U.S. Department of Labor

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

BRB No. 20-0157 BLA

EARNEST BARNETTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MCMURPHY MINING, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/29/2021
	)	
Employer/Carrier-Respondents	)	
	)	
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Earnest E. Barnette, Keokee, Virginia.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for Employer/Carrier.

Julia C. Malette (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

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

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

BUZZARD, Administrative Appeals Judge:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge Larry S. Merck's Decision and Order Denying Benefits in a Subsequent Claim (2018-BLA-05048) filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on August 30, 2016.[2] 20 C.F.R. §725.309.

After crediting Claimant with 13.35 years of coal mine employment, the administrative law judge found Claimant established he has clinical and legal pneumoconiosis, his pneumoconiosis arose out of his coal mine employment, and he is totally disabled. He found, however, that Claimant failed to establish that pneumoconiosis is a substantially contributing cause of his total disability and therefore denied benefits.

On appeal, Claimant challenges the denial of benefits. The Director, Office of Workers' Compensation Programs, filed a response brief, asserting remand is necessary because the administrative law judge did not weigh all the evidence regarding the cause of Claimant's total disability. Employer filed a response to Claimant's appeal and a reply in opposition to the Director's brief. Employer urges affirmance of the finding that Claimant is not totally disabled due to pneumoconiosis. It also contends the administrative law judge erred in finding it to be the responsible operator and that Claimant has legal pneumoconiosis and a totally disabling respiratory impairment.[3]

[1] On Claimant's behalf Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the administrative law judge's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed an initial claim for benefits on February 18, 2003, which the District Director denied on July 31, 2003 by reason of abandonment. Claimant took no further action until filing the current claim on August 30, 2016.

[3] We decline to address Employer's challenge to its designation as the responsible operator. This contention does not support the decision below and should have been raised

As Claimant filed this appeal without the assistance of counsel, the Benefits Review Board considers whether substantial evidence supports the decision below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

To be entitled to benefits under the Act, the claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing entitlement; however, failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds "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); *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). Claimant's prior claim was denied by reason of abandonment; thus, in order to obtain review of the merits of the claim, he was required to establish at least one of the elements of entitlement. 20 C.F.R. §725.409(c).

The administrative law judge found Claimant established 13.35 years of qualifying coal mine employment. *See* Decision and Order at 8. He further found Claimant

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in a cross-appeal. *See* 20 C.F.R. §§802.201(a)(2), 802.212(b); *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1999); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129 (3d Cir. 1987).

[4] The Board will apply the law of the United States Court of Appeals of the Fourth Circuit because Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4 n.4.

established that he has clinical pneumoconiosis based on the positive x-ray readings[5] and the medical opinions of Drs. Ajjarapu, McSharry and Fino. *See id.* at 11-12. He also found Claimant established legal pneumoconiosis based on Dr. McSharry's opinion that Claimant has a moderate obstructive lung disease due in part to his coal mine employment. *See id.* at 15-16.

Because Claimant has at least 10 years of coal mine employment, the administrative law judge found him entitled to the rebuttable presumption that his pneumoconiosis arose out of that employment, which, he further found, Employer did not rebut. *See* Decision and Order at 16-17; 30 U.S.C. §921(c)(1); 20 C.F.R. §718.203(b). He concluded Claimant established he has a totally disabling respiratory impairment based on the pulmonary function test evidence and the opinion of Dr. Ajjarapu. *See* Decision and Order at 21-25. While Claimant established the first three elements of entitlement,[6] the administrative law judge concluded he did not establish his pneumoconiosis is a substantially contributing cause of his total disability and, therefore, he denied benefits. *See id.* at 25.

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

A claimant is entitled to a presumption that his total disability is due to pneumoconiosis if he has at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b). The regulations define "year" as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 379 F.3d 321 (4th Cir. 2017). Claimant bears the burden of proving the length of his coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold the administrative law judge's finding if it is based on a reasonable method of computation and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-25, 1-27 (2011).

The administrative law judge initially accepted Claimant's hearing testimony regarding all of the coal mine employers for whom he worked, and credited him with annual income from those employers as listed on his Social Security Administration earnings statement. Decision and Order at 6. Finding the specific beginning and ending

[5] The record consists of eight substantive interpretations of five x-rays, all of which were interpreted as positive for simple pneumoconiosis. *See* Decision and Order at 10-11.

[6] Thus, Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

dates of Claimant's employment with various operators unascertainable, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days each year Claimant worked in coal mine employment.[7] *See id.* at 6-7. Finally, applying the Sixth Circuit's decision in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), the administrative law judge credited Claimant with a full year of coal mine employment for every year in which he worked at least 125 days or a fraction of a 125-day work-year where Claimant worked fewer than 125 days.[8] *See id.* at 7. Applying this method, he concluded Claimant established 13.35 years of coal mine employment and thus did not invoke the Section 411(c)(4) presumption.[9]

The administrative law judge rationally relied on Claimant's SSA earnings records as credible evidence of Claimant's coal mining income and, given the absence of evidence regarding the specific beginning and ending dates of Claimant's employment, permissibly referenced Exhibit 610 of the Black Lung Benefits Act Procedure Manual to determine the number of days Claimant worked each year. 20 C.F.R. §725.101(a)(32)(iii). Although this case arises within the jurisdiction of the Fourth Circuit, we need not determine whether the administrative law judge erred by relying on the Sixth Circuit's rationale in *Shepherd* to credit Claimant with coal mine employment based solely on a 125-day work-year. Error, if any, is harmless, as calculating Claimant's employment based on a 125-day work-year without regard to whether he established a 365-day employment relationship results in additional years of coal mine employment credited to Claimant, not less. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because the administrative law judge found Claimant established only 13.35 years of coal mine employment, we affirm his

[7] Under the formula, "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may . . . divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS)." 20 C.F.R. §725.101(a)(32)(iii). The BLS data is published at Exhibit 610 of the Black Lung Benefits Act Procedure Manual.

[8] In *Shepherd*, the Sixth Circuit held that a miner is entitled to credit for a full year of coal mine employment if he establishes 125 working days in a given year; the miner need not also establish a full 365-day employment relationship with that employer.

[9] The administrative law judge credited Claimant with full years of employment in 1980, 1981, 1983, 1984, 1989, 1990 and 1991 and partial years in 1975, 1978, 1979, 1982, 1985, 1987, 1988, 1992, 1993, 1994 and 1995. Decision and Order at 7.

finding Claimant did not invoke the Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-27.

Existence of Pneumoconiosis

The administrative law judge found Claimant established both clinical and legal pneumoconiosis.[10] Employer contends the administrative law judge erred in finding Claimant has legal pneumoconiosis. *See* Emp. Resp. Br. at 15-16.

In order to establish legal pneumoconiosis, Claimant must prove he suffers from a "chronic lung disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); Decision and Order at 13. The administrative law judge found Dr. McSharry had an adequate "understanding of [this] regulatory definition of legal pneumoconiosis[.]" He further found that Dr. McSharry's statement, expressed to "a reasonable degree of medical certainty", that Claimant "may well have legal pneumoconiosis" because he has a moderate obstructive lung disease likely due at least in part to his coal mine employment met the definition *See* Decision and Order at 14. We reject Employer's assertion Dr. McSharry's statement was too equivocal. It was within the administrative law judge's discretion to determine that Dr. McSharry's statement equated to a diagnosis that coal dust more likely than not contributed in part to Claimant's obstructive impairment, which, if found credible, satisfies Claimant's burden.[11] *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305 (4th Cir. 2012).

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[10] We affirm the finding that Claimant has clinical pneumoconiosis as it is unchallenged on appeal. 20 C.F.R. §718.201(a); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[11] Dr. McSharry stated:

> In my opinion, this claimant may well have legal coal workers' pneumoconiosis. He has moderate obstructive lung disease without restrictive abnormalities. While this purely obstructive impairment is an unusual [pulmonary function test] finding in pneumoconiosis, and he has another reasonable cause for this pulmonary function abnormality (namely his long smoking history), I feel that his [coal workers' pneumoconiosis] radiographically is severe enough that his lung disease could be due at least in part to pneumoconiosis. For this reason I believe legal pneumoconiosis may be present to a reasonable degree of medical certainty.

Employer's Exhibit 1.

And the administrative law judge permissibly found it so. He quoted the relevant portion of Dr. McSharry's statement in full and considered his reasoning. He noted Dr. McSharry acknowledged accurate employment and smoking histories, and concluded that, given his years of exposure, coal mine dust "contributed" to Claimant's obstructive impairment along with smoking. Decision and Order at 14 (citing 65 Fed. Reg. 79920, 79940 (Dec. 20, 2000)); *see Westmoreland Coal Co. v. Stallard*, 876 F. 3d 663 (4th Cir. 2017) (smoking history does not preclude diagnosis of legal pneumoconiosis as conditions may additive). We see no error in that determination. It is the administrative law judge's prerogative to draw inferences from the evidence and determine the weight to be accorded the medical opinions. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319 (4th Cir. 2013); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753 (4th Cir. 1999) (noting "the reliability of a given opinion is not necessarily revealed by the forcefulness of the speaker's language"). As his conclusion that Dr. McSharry credibly diagnosed legal pneumoconiosis based on Claimant's years of exposure to coal dust and type of impairment is rational and supported by substantial evidence, we affirm it.[12] *Looney*, 678 F.3d at 315-16.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function tests, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting a finding of total disability against the 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).

[12] The administrative law judge found "Dr. Ajjarapu's opinion demonstrates that Claimant's chronic bronchitis was 'significantly related to' or 'substantially aggravated by' Claimant's coal mine employment, and falls within the regulatory definition of legal pneumoconiosis." Decision and Order at 13. However, he gave her opinion diminished weight because she relied on an incorrect history of coal mine employment (by ten years). *Id.* Dr. Fino did not diagnose legal pneumoconiosis. The administrative law judge gave his opinion "little probative weight" because it "does not account for both C1aimant's exposure to coal mine dust and smoking history," contrary to the Preamble to the 2001 regulations. *Id.* at 15-16. These findings are rational and supported by substantial evidence, and are, therefore, affirmed. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305 (4th Cir. 2012).

The administrative law judge found Claimant's three qualifying pulmonary function tests weigh in favor of total disability. *See* Decision and Order at 19-20. Conversely, he accorded less weight to the two non-qualifying tests administered by Dr. McSharry and Dr. Fino because they either did not produce acceptable spirometry data or did not include a notation on Claimant's effort and thus did not conform to the regulatory quality standards. *See id.* at 20; Employer's Exhibits 1, 3. He gave probative weight to Dr. Ajjarapu's opinion that Claimant is totally disabled by his respiratory impairment while discounting the contrary opinions of Drs. Fino and McSharry because he found them to be poorly reasoned and insufficiently documented. Decision and Order at 22-24.

Employer contends the administrative law judge erred in evaluating the pulmonary function study evidence, which, in turn, affected his analysis of the medical opinion evidence. Employer also contends the administrative law judge failed to weigh the evidence supportive of total respiratory disability against the contrary probative evidence. 20 C.F.R. §718.204(b)(2). Employer's contentions are without merit.

The record consists of five pulmonary function tests, three of which produced qualifying values and two of which did not.[13] The three qualifying pulmonary function tests were administered on September 21, 2016, May, 30, 2017, and December 12, 2017 and each included a notation that Claimant cooperated and gave good effort.[14] *See* Director's Exhibit 16; Claimant's Exhibits 5, 6. The administrative law judge gave probative weight to these qualifying tests because they produced acceptable results and included a notation that Claimant gave good efforts. *See* Decision and Order at 20. The administrative law judge found the two non-qualifying pulmonary function tests, one administered by Dr. Fino on April 20, 2017, and the other administered by Dr. McSharry on July 18, 2018, were not entitled to probative weight because Dr. Fino did not make a notation as to Claimant's effort and cooperation as required by the regulations and the test administered by Dr. McSharry failed to produce acceptable spirometry data. *Id.* He

[13] The administrative law judge did not consider the pulmonary function test administered on August 4, 2016 because Claimant did not complete the test and thus it was invalid. *See* Decision and Order at 19 n.14.

[14] The September 21, 2016 test was qualifying before and after the administration of a bronchodilator. Director's Exhibits 15, 16 at 13. The May 30, 2017 and December 12, 2017 tests were qualifying; no post-bronchodilator tests were administered. Claimant's Exhibit 6. The April 20, 2017 and July 18, 2018 tests were non-qualifying, both before and after the administration of a bronchodilator. Employer's Exhibits 1, 3.

therefore concluded the pulmonary function test evidence weighed in favor of total disability. *Id.*

The administrative law judge permissibly found the preponderance of the conforming pulmonary function test evidence establishes total disability. Decision and Order at 19-20. He found the two non-qualifying pulmonary function tests not entitled to probative weight because they did not produce acceptable spirometry curves or did not contain a notation as to Claimant's level of effort. 20 C.F.R. §718.103. Thus, even accepting Employer's argument that the December 12, 2017 qualifying test should not have been credited because it also did not conform to the regulatory quality standards, any error would be harmless because it does not undermine the probative weight the administrative law judge gave the remaining two qualifying pulmonary function tests. *See Larioni*, 6 BLR at 1-1278. The administrative law judge performed a permissible qualitative and quantitative analysis in determining the majority of the conforming tests establish total disability. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 149 (1990). The Board is not permitted to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As it is supported by substantial evidence, we affirm the administrative law judge's finding.

Regarding the medical opinion evidence, the administrative law judge permissibly discounted the opinions of Drs. Fino and McSharry because he found they did not adequately address the qualifying pulmonary function studies or assess whether Claimant could return to his coal mine work from a respiratory standpoint. Decision and Order at 22-24; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013); *Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1997). Conversely, he credited Dr. Ajjarapu's opinion, among other reasons, because she "demonstrated an accurate understanding of the exertional requirements of Claimant's last coal mine employment," and based her opinion on Claimant's "medical and social histories, a physical examination and objective testing" in determining that Claimant's spirometry values establish "he doesn't have the pulmonary capacity to do his previous coal mine employment." Decision and Order at 22.

He then concluded the relevant evidence weighed together did not affect his determination the qualifying pulmonary function studies and Dr. Ajjarapu's opinion establish total disability. Decision and Order at 25. While the administrative law judge found the blood gas studies non-qualifying, such testing does not undermine the pulmonary function study evidence, or Dr. Ajjarapu's reliance on them, because blood gas studies measure a different form of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-1041 (6th Cir. 1993). The administrative law judge discussed all the relevant evidence in determining Claimant established total disability and his findings are supported by substantial evidence. We therefore affirm them. *See Lane*, 105 F.3d at 173-74.

Disability Causation

A miner is totally disabled due to pneumoconiosis if it is "a substantially contributing cause of his totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis is a "substantially contributing cause" if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

In addressing the issue, the administrative law judge permissibly rejected the causation opinions of Drs. McSharry and Fino for failure to diagnose disability, counter to his own finding on the issue. Decision and Order at 25; *see Toler v. Eastern Associated Coal Co.*, 43 F.3d 109 (4th Cir. 1995). He also did not give great weight to Dr. Ajjarapu's opinion because she based her opinion of the effect of Claimant's coal dust exposure on his respiratory impairment on an inaccurate understanding of Claimant's coal mine employment, relying on a history of 23 years of coal mine employment rather than the 13.35 years the administrative law judge found Claimant actually established. Decision and Order at 13, 25. Having discredited all of the causation opinions in the case, the administrative law judge found Claimant did not meet his burden to establish the disability causation element. *Id.* at 25.

We agree with the Director that the administrative law judge's finding cannot be affirmed. While the administrative law judge articulated the proper standard for establishing disability causation, he misapplied it in analyzing the medical opinions. The relevant question under Section 718.204(c)(1) is whether Claimant's pneumoconiosis is a substantially contributing cause of his total respiratory disability (disability causation element), not whether coal dust contributes to his impairment (disease element). *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189 (4th Cir. 1995). Remand is not required, however. As a matter of law and logic, the administrative law judge's findings dictate Claimant is entitled to benefits because they categorically establish pneumoconiosis in its two forms as the sole cause of his respiratory disability.

All three doctors who offered an opinion agree Claimant suffers from clinical pneumoconiosis and an obstructive impairment. Employer does not contest the existence of clinical pneumoconiosis. *See* n.10 *supra*. In addition, Dr. McSharry diagnosed an "irreversible obstructive lung disease." Employer's Exhibit 1 at 2. Dr. Fino diagnosed "mild" obstructive disease. Employer's Exhibit 3 at 7. And Dr. Ajjarapu diagnosed a "severe obstruction." Director's Exhibit 16 at 4. No other respiratory conditions have been identified. The administrative law judge determined, and we have affirmed, that Claimant

is totally disabled from a respiratory standpoint. *See* Decision and Order at 25; *Supra* at 9. Because clinical pneumoconiosis and the remaining obstructive impairment -- that we have affirmed to be legal pneumoconiosis -- are the only causes of that respiratory disability, they necessarily are "substantially contributing causes" of it. *See* 20 C.F.R. §718.204(c)(1); *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994). Thus, we reverse the administrative law judge's finding that Claimant did not establish the disability causation element.

Accordingly, Claimant has met his burden to establish the elements of entitlement. We affirm the administrative law judge's Decision and Order in part, but reverse the denial of benefits. We remand the case for entry of an award of benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

While I agree with my colleagues that the administrative law judge's finding on the length of Claimant's coal mine employment may be affirmed, I would vacate the findings on legal pneumoconiosis, disability, and disability causation and remand for the administrative law judge to discuss the evidence under the correct standards.

With respect to legal pneumoconiosis, Employer correctly contends the administrative law judge did not adequately explain why he interpreted Dr. McSharry's arguably equivocal statements that Claimant "*may well have* legal coal workers' pneumoconiosis…," "his lung disease *could be* due at least in part to pneumoconiosis…," and "legal pneumoconiosis *may* be present…," Employer's Exhibit 1, establish Claimant's respiratory impairment is, more likely than not, "significantly related to or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R. §718.201(b). While the administrative law judge is entitled to weigh and draw inferences from the evidence, *see, e.g., Lane v. Union Carbide Corp*., 105 F.3d 166 (4th Cir. 1997), he also is required to provide a reasoned analysis and explanation for his findings, *see, e.g.,*

Milburn Colliery Co. v. Hicks, 138 F.3d 524 (4th Cir. 1998); *see also* 5 U.S.C. §557(c)(3)(A). As he did not do so here, *see* Decision and Order at 14-15, I would remand for him to reconsider whether Claimant established the existence of legal pneumoconiosis and provide an appropriate explanation for his finding, applying the requirements of the regulatory definition.

The administrative law judge's assessment of the pulmonary function tests also requires remand. As Employer suggests, the administrative law judge failed to assess the validity of the December 12, 2017 test. Moreover, the administrative law judge eliminated the non-qualifying tests conducted by Drs. McSharry and Fino because in the one case there was too much variability and in the other there was no certificate as to cooperation; hence they failed to meet the standards. The requirement, however, is that the tests be in "substantial compliance" with the standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B. Moreover, with respect to a non-qualifying test for which there is no statement as to cooperation, it is evident that the claimant cooperated to the extent that he can do at least as well as the test results demonstrate. *See Crapp v. United States Steel Corp.*, 6 BLR 1-476 (1983). Hence, even without a statement of cooperation, or where the claimant has not cooperated fully, the test can provide some useful information about the claimant's capabilities. By completely eliminating the two tests from his analysis without determining whether they were in substantial compliance or provided pertinent and credible information the administrative law judge failed to consider all relevant evidence. It is possible for a different conclusion to be reached had the administrative law judge assessed and considered the evidence in its entirety. Consequently, I would remand for him to assess whether the pulmonary function tests (including the December 12, 2017 test) are in substantial compliance with the requirements, taking into account the regulatory presumption of validity, and to consider all the relevant evidence with respect to the tests. *See* 20 C.F.R. 718.101(b); *Orek v. Director, OWCP*, 10 BLR 1-51 (1987).

If, after following the appropriate process, the administrative law judge again finds total disability, the administrative law judge should revisit the issue of disability causation in light of the Director's argument.

Accordingly, I would vacate the administrative law judge's findings that Claimant established legal pneumoconiosis based on Dr. McSharry's opinion and total disability based on pulmonary function studies, and that Claimant did not establish his disability is due to pneumoconiosis and remand for the administrative law judge to reconsider these issues. Therefore, I respectfully dissent.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge