U.S. Department of Labor

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

BRB No. 23-0257 BLA

DONALD M. KUNSELMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROSEBUD MINING COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 06/28/2024
	)	
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 on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

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

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits on Remand (2019-BLA-06290) 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 miner's claim filed on November 5, 2018, and is before the Benefits Review Board for the second time.

In his initial Decision and Order Denying Benefits, the ALJ credited Claimant with forty-one years of coal mine employment and more than fifteen years of underground mining. Although the ALJ found Claimant established both legal and clinical pneumoconiosis arising out of coal mine employment, he found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2)(i)-(iv). Thus, he found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[1] or establish entitlement to benefits under 20 C.F.R. Part 718. He therefore denied benefits.

In response to Claimant's appeal, the Board affirmed the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment and the existence of both legal and clinical pneumoconiosis arising out of coal mine employment. *Kunselman v. Rosebud Mining Co.*, BRB No. 21-0221 BLA, slip op. at 2 nn.2 & 3 (Feb. 16, 2022) (unpub.). The Board also affirmed the ALJ's findings that the pulmonary function and arterial blood gas studies do not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Id.* at 3 n.5. However, the Board vacated the ALJ's finding that the medical opinion evidence does not support a finding of total disability and remanded the case for further consideration. *Id*. at 5-6.

On remand, the ALJ again found the medical opinion evidence does not support a finding of total disability. He therefore found Claimant could not invoke the Section 411(c)(4) presumption or establish entitlement to benefits under 20 C.F.R. Part 718. Consequently, he denied benefits.

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

On appeal, Claimant argues the ALJ erred in finding the medical opinion evidence does not establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[2] 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 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Medical Opinions

In his initial decision, the ALJ determined Claimant's usual coal mine work was working as a purchasing agent and then considered the medical opinions of Drs. Zlupko, Fino, and Basheda. Decision and Order at 19. Dr. Zlupko opined Claimant has a totally disabling respiratory or pulmonary impairment,[3] while Drs. Fino and Basheda opined he

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[3] Dr. Zlupko attached Claimant's employment history Form CM-911a to his report and noted his symptoms include shortness of breath affecting his daily activities, and an inability to "walk very far before becoming winded." Director's Exhibit 12 at 2-3. He opined Claimant has a severe respiratory impairment "evidenced by a substantial drop in his PO2 with exertion" on blood gas testing, and he would neither "return [Claimant] to his

does not.[4] Director's Exhibit 12 at 4-5; Employer's Exhibits 1 at 1-2, 8-9; 2 at 8-9; 3 at 16-17; 4 at 16-18, 22. The ALJ found Drs. Fino's and Basheda's opinions well-reasoned and entitled to great weight because they addressed the exertional requirements of Claimant's last coal mine job and reflect the diagnostic testing results. Decision and Order at 21. Further, he found Dr. Zlupko's opinion not reasoned because the doctor failed to list Claimant's last coal mine job or discuss its exertional requirements. *Id*. at 20. He thus found the medical opinion evidence does not support a finding of total disability. *Id*.

In its prior decision, the Board held that although the ALJ identified Claimant's usual coal mine employment as working as a purchasing agent,[5] he erred in failing to render a finding regarding the exertional requirements of Claimant's usual coal mine employment for comparison with the medical opinions assessing his capability to perform that work. *Kunselman*, BRB No. 21-0221 BLA, slip op. at 5. The Board explained that "[t]his error is not harmless as a finding regarding the exertional requirements of Claimant's usual coal mine job is central to the ALJ's rationale for resolving the conflict in the medical opinions." *Id*. Thus, the Board vacated the ALJ's finding that the medical opinion evidence does not support a finding of total disability and remanded the case for further consideration. *Id*.

In its remand instructions to the ALJ, the Board stated:

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previous coal mine work" nor "expect him to be able to perform his job duties." *Id*. at 4. Further, he opined "[Claimant] is substantially impaired and unable to perform any of the work duties that he did during his coal mining career." *Id*. at 4-5.

[4] Dr. Fino identified Claimant's last coal mine work as working as an outside section foreman requiring a mixture of very heavy, heavy, moderate, and light exertion. Employer's Exhibits 2 at 2; 4 at 8. He opined Claimant has a mild respiratory impairment based on his pulmonary function and arterial blood gas studies but retains the pulmonary capacity to return to his last coal mine job. Employer's Exhibits 2 at 8-9; 4 at 16-18, 22. Dr. Basheda identified Claimant's last coal mine work as above-ground supply work involving lifting and carrying, and he opined Claimant is not disabled as objective testing shows no significant impairment. Employer's Exhibit 1 at 1-2, 8-9. At his deposition, Dr. Basheda identified Claimant's last coal mine job as an underground face boss that required heavy exertion sometimes, and opined he retains the pulmonary capacity to return to his coal mine work. Employer's Exhibit 3 at 16-17.

[5] The Board previously affirmed the ALJ's finding that Claimant's usual coal mine work was working as a purchasing agent. *Kunselman v. Rosebud Mining Co.*, BRB No. 21-0221 BLA, slip op. at 5 n.9 (Feb. 16, 2022) (unpub.).

> In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must first determine the exertional requirements of Claimant's usual coal mine work and then must consider the medical opinions in light of those requirements. He must then consider the credibility of the opinions of Drs. Basheda, Fino, and Zlupko in light of their understanding of the exertional requirements of Claimant's usual coal mine work, focusing his analysis on the presence or absence of a totally disabling respiratory or pulmonary impairment without regard to causation. **Moreover, even if the ALJ determines a physician did not properly identify Claimant's usual coal mine work, he must consider whether the doctor adequately described Claimant's physical limitations. If the ALJ credits a physician's statement of Claimant's physical limitations, he can consider the limitations together with the exertional requirements of Claimant's usual coal mine work to determine if the opinion supports Claimant's burden to establish total disability at 20 C.F.R. §718.204(b)(2)(iv)**.

Kunselman, BRB No. 21-0221 BLA, slip op. at 6 (citations omitted) (emphasis added).

On remand, the ALJ found Claimant's last coal mining job as a purchasing agent required light exertion, and he again considered Dr. Zlupko's opinion that Claimant has a totally disabling respiratory or pulmonary impairment and Drs. Fino's and Basheda's opinions that he does not. Decision and Order on Remand at 11. The ALJ found Drs. Fino's and Basheda's opinions well-reasoned and entitled to great weight because they are consistent with the objective medical evidence of record. *Id.* at 14. Further, he found Dr. Zlupko's opinion inadequately reasoned and entitled to no weight because the doctor "fail[ed] to discuss [Claimant's] exertional requirements or physical limitations in relation to [his] disability (i.e., limitations on walking, running, climbing, lifting, etc.)." *Id.* at 13-14. He thus concluded the medical opinion evidence does not support a finding of total disability.

Claimant argues the ALJ erred in discrediting Dr. Zlupko's opinion based on the same error the Board identified when it vacated his prior decision. Claimant's Brief at 5-6. Specifically, Claimant contends "the ALJ once again discredits Dr. Zlupko's opinion based solely on the fact that [the doctor] did not explain the exertional requirements of [his] last coal mine employment." *Id.* at 6. We agree.

A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a miner is unable to do his usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of

physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability).

Dr. Zlupko noted Claimant has respiratory symptoms that include chronic shortness of breath during exertion, he complained of "shortness of breath" that "affects his daily activities," and he cannot "walk very far before becoming winded." Director's Exhibit 12 at 3. He opined Claimant has a functional impairment based on a substantial drop in his PO2 with exertion[,]" as demonstrated by the arterial blood gas study Dr. Zlupko conducted. *Id*. at 3-4. Ultimately, he identified Claimant's respiratory impairment as severe and substantial, and opined he would be "unable to perform any of the work duties that he did during his coal mining career." *Id*. at 4-5.

The ALJ noted Dr. Zlupko did not list Claimant's last coal mine job, identify its duties, or discuss its exertional requirements.[6] Decision and Order on Remand at 13. He also noted Dr. Zlupko did not "explain what level of exertion [Claimant] is totally disabled from performing nor does the physician describe what physical limitations are imposed on [him] due to his disability (i.e., limitations on walking, running, climbing, lifting, etc.)." *Id*. Thus, he concluded Dr. Zlupko's opinion that Claimant is totally disabled from performing the duties of his usual coal mine job "based on PO_2 decrease with exertion" on blood gas testing is insufficient "to infer a finding of total disability." *Id*. In addition, he found Dr. Zlupko's opinion not reasoned because the doctor failed to discuss the exertional requirements of Claimant's usual coal mine job "in relation" to his physical limitations when opining he would not be able to perform any of the duties of his usual coal mine job. *Id*. at 13-14.

While the ALJ rendered a factual finding regarding the exertional requirements of Claimant's usual coal mine work, he erred in failing to follow the Board's instructions to compare Claimant's exertional requirements with Dr. Zlupko's opinion regarding his physical limitations to determine whether the doctor's opinion supports a finding of total disability. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) ("Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error"); *Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988) ("a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it"). Dr. Zlupko's assessment of Claimant's impairment and physical limitations provides sufficient information from which the ALJ can reasonably infer whether he is unable to do his usual coal mine work. *See Scott*, 60 F.3d at 1141; *Poole v. Freeman United Coal*

[6] The ALJ acknowledged Dr. Zlupko had attached Claimant's Employment History CM-911a form to his report, but he found that attaching the form did not suffice to prove the doctor considered it in rendering his opinion. Decision and Order at 13 n.13.

Mining Co., 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion."); *Budash*, 9 BLR at 1-51-52 (ALJ may find total disability by comparing physician's impairment rating and any physical limitations due to that impairment with the exertional requirements of the miner's usual coal mine work).[7]

Claimant also argues that while the ALJ found Dr. Zlupko's reliance on a substantial drop in Claimant's PO2 with exertion on blood gas testing was insufficient to support a finding of total disability, he did not impose the same standard on Employer's experts. Claimant's Brief at 7. Specifically, Claimant asserts the ALJ failed to reconcile his finding that Dr. Zlupko's opinion is not reasoned and documented with his finding that Drs. Fino's and Basheda's opinions are reasoned and documented despite their failure to explain why Claimant "is not disabled in light of the severe [PO2] drop." *Id.* We agree the ALJ's finding does not satisfy the explanatory requirements of the Administrative Procedure Act (APA)[8] as he failed to adequately explain how he resolved the conflict in the medical opinions regarding Claimant's reduced PO2 with exertion on blood gas testing. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The December 10, 2018 arterial blood gas study Dr. Zlupko conducted produced results indicating a drop in Claimant's PO2 values from 88 at rest to 69 after twelve minutes of incline walking. Director's Exhibit 12 at 20-22. As discussed, Dr. Zlupko opined the substantial drop in Claimant's PO2 with exertion "evidenced" a "severe" respiratory

[7] Our dissenting colleague characterizes the ALJ's finding, that Dr. Zlupko's opinion Claimant is totally disabled "based on PO2 decrease with exertion [on blood gas testing] is not sufficient to infer a finding of total disability," Decision and Order on Remand at 13, as indicating Claimant "could not perform even the light labor required of his coal mine job." *See infra* at 10-11. But the ALJ did not make such a finding; the ALJ did not compare the "light" exertional requirements of Claimant's last coal mining job working as a purchasing agent with Dr. Zlupko's opinion regarding his physical limitations. The Board lacks the authority to render factual findings to fill in gaps in the ALJ's opinion. *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Under these circumstances, when an ALJ does not make necessary findings of fact, the proper course is for the Board to remand the case for the ALJ to do so.

[8] The Administrative Procedure Act provides 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).

impairment. *Id*. at 4. Dr. Basheda did not review the study in rendering his opinion. Employer's Exhibits 1, 3. While Dr. Fino included the results of the study in his initial report, he did not individually address them. Employer's Exhibit 2 at 7-9. In his deposition, however, Dr. Fino acknowledged that the study showed a drop in PO2, but found the result was still non-qualifying[9] and did not indicate clinically significant hypoxemia. Employer's Exhibit 4 at 14, 16-17.

While the ALJ found Dr. Zlupko's opinion, that Claimant is totally disabled from performing his usual coal mine job "based on [his] PO2 decrease with exertion" on blood gas testing, was insufficient to support a finding of total disability, he found Drs. Fino's and Basheda's opinions well-reasoned because they "are supported by the objective medical data of record." Decision and Order on Remand at 13, 14. However, he did not address whether Drs. Fino and Basheda considered Claimant's reduced PO2 with exertion on the blood gas study Dr. Zlupko conducted. Thus, we are unable to discern how the ALJ resolved the conflict in the medical opinions regarding the reduced PO2 with exertion on blood gas testing.

In view of the foregoing errors, we vacate the ALJ's finding that the medical opinion evidence does not support a finding of total disability, 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration. *See Wojtowicz*, 12 BLR at 1-165; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order on Remand at 15. Further, we vacate his findings that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) and therefore failed to invoke the Section 411(c)(4) presumption. Decision and Order on Remand at 14-15. Thus, we vacate his finding that Claimant is not entitled to benefits.

Remand Instructions

On remand, the ALJ must consider whether Claimant has established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). When weighing the medical opinions, the ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). In addition, the ALJ must compare the findings regarding

[9] A "qualifying" arterial blood gas study yields results equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. *See Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52. Moreover, the ALJ must set forth in detail how conflicts in the evidence are resolved, as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability based on the medical opinion evidence, the ALJ should then weigh all the relevant evidence together to determine whether he has established total disability. *See* 20 C.F.R. §718.204(b)(2); *see also Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, and thereby invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305. The burden would then shift to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[10] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). As the Board has previously affirmed the ALJ's finding that Claimant established both legal and clinical pneumoconiosis arising out of coal mine employment, Employer is foreclosed from rebutting the presumption by establishing Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, the ALJ must address whether Employer has established "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

If Claimant is unable to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, benefits are precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[10] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary 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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Accordingly, the ALJ's Decision and Order Denying Benefits on Remand is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority decision. I would hold the ALJ acted within his discretion in finding Dr. Zlupko's opinion on total disability inadequately explained.

The Board previously remanded the claim to the ALJ because he did not render findings regarding the exertional requirements of Claimant's usual coal mine work as a purchasing agent, which may have affected his weighing of the medical opinions. *Kunselman v. Rosebud Mining Co.*, BRB No. 21-0221 BLA, slip op. at 5 (Feb. 16, 2022) (unpub.). On remand, the ALJ found Claimant's work required "light labor." Decision and Order on Remand at 4. The most difficult part of the job was "climbing in and out of the front-end loader." *Id.*

The ALJ then rejected Dr. Zlupko's opinion. He found the physician did not credibly explain why Claimant would be unable to perform his previous coal mine work due to the decrease in PO2 he experienced "with exertion" (i.e., after performing a twelve-minute exercise test with speeds up to 2.5 miles per hour and an incline of up to 12 percent).[11] Decision and Order on Remand at 12-13. The ALJ reasoned that Dr. Zlupko

[11] Although Dr. Zlupko recorded other respiratory limitations Claimant reported to him, the physician relied exclusively on Claimant's drop in PO2 during the twelve-minute exercise test to diagnose total disability. Director's Exhibit 12 at 2-4. The ALJ thus rationally considered whether Dr. Zlupko credibly explained why that specific physical limitation renders Claimant disabled. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141

did not demonstrate an understanding of the exertional requirements of Claimant's coal mine job and thus declined to infer that Dr. Zlupko's reference to Claimant's disability "with exertion" meant the physician also believed Claimant could not perform the "light labor" required of that job. *Id.* at 13.

I agree with the majority that Dr. Zlupko's opinion is facially sufficient to meet the definition of total disability. He not only identified a level of exertion Claimant could not perform (the "exertion" required of the twelve-minute exercise test), he also explicitly opined Claimant would be unable to perform his prior coal mine work based on that test. *See Gonzales v. Director, OWCP*, 869 F.2d 776, 780 (3d Cir. 1989) (physician's description of miner's functional limitations is "probative of a finding [the miner] is totally disabled"); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion*.") (emphasis added); Director's Exhibit 12 at 4, 21. Thus, his opinion could, *if credited*, meet Claimant's burden of proof. 20 C.F.R. §718.204(b)(2).

However, the ALJ in this case, performing his duty to weigh the credibility of the evidence, permissibly found Dr. Zlupko's opinion not well-reasoned. In so finding, he rationally declined to infer that the physician's reference to disability "with exertion" during the twelve-minute exercise test means Claimant could not perform even the light labor required of his coal mine job. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the ALJ followed the Board's remand instructions and explained his findings in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), I would affirm his decision.[12] *See Barren Creek Coal Co. v.*

(4th Cir. 1995) (physical limitations described in a doctor's report may not be rejected "as being nothing more than mere notations of the patient's descriptions unless there is specific evidence for doing so in the report").

[12] Because Dr. Zlupko's report is the only medical opinion supporting total disability and the ALJ permissibly discredited it, any error the ALJ may have committed in crediting Drs. Fino's and Basheda's contrary opinions is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Witmer, 111 F.3d 352, 354 (3d Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

GREG J. BUZZARD
Administrative Appeals Judge