

U.S. Department of Labor

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



BRB Nos. 23-0497 BLA
and 23-0498 BLA

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

Claimant-Petitioner)

v.)

STONE MOUNTAIN TRUCKING)
COMPANY)

and)

TRAVELERS)

Employer/Carrier-)
Respondents)

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

Party-in-Interest)

DATE ISSUED: 07/30/2024

DECISION and ORDER

Appeal of the Decision and Order on [Second] Remand Denying Benefits of
Dana Rosen, Administrative Law Judge, United States Department of Labor.

Wanda J. Woodard, Jonesville, Virginia.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer
and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES,
Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative
Appeals Judge:

Claimant appeals, without representation,¹ the Decision and Order on [Second] Remand Denying Benefits (2021-BLA-05532 and 2021-BLA-05533) of Administrative Law Judge (ALJ) Dana Rosen, rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on May 20, 2011, and a survivor's claim filed on December 29, 2015,² and is before the Board for the third time.³

In its previous decision, the Board vacated the ALJ's denial of benefits and remanded the case for the ALJ to reconsider whether Claimant established the Miner was totally disabled and could thereby invoke the Section 411(c)(4) rebuttable presumption that the Miner was total disabled due to pneumoconiosis.⁴ *Woodard v. Stone Mountain*

¹ On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Benefits Review Board review the ALJ's decision, but she does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

² The Miner filed a prior claim on October 28, 1998, and the district director denied it on March 5, 1999, for failure to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. The Miner died on December 6, 2015, while his subsequent claim was pending. Survivor's Claim (SC) Director's Exhibits 19, 22. Claimant, the Miner's widow, is pursuing both the miner's claim on his behalf and her survivor's claim.

³ We incorporate the procedural history of this case as set forth in *Woodard v. Stone Mountain Trucking Co.*, BRB Nos. 21-0533 BLA, 21-0533 BLA-A, 21-0534 BLA, and 21-0534 BLA-A, slip op. at 2-3 (Mar. 17, 2023) (unpub.). The Board affirmed the ALJ's findings that the Miner's last coal mine employment was in Kentucky, and thus the law of the United States Court of Appeals for the Sixth Circuit applies; Employer is the responsible operator; the Miner had at least fifteen years of qualifying coal mine employment; and Claimant failed to establish the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b). *Id.*, at 5, 6, 7, 11.

⁴ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or

Trucking Co., BRB Nos. 21-0533 BLA, 21-0533 BLA-A, 21-0534 BLA, and 21-0534 BLA-A (Mar. 17, 2023) (unpub.). Specifically, the Board instructed the ALJ to reconsider the validity of the pulmonary function study evidence, reweigh that evidence, and then to reconsider the weight of the medical opinion evidence and the evidence as a whole to determine whether Claimant established the Miner was totally disabled at the time of his death. *See* 20 C.F.R. §718.204(b)(2).

On remand, the ALJ again found Claimant failed to establish total disability and thus could not invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2). Consequently, the ALJ denied benefits in the miner's claim and further found Claimant was not entitled to derivative survivor's benefits under Section 422(l) of the Act.⁵ 30 U.S.C. §§921(c)(4), 932(l) (2018); 20 C.F.R. §718.305.

On appeal, Claimant generally challenges the ALJ's denials of the miner's and survivor's claims. Employer and its Carrier (Employer) respond, urging affirmance of the denials of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Miner's Claim

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory

substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

⁵ Section 422(l) of the Act provides that the survivor of a miner determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,⁶ evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.⁷ 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant evidence supporting total disability against all relevant contrary evidence and must determine whether Claimant established total disability by a preponderance of the evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Pulmonary Function Studies

The ALJ reconsidered the four pulmonary function studies developed in connection with the miner's claim. Dr. Alam's November 30, 2011 study and Dr. Rosenberg's May 17, 2012 study were qualifying before and after the administration of a bronchodilator. Miner's Claim (MC) Director's Exhibits 11, 30. Dr. Rosenberg's July 10, 2012 study was non-qualifying and no bronchodilator was administered. MC Employer's Exhibit 1. Dr. Sargent's August 29, 2013 study was non-qualifying before and after the administration of a bronchodilator. MC Employer's Exhibit 6. The ALJ discredited the qualifying studies as invalid. Decision and Order on Second Remand at 6-8.

The ALJ further considered four pulmonary function studies from the Miner's treatment records conducted on April 23, 2007, May 15, 2008, January 25, 2010, and May 2, 2011, which are all non-qualifying. Decision and Order on Second Remand at 9; MC

⁶ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

⁷ The Board previously noted the ALJ accurately found the three blood gas studies dated November 30, 2011, May 17, 2012, and August 29, 2013, are non-qualifying, and that there is no evidence that the Miner suffered from cor pulmonale with right-sided congestive heart failure. *Woodard*, BRB Nos. 21-0533 BLA, 21-0533 BLA-A, 21-0534 BLA, and 21-0534 BLA-A, slip op. at 8 n.10; *see* 20 C.F.R. §718.204(b)(2)(ii), (iii).

Director's Exhibit 29. She concluded the treatment studies are not sufficiently reliable and gave them no weight. Decision and Order on Second Remand at 9.

Thus, having found all of the qualifying studies were invalid or unreliable, the ALJ concluded Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Second Remand at 9. For the reasons that follow, we vacate the ALJ's weighing of the November 30, 2011 and August 29, 2013 studies and her overall conclusion that the pulmonary function study evidence does not support a finding of total disability.⁸

November 30, 2011 study

Dr. Alam's pulmonary function study, conducted as part of the Department of Labor's (DOL's) complete pulmonary evaluation, was qualifying for total disability before and after bronchodilators. MC Director's Exhibit 11. The ALJ noted the technician who administered the study reported it was performed with good cooperation and understanding by the Miner, and that Dr. Alam had signed off on the study as being valid. *Id.* Dr. Michos, a DOL consultant, validated the study by checking a box that said, "Vents are acceptable."

⁸ The Board previously affirmed the ALJ's permissible finding that the May 17, 2012 qualifying pulmonary function study is invalid. *See Woodard*, BRB Nos. 21-0533 BLA, 21-0533 BLA-A, 21-0534 BLA, and 21-0534 BLA-A, slip op. at 8 n.11. We also affirm the ALJ's finding that Dr. Rosenberg's non-qualifying July 10, 2012 pulmonary function study is valid and sufficient to support a finding the Miner was not totally disabled. Decision and Order on Second Remand at 8-9. Although Dr. Rosenberg indicated the Miner's efforts were not maximal in conducting the test, he did not specifically invalidate it. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Second Remand at 8-9; MC Employer's Exhibit 1 at 1. Further, we see no error in the ALJ's assignment of no weight to the four treatment studies. *See* Decision and Order on Second Remand at 9; MC Director's Exhibit 29. The ALJ mistakenly stated that one of the four studies was qualifying when in fact all of the treatment studies are non-qualifying and therefore do not aid Claimant in satisfying her burden of proof. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). She also gave permissible reasons for finding each of the studies unreliable. Decision and Order on Second Remand at 9; MC Director's Exhibit 29; *see* MC Director's Exhibit 30 at 2-3 (Dr. Rosenberg stating all of the Miner's treatment pulmonary function studies are unreliable because the efforts were not maximal or were incomplete); MC Employer's Exhibit 22 at 2-3 (same); MC Employer's Exhibit 6 at 2 (Dr. Sargent stating the treatment pulmonary function studies do not reflect minimum reproducibility criteria and indicate less than optimal effort).

MC Director's Exhibit 13. Drs. Long and Castle invalidated the studies for reasons outlined below. *See* MC Director's Exhibit 32; MC Employer's Exhibit 25.

The ALJ found Drs. Long and Castle offered opinions with a "much higher level of detail and explanation than the conclusory statements of Dr. Alam and Dr. Michos," and she observed both Drs. Long and Castle "pointed to precise elements of the testing to explain their conclusions." Decision and Order on Second Remand at 7. Thus, the ALJ concluded the November 30, 2011 study was invalid and entitled to no weight.

In the absence of evidence to the contrary, compliance with the requirements of 20 C.F.R. Part 718, Appendix B shall be presumed. 20 C.F.R. §718.103(c). A party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). Because Employer bears the burden of proof, the ALJ was required to examine the reasoning behind the opinions of Drs. Long and Castle before accepting them. *Id.* In this case, Drs. Long's and Castle's opinions are apparently inconsistent as to why the November 30, 2011 study is invalid, but the ALJ did not adequately resolve that conflict.⁹ Further, although Dr. Castle opined the pre-bronchodilator FEV1 result is not reproducible within the requisite five percent, he stated the post-bronchodilator FEV1 result, which is also qualifying for total disability, is reproducible within the requisite five percent. MC Employer's Exhibit 25. The ALJ did not consider the discrepancy or that studies not meeting the requisite five

⁹ Although Dr. Long invalidated the November 30, 2011 pulmonary function study because the "tracings are recorded at too rapid paper speed," Dr. Castle did not invalidate the study based on its paper speed. MC Director's Exhibit 32; MC Employer's Exhibit 25. The ALJ did not consider that Dr. Castle invalidated the study because the flow volume loops and volume time curves show less than maximal effort, when Dr. Long did not invalidate the study on this basis. MC Director's Exhibit 32; MC Employer's Exhibit 25. Instead, Dr. Long noted inconsistent effort on the pre-bronchodilator flow volume loops but consistent effort on the post-broncho-dilator flow volume loops. MC Director's Exhibit 32. Our dissenting colleague asserts that the ALJ treated the apparently inconsistent reasons Drs. Long's and Castle's gave for why they found the November 30, 2011 study is invalid as "supplementary" and found they were both "correct." *Infra*, at 11-12. But contrary to her characterization of the ALJ's finding, the ALJ did not adequately address or explain how she resolved that apparent conflict or make such findings as our dissenting colleague asserts that she did. *Id.* Contrary to her contention that we are substituting our judgment for that of the ALJ, where the ALJ fails to make appropriate factual findings and credibility determinations, the proper course for the Board is to remand the case for such determinations, instead of filling in the gaps in the ALJ's decision. *See* 30 U.S.C. §923(b); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

percent criterion may still be submitted for consideration in support of a claim.¹⁰ 20 C.F.R. Part 718, Appendix B, (2)(ii)(G); MC Employer’s Exhibit 25. The ALJ also did not consider whether, despite Dr. Castle’s opinion, the pre-bronchodilator values were in substantial compliance with the regulations. 20 C.F.R. §718.101(b). Moreover, the ALJ did not consider whether Dr. Castle’s statement that the Miner’s mouthpiece was obstructed “as though with tongue” should be considered speculative as he was not present during the testing. 20 C.F.R. Part 718, Appendix B, (2)(ii)(E); *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997) (physician’s opinion must be based on more than “mere speculation”); MC Employer’s Exhibit 25. Because the ALJ did not adequately explain her credibility findings as the Administrative Procedure Act (APA) requires,¹¹ we vacate her determination that the November 30, 2011 study is invalid and her conclusion that the study is not otherwise reliable for establishing the Miner’s total disability pursuant

¹⁰ A miner’s effort “shall be judged unacceptable when” he:

Has an excessive variability between the three acceptable curves. The variation between the two largest FEV1’s of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 [milliliters], whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test.

20 C.F.R. Part 718, Appendix B, 2(ii)(G). Although our dissenting colleague asserts that the ALJ properly considered Dr. Castle’s opinion as to the validity of the November 30, 2011 test in its “entirety,” not just as to reproducibility, the ALJ again did not adequately address or explain how she resolved the discrepancy in Dr. Castle’s opinion regarding the reproducibility of the pre-bronchodilator and post-bronchodilator FEV1 results. Again, where the ALJ fails to make appropriate factual findings and credibility determinations, the proper course for the Board is to remand the case for such determinations, instead of filling in the gaps in the ALJ’s decision. *See* 30 U.S.C. §923(b); *Rowe*, 710 F.2d at 255.

¹¹ The APA 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).

to 20 C.F.R. §718.103(c).¹² See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

August 29, 2013 study

Dr. Sargent conducted the August 29, 2013 study, which was non-qualifying before and after bronchodilators were administered. MC Employer's Exhibit 6. He concluded the pulmonary function testing was normal or "nearly normal" but that the spirometric testing was invalid:

Pulmonary function testing was done. Lung volumes were normal. Diffusion capacity was normal based on the patient's effort. The patient was either unwilling or unable to give a complete effort with spirometric testing and therefore no valid results were obtained. His FEV₁ was 74% of predicted with his best spirometry, which is nearly normal.

Id. at 1.

The ALJ found the non-qualifying August 29, 2013 study supported a finding that the Miner was not totally disabled, noting Dr. Sargent concluded the study showed no obstruction or restriction. Decision and Order on Second Remand at 9. But contrary to the ALJ's characterization, Dr. Sargent did not state that the Miner's August 29, 2013 pulmonary function study reflected no obstruction or restriction. *Id.* Rather, Dr. Sargent stated that, although no valid results were obtained on the August 29, 2013 study due to incomplete effort, a review of other pulmonary function studies showed no obstruction or restriction. MC Employer's Exhibit 6 at 2. Based on Dr. Sargent's opinion that the August 29, 2013 pulmonary function study is invalid, the ALJ erred in relying on it to support a finding that the Miner was not totally disabled at the time of his death, as an invalid pulmonary function study cannot support a finding of either the presence or absence of total disability. 20 C.F.R. §718.103(c); Decision and Order on Second Remand at 8-9; MC Employer's Exhibit 6 at 2.

Consequently, because we vacate the ALJ's consideration of the November 30, 2011 and August 29, 2013 studies, we vacate her conclusion that Claimant did not establish

¹² The regulation states that "[i]n the case of a deceased miner, where no pulmonary function tests are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner." 20 C.F.R. §718.103(c).

total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i).

Medical Opinion and Lay Evidence

The ALJ found Claimant did not establish the Miner was totally disabled based on medical opinions and lay testimony. Decision and Order on Second Remand at 9-13. She credited Dr. Rosenberg’s opinion that the Miner was not totally disabled because it was supported by her findings regarding the pulmonary function study evidence, and she discredited Dr. Alam’s opinion because it was based on an invalid pulmonary function study. Decision and Order on Second Remand at 10-12; MC Director’s Exhibits 11, 30, 45; MC Employer’s Exhibits 1, 22, 28. Moreover, the ALJ found the Miner’s statements before his death regarding his shortness of breath that worsened with physical activity, and his use of inhalers when needed and an extra pillow at night when sleeping, did not “outweigh the absence of a valid, qualifying pulmonary function test in evidence, or the well-documented and well-reasoned opinion of Dr. Rosenberg.”¹³ Decision and Order on Second Remand at 13; *see* 20 C.F.R. §718.204(d)(4) (“Statements made before death by a deceased miner about his . . . physical condition are relevant and shall be considered in making a determination as to whether the [M]iner was totally disabled at the time of [his] death.”).

To the extent the ALJ’s erroneous weighing of the pulmonary function study evidence influenced her weighing of the medical opinions and lay testimony, we vacate her findings at 20 C.F.R §718.204(b)(2)(iv), and her overall finding that Claimant did not establish the Miner had a totally disabling respiratory impairment and could not invoke the Section 411(c)(4) presumption. Thus, we vacate the ALJ’s denial of benefits in the miner’s claim.

Survivor’s Claim

Having vacated the denial of benefits in the miner’s claim, we also vacate her determination that Claimant is not eligible for derivative benefits in her survivor’s claim

¹³ The ALJ properly found that 20 C.F.R. §718.204(d)(3), which states that lay testimony is sufficient to establish total disability due to pneumoconiosis in a deceased miner’s claim when there is no other evidence addressing the Miner’s respiratory or pulmonary condition, did not apply because there is medical evidence of record addressing the Miner’s respiratory or pulmonary condition. *See Coleman v. Director, OWCP*, 829 F.3d 3, 5 (6th Cir. 1987); *Sword v. G&E Coal Co.*, 25 BLR 1-127, 1-131-32 (2014); Decision and Order on Second Remand at 12.

under Section 422(l) of the Act. Decision and Order on Second Remand at 13; 30 U.S.C. §§921(c)(4), 932(l) (2018); 20 C.F.R. §718.305.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established the Miner was totally disabled based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). The ALJ must specifically determine whether the pulmonary function study dated November 30, 2011 is in substantial compliance with the quality standards or sufficiently reliable under 20 C.F.R. §718.103(c). As Dr. Alam conducted the November 30, 2011 pulmonary function study as part of his DOL-sponsored complete pulmonary evaluation of the Miner, if the ALJ finds the study invalid on remand, she should consider whether it is appropriate to remand the case to the district director “to develop only such additional evidence as is required” to remedy the defect. 20 C.F.R. §§725.406(c), 725.456(e).¹⁴

The ALJ should then reconsider her findings regarding the medical opinion and lay evidence in light of her findings regarding the pulmonary function study evidence and render findings pursuant to 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole.

¹⁴ Although the Board previously instructed the ALJ to address whether it was appropriate to remand this case to the district director if she concluded the November 30, 2011 study is invalid, she failed to do so. *See Woodard*, BRB Nos. 21-0533 BLA, 21-0533 BLA-A, 21-0534 BLA, and 21-0534 BLA-A, slip op. at 11 n.14. When the Board remands a case, the ALJ must comply with its instructions and “‘implement both the letter and spirit’ of the mandate.” *See Edd Potter Coal Co. v. Dir., OWCP [Salmons]*, 39 F.4th 202, 210 (4th Cir. 2022) (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 267 (4th Cir. 2002).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order on [Second] Remand Denying Benefits and remand this case for further consideration consistent with this opinion and the Board's prior remand instructions.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the ALJ's determination that Claimant did not establish total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), and to vacate the denial of benefits in the miner's and survivor's claims.

ALJs are afforded considerable discretion in making findings of fact. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The Board must affirm an ALJ's determinations that are rational, supported by substantial evidence, and are in accordance with law, even though we might determine otherwise were we acting de novo. *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965); *Rowe*, 710 F.2d at 254. Because the ALJ permissibly acted within her discretion in finding that Claimant did not establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death, I would affirm that finding.

There were four pulmonary function studies developed in connection with the miner's claim. Miner's Claim (MC) Director's Exhibits 11, 30; MC Employer's Exhibits 1, 6. The ALJ determined the qualifying studies conducted on November 30, 2011 were invalid based on the criticisms of the studies by Drs. Long and Castle.¹⁵ Decision and

¹⁵ The district director must provide a miner with an additional opportunity to take a Department of Labor (DOL)-sponsored pulmonary function study if the deficiencies in the first study are due to lack of effort. 20 C.F.R. §725.406(c). That is not possible in this

Order on Second Remand at 6-7. The majority finds the ALJ erred in making that determination. I disagree.

First, the majority finds there is a conflict between the criticisms of the November 30, 2011 studies made by Dr. Long and the criticisms made by Dr. Castle, and that the ALJ erred by failing to resolve the conflict. However, the only conflict is one created by the majority. The ALJ was well aware that the failings identified by the physicians differed because she specifically pointed that out. Decision and Order on Second Remand at 6-7. Acting within her discretion, she treated the criticisms identified as supplementary to each other, and this was entirely permissible. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (even though the facts might permit an alternative conclusion, appellate tribunals cannot substitute their judgment for that of the ALJ); Decision and Order on Second Remand at 6-7; MC Director's Exhibit 32; MC Employer's Exhibit 25. There is no obvious tension between Dr. Long's criticism (that the paper speed for the test was markedly different from the paper speed required in the Department of Labor's standards) and Dr. Castle's criticisms (that the volume time curves show less than maximal effort and the flow volume loops are variable in effort and many showed less than maximal effort). *See* MC Director's Exhibit 32; MC Employer's Exhibit 25. Both physicians' criticisms can be correct, and the ALJ permissibly found they were. *See Banks*, 690 F.3d at 489; Decision and Order on Second Remand at 6-7; MC Director's Exhibit 32; MC Employer's Exhibit 25.

The majority also suggests that the ALJ did not consider whether the November 30, 2011 tests were in substantial compliance with the standards because FEV1 studies not meeting the five percent criterion for reproducibility may still be submitted for consideration, citing 20 C.F.R. Part 718, Appendix B, 2(ii) (G). Moreover, the majority notes Dr. Castle did not opine the FEV1 results from the post-bronchodilator test were not reproducible. However, the majority ignores that although he found the post-

case involving a deceased miner. The ALJ did consider whether the testing was valid under the more lenient standards applied when a Miner is deceased; however, she permissibly concluded that it did not meet those standards. *See* 20 C.F.R. §718.103(c); *Rowe*, 710 F.2d at 255; Decision and Order on Second Remand at 7. The applicable regulation requires that testing under such circumstances "may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner." 20 C.F.R. §718.103(c). The criticisms made by Drs. Long and Castle constitute substantial evidence supporting the ALJ's determination that the values of the November 30, 2011 pulmonary function study did not yield technically valid results. 20 C.F.R. §718.103(c); Decision and Order on Second Remand at 6-7; MC Director's Exhibit 32; MC Employer's Exhibit 25.

bronchodilator FEV1 test results were reproducible, Dr. Castle found both the pre- and post-bronchodilator tests invalid because the volume time curves showed less than maximal effort and the flow volume loops were variable in effort and many showed less than maximal effort.¹⁶ MC Employer's Exhibit 25. The ALJ accordingly properly considered Dr. Castle's opinion as to the validity of the tests in its entirety, not just as to reproducibility. 20 C.F.R. §718.101(b); Decision and Order on Second Remand at 6-7; MC Employer's Exhibit 25. Dr. Castle specifically opined that the November 30, 2011 test data from both the pre- and post-bronchodilator testing are invalid for assessing true ventilatory function. MC Employer's Exhibit 25. He did not suggest that the post-bronchodilator testing was valid although the pre-bronchodilator testing was not valid.¹⁷ *Id.* The majority also requires the ALJ to consider whether Dr. Castle's statement that the miner's mouthpiece was obstructed should be considered "speculative." *Supra*, at 7. Although the ALJ could have questioned Dr. Castle's opinion in this regard, her acceptance of the expert's opinion also was within her discretion. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (appellate tribunals must defer to the ALJ's assessment of the physician's credibility); Decision and Order on Second Remand at 6-7; MC Employer's Exhibit 25. Thus, her finding that the November 30, 2011 testing was invalid was within her discretion, and I would affirm it.

The majority additionally finds the ALJ erred in considering the non-qualifying August 29, 2013 test because an invalid test cannot support a determination as to the existence or non-existence of disability. 20 C.F.R. §718.103(c). However, any error in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Since the ALJ permissibly found the only qualifying studies were invalid, there is no pulmonary function study evidence in favor of a finding of total disability.¹⁸ *Banks*, 690

¹⁶ These are issues not related to reproducibility. There is no discrepancy in Dr. Castle's opinion.

¹⁷ The DOL has opined that post-bronchodilator results should not be used in assessing disability, although they may be useful in determining causation, because the purpose of the testing is not to determine how the miner performs when taking medication. 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

¹⁸ As the majority already noted, the Board previously affirmed the ALJ's permissible finding that the qualifying May 17, 2012 pulmonary function study is invalid, citing *Woodard*, BRB Nos. 21-0533 BLA, 21-0533 BLA-A, 21-0534 BLA, and 21-0534 BLA-A, slip op. at 8 n.11. Although there are pulmonary function studies conducted in the course of the Miner's treatment, they are non-qualifying, and the ALJ concluded they were not sufficiently reliable to support a finding of total disability and gave them no

F.3d at 489; *Napier*, 301 F.3d at 713-14; Decision and Order on Second Remand at 6-8; MC Director's Exhibits 11, 30. Moreover, the remaining study, conducted on July 10, 2012, was non-qualifying and there is no issue as to the ALJ's findings regarding it. Decision and Order on Second Remand at 8-9; MC Employer's Exhibit 1. Thus, the ALJ's determination that the pulmonary function study evidence did not support the establishment of total disability is fully affirmable. Consequently, there is no reason to question her determinations as to the medical opinion evidence and lay testimony. *See* Decision and Order on Second Remand at 9-13. Accordingly, her determination that the Miner did not establish entitlement to benefits and the Claimant is not eligible for derivative benefits in her survivor's claim should be affirmed.

JUDITH S. BOGGS
Administrative Appeals Judge

weight. Decision and Order on Second Remand at 9. There is no issue as to that determination.