJ plainly did not provide a reason other than recency to credit the non-qualifying testing and in so doing failed to resolve the actual conflict in the medical opinions regarding which test more accurately reflected the Miner's pulmonary capacity.

disabled due to a moderate diffusion impairment and gas exchange abnormalities with exercise. Claimant's Exhibit 2 at 21. Dr. Spagnolo opined the Miner did not have an obstructive or restrictive respiratory impairment based on the arterial blood gas studies and pulmonary function tests, indicated diffusion capacity should not be used in isolation to diagnose a respiratory impairment, and concluded the Miner was not totally disabled. Employer's Exhibit 1 at 13. In a supplemental report dated December 30, 2019, Dr. Zaldivar reviewed Dr. Gaziano's April 18, 2019 pulmonary function study[15] and maintained his non-disability opinion from his original report. Employer's Exhibit 2 at 2. The ALJ found Dr. Spagnolo to be the most qualified physician and credited his opinion over Dr. Cohen's because Dr. Spagnolo "relied on the more recent blood gas tests." Decision and Order at 21-22. He additionally accorded "little weight" to Dr. Zaldivar's supplemental report because it was conclusory. *Id.* at 22.

Because the ALJ's error in weighing the arterial blood gas studies affected his consideration of the medical opinion evidence, we vacate his finding that the medical opinions do not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21.

Employer's Cross-Appeal

Because we have vacated the ALJ's denial of benefits, we address Employer's arguments on cross-appeal. Employer argues that, in reviewing the medical opinion evidence, the ALJ failed to consider Dr. Zaldivar's August 6, 2020 deposition and thus erroneously discredited Dr. Zaldivar's opinion as conclusory. Employer's Brief at 23; Employer's Exhibit 5. We agree. Because the ALJ did not address Dr. Zaldivar's deposition, his credibility finding does not account for all relevant evidence or satisfy the explanatory requirements of the Administrative Procedure Act (APA),[16] and we vacate it. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[15] Dr. Zaldivar indicated the records from Dr. Gaziano's April 18, 2019 study included resting blood gas results. Employer's Exhibit 2. However, this evidence does not appear in the record before us. *See* Claimant's Exhibit 1.

[16] The Administrative Procedure Act provides that every adjudicatory decision must include "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).

Remand Instructions

On remand, the ALJ must first reconsider the arterial blood gas study evidence and resolve the conflict in the evidence without regard to recency in order to determine whether Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Adkins*, 958 F.2d at 51-52; *Thorn*, 3 F.2d at 319-20. He must further address the exertional requirements of the Miner's usual coal mine employment and reevaluate the medical opinions to determine whether the evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). In rendering his credibility findings, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, and the sophistication of, and bases for, their diagnoses. *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). Furthermore, he must explain the rationale for his conclusions in accordance with the APA. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165. The ALJ must then weigh all the relevant evidence together to determine whether Claimant established total disability at 20 C.F.R. §718.204(b). *See Rafferty*, 9 BLR at 1-232.

If Claimant fails to establish the Miner was totally disabled, benefits are precluded, and the ALJ may reinstate the denial of modification. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). If Claimant establishes total disability, however, she will have invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305. The ALJ must then determine whether Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits, and we remand the case for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I write in concurrence to clarify that caselaw does not preclude consideration of the temporal relationship of evidence in appropriate circumstances. This is evident from the United States Court of Appeals for the Fourth Circuit cases that look at how medical opinion evidence and testing should be considered in this regard. They do not do away with temporal consideration; rather, they explicitly look at the timing of the evidence and require that evidence be *rationally*, rather than *mechanically*, evaluated.[17]

In *Thorn v. Itmann*, 3 F.3d 713 (4th Cir. 1993), the ALJ credited medical opinions based on the date on which the medical opinions were issued. The court found that the ALJ thereby committed an analytical error, because at least four of the physicians who examined the claimant did so within a space of eighty-four days and the reports of the

[17] To the extent that they seek to suggest that this decision has any bearing as to whether a claimant's condition is to be determined as of the date of the hearing, my colleagues' excursion in footnote 10 is pure dicta. They argue *Cooley v. Island Creek Coal Co.*, 845 F.2d 622 (4th Cir. 1988), is an interim presumption case under regulatory Section 727 and thus does not affect Section 718 cases. *Supra* note 10. However, my colleagues also rely on cases involving rebuttal of the interim presumption, such as *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993), *see supra* note 10, which, under the reasoning that they were issued in the context of rebuttal of the interim presumption, similarly would have no bearing on cases like the one before us. More importantly, none of the cases (all of which were issued post-*Cooley*), including the later cases addressing mere recency and discussing the interim presumption, have suggested there is any conflict between focusing on a living miner's condition at the time of the hearing and precluding reliance on mere recency. Nor have my colleagues shown there is any such conflict, since the ruling in this case depends upon the authority of the mere recency cases alone, and condition at the time of the hearing is not at issue here. Accordingly, it is patent that the comments about *Cooley* and condition at the time of the hearing are not a portion of the holding in this case. Consequently, it is not necessary for me to dissent in that regard. With respect to whether the condition of a living miner is to be adjudged as of the time of the hearing, I note the current regulations at Part 718 make clear that it is the *current* condition of the Claimant that is at issue in a living miner's case. To wit, 20 C.F.R. §718.204(a) provides "[b]enefits are provided under the Act for or on behalf of miners who *are* totally disabled due to pneumoconiosis or who were totally disabled due to pneumoconiosis at the time of death." Likewise, 20 C.F.R. §718.204(e) deals with the miner's *current* employment as evidence relating to entitlement (and deals with much the same concerns, although in a slightly different context, because they are not addressed in the context of rebuttal, as employment in *Cooley*).

consulting physicians "naturally post-dated the actual examination"; thus, all their opinions were "among the most recent."[18, 19] *Id.* at 718. Similarly, in *Greer v. Director, OWCP*, 940 F.2d 88 (4th Cir. 1991), the court determined that the ALJ erred in giving greater weight to the more recent of two tests because the tests were conducted only two months apart; they therefore should have been considered contemporaneous.[20] *Id.* at 91. In *Gray* v. *Director, OWCP*, 943 F.2d 513 (4th Cir. 1991), the court affirmed the crediting of later non-qualifying resting blood gas studies over an earlier qualifying exercise study because the ALJ had not mechanically applied "later is better" but instead had considered all the evidence and determined that the later testing was "more indicative" of Gray's condition.[21]

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[18] The "mere recency" the court was considering was which opinions had been most recently issued, without regard for whether those opinions reflected the claimant's condition at a later date. *See Thorn*, 3 F.3d at 718. According to the court, the ALJ erred because he mechanically applied the criteria when the later date of a report did not correlate with the report being based on significantly more up to date information (since the evidence was substantively contemporaneous). *Id.* Implicit in finding error here is that a meaningful separation in time between examination or test results may be credited.

[19] The court in *Thorn* specifically acknowledges "a recent physician's opinion may be more reliable than an old one." *Id.*

[20] The court in *Greer*, finding the tests in equilibrium, awarded benefits based on the true doubt rule. *Greer v. Director, OWCP*, 940 F.2d 88, 91 (4th Cir. 1991). The true doubt rule was eliminated by *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994), as violative of Section 7(c) of the Administrative Procedure Act, which places the burden of proof on the party advancing a rule or order. *Id.* at 281. In the wake of *Ondecko*, a requirement, restriction, or determination whose application is limited to favoring a particular party, even though that party has the burden of proof, is of questionable validity. There is no presumption that a claimant is disabled by pneumoconiosis. Rather, the burden of proof rests with the claimant to establish that he or she is totally disabled. *See id.*; 65 Fed. Reg. 79,920, 79,927 (Dec. 20, 2000). This casts doubt on the validity of case holdings that accord greater weight to recent testing only when it supports entitlement.

[21] I agree with my colleagues that recency is to be applied within binding precedent. *Supra* note 13. In this regard, careful attention must be paid to what is the holding in the cases and what is dicta. These cases have addressed mere recency and its mechanical application, and they have done so in the context of the consideration of specific types of evidence. Both *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992), and *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), held it is impossible to reconcile later x-

Thus, when an ALJ rationally determines that more recent non-qualifying evidence provides information more indicative of whether the claimant meets the particular condition of entitlement than earlier qualifying evidence, the ALJ may give greater credit

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ray evidence which is negative for pneumoconiosis with earlier x-ray evidence finding pneumoconiosis, and therefore applying the later evidence rule to such evidence is error. This is consistent with the fact that (absent a miracle) clinical pneumoconiosis does not cease to exist unless it is excised. Consequently, either the earlier or the later interpretive result must be wrong. *See Adkins*, 958 F.2d at 52. Respiratory or pulmonary testing results which are qualifying at an earlier time and non-qualifying later can be compatible, however, because a miner's respiratory or pulmonary condition can indeed change. Given that coal dust can be aggravating another respiratory or pulmonary impairment to produce a qualifying test result, when the non-coal-dust-related impairment is reduced or eliminated, it is possible for the result to be non-qualifying and for the miner to be not totally disabled. Further, it is possible for the earlier result to have been wholly unrelated to coal mine dust exposure and thus not present subsequently, so that the miner is not totally disabled. On the other hand, there can be a difference in test results, within certain limits, simply as a matter of test variability—the known differences which can occur in testing results without a change in condition. *See Greer*, 940 F.2d at 90-91. It is the ALJ's responsibility to consider all the relevant evidence and make a rational determination as to whether the evidence establishes total disability. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997).

It should also be noted that the United States Court of Appeals for the Sixth Circuit has not decided to extend *Woodward* beyond x-ray interpretations. In *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734 (6th Cir. 2014), the court expressly did not extend *Woodward*; rather, it disavowed the need for such consideration in that case. *Id.* at 740 ("It is unnecessary to decide whether *Woodward* should be extended to cover the evaluation of pulmonary function tests, because even if *Woodward* applies, the ALJ satisfied *Woodward's* standard [by considering an additional factor, quality, as well as quantity].").

In the interests of accuracy, I also note a careful reading of the cases does not support the proposition that they specifically require qualitative review of disability evidence (except to the extent that *Woodward* and *Adkins* reference and support the regulatory requirement that the qualifications of those reviewing the x-rays be considered).

to the later evidence.[22] *See id.* at 520-21. However, "blindly ascribing more weight to the most recent evidence" is proscribed. *Thorn*, 3 F.3d at 718.

JUDITH S. BOGGS
Administrative Appeals Judge

[22] An ALJ also may rationally determine that a condition of entitlement is not established because the later evidence credibly causes the earlier evidence to lose force with respect to that issue. *See Thorn*, 3 F.3d at 718. Further, when an ALJ considers other appropriate factors relevant to the testing (such as quality), in addition to recency, the ALJ is not merely considering recency. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016) (consideration of the credentials of the x-ray readers and the quality of their opinions in addition to the number of positive and negative readings does not run afoul of the prohibition on counting heads); *Keathley*, 773 F.3d at 740. Moreover, rationally relying on physicians' opinions as to the interpretation that should be given to test results, including whether they demonstrate improvement, is not making a determination based on mere recency.