U.S. Department of Labor

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

BRB No. 23-0326 BLA

LARRY R. BLACKBURN Claimant-Respondent v. COAL RIVER MINING, LLC and BRICKSTREET MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/30/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Willow Eden Fort, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for Claimant.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

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

BUZZARD, and JONES, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Willow Eden Fort's Decision and Order Awarding Benefits (2018-BLA-06130) rendered on a claim filed on August 4, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established forty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the ALJ erred in finding Claimant established he is totally disabled, thereby invoking the Section 411(c)(4) presumption. Employer also alleges she erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review 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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

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

To invoke the Section 411(c)(4) presumption, a 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,

[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); 20 C.F.R. §718.305.

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

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 20, 23; Employer's Exhibit 1 at 5.

prevents him from performing his usual coal mine work or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[4] pulmonary function or 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).

The ALJ found Claimant established total disability based on the medical opinion evidence and the evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-14.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated December 10, 2019, September 2, 2020, and May 4, 2022. Decision and Order at 6-9. The December 10, 2019 study produced non-qualifying values before and after the administration of a bronchodilator. Director's Exhibit 55 at 2. The September 2, 2020 study produced qualifying values before and after the administration of a bronchodilator. Director's Exhibit 73 at 1 (unpaginated). Finally, the May 4, 2022 study produced non-qualifying values pre-bronchodilator; post-bronchodilator values were not obtained. Employer's Exhibit 5 at 14. The ALJ found the December 10, 2019 study is invalid while the September 2, 2020 and May 4, 2022 studies are valid. Decision and Order at 7-9. Because the September 2, 2020 study is qualifying and the May 4, 2022 study is non-qualifying, she found the weight of the pulmonary function study evidence is in equipoise and thus does not establish disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 9.

Employer argues the ALJ erred in finding the non-qualifying pre-bronchodilator values from the December 10, 2019 pulmonary function study are invalid. Employer's Brief at 4-5 (unpaginated). We disagree.

[4] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 4, 9.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B.

The ALJ acknowledged that Dr. Vuskovich questioned the validity of the post-bronchodilator results but opined the pre-bronchodilator results are valid. Decision and Order at 7. She also observed that Dr. Ammisetty, who conducted the study, opined Claimant's "effort was erratic which makes it impossible to adequately evaluate the flow volume loops." Director's Exhibit 55 at 3; Decision and Order at 7. She found Dr. Vuskovich's opinion that the pre-bronchodilator values are valid is unpersuasive given that he reviewed Dr. Ammisetty's comment but did not explain how he was able to evaluate the tracings while Dr. Ammisetty was unable to do so. Decision and Order at 7. Thus, crediting Dr. Ammisetty's opinion, the ALJ permissibly found the study is invalid.[6] *See Milburn Colliery v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 7.

As Employer raises no additional arguments, we affirm the ALJ's finding that the pulmonary function study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

Before considering whether the medical opinion evidence establishes total disability, the ALJ determined the exertional requirements of Claimant's usual coal mine

[6] Employer argues an invalid pulmonary function study is "still capable of establishing at least the *minimum* a particular patient can produce," and thus failure to consider the December 10, 2019 pulmonary function study was error. Employer's Brief at 4-5 (unpaginated). We disagree. The ALJ properly declined to consider whether the study establishes total disability at 20 C.F.R. 718.204(b)(2)(i) as the regulations state "no results of a pulmonary function study shall constitute evidence of the presence *or absence* of a respiratory or pulmonary impairment unless it is conducted and reported in accordance" with the quality standards. 20 C.F.R. §718.103(c) (emphasis added); Decision and Order at 7.

employment.[7] Decision and Order at 5. She found Claimant's usual coal mine employment as a production supervisor required heavy manual labor because he was required "to stand for most of [his] shift and lift and carry up to a hundred pounds or more multiple times per day." *Id.* We affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ then considered the opinions of Drs. Ammisetty, Fino, and Vuskovich. Decision and Order at 10-13. Dr. Ammisetty opined Claimant is totally disabled based on the September 2, 2020 pulmonary function study and the "high physical demand" of his usual coal mine employment. Director's Exhibits 10 at 2; 73 at 14 (unpaginated). Dr. Fino opined Claimant has an impairment but the exertional requirements of his usual coal mine employment were not demanding enough for the impairment to be disabling. Employer's Exhibit 5 at 6-10. Dr. Vuskovich opined Claimant is not totally disabled because the pulmonary function and blood gas studies are all non-qualifying except for the September 2, 2020 pulmonary function study which he opined is invalid pre-bronchodilator. Employer's Exhibits 2 at 5-6; 3 at 3-6; 4 at 3-6; 9 at 2-5.

The ALJ found Dr. Ammisetty's opinion is well-reasoned and documented and entitled to probative weight. Decision and Order at 10-11. She found the contrary opinions of Drs. Fino and Vuskovich entitled to reduced weight because their explanations are not documented and they did not persuasively explain how they concluded Claimant would be able to perform the heavy manual labor required by his usual coal mine employment. *Id.* at 11-13.

Employer argues the ALJ erred in crediting Dr. Ammisetty's opinion because he relied on the pulmonary function studies which the ALJ found "were not in favor of a finding of disability." Employer's Brief at 6 (unpaginated). We disagree. Contrary to Employer's assertion, even if total disability cannot be established by pulmonary function or arterial blood tests, it "may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents" him from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v.*

[7] A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining* Co., 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

Director, OWCP, 415 F.3d 716, 721-22 (7th Cir. 2005) (a claimant can establish total disability despite non-qualifying objective tests).

Dr. Ammisetty based his opinion on the qualifying September 2, 2020 pulmonary function study which the ALJ found is valid. Decision and Order at 7-8; Director's Exhibit 73 at 14 (unpaginated). He also observed that Claimant's usual coal mine employment required "sitting for [two to four] hours, standing [eight to ten] hours, crawling variable distances many times per day, lifting less than [fifty] pounds multiple times per day, [and] carrying [one hundred] pounds variable distances multiple times per day." Director's Exhibit 10 at 2. He noted that Claimant is unable to walk "more than one block [on] level road without catching breath" and that "climbing [ten] steps make[s] him out of breath." *Id.* at 4. Based on these limitations and the qualifying September 2, 2020 pulmonary function study, Dr. Ammisetty opined Claimant is unable to perform the "high physical demand" required by his coal mine work. Director's Exhibits 10; 73.

The ALJ permissibly found Dr. Ammisetty's opinion is credible because it is consistent with her finding that the September 2, 2020 pulmonary function study results he relied on are valid and qualifying. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 11. Moreover, she permissibly found Dr. Ammisetty's opinion persuasive because the physician displayed an accurate understanding of the heavy exertional requirements of Claimant's usual coal mine job as a production supervisor. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 11.

Employer also argues Dr. Ammisetty's opinion is not credible because he did not review the most recent May 4, 2022 pulmonary function study. Employer's Brief at 6-7 (unpaginated). Contrary to Employer's assertion, an ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner and objective test results. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Moreover, Employer's argument is based largely on its belief that the non-qualifying May 4, 2022 pulmonary function study is the most probative evidence of Claimant's condition because it is the most recent. Employer's Brief at 6-7. However, the Board and federal Courts of Appeals have held it is irrational to credit evidence solely because of recency where it purportedly shows the miner's condition has improved.[8] *See*

[8] Our dissenting colleague does not object to the ALJ's weighing of the pulmonary function studies or the ALJ's finding that Dr. Ammisetty's total disability diagnosis is credible, while Drs. Fino's and Vuskovich's contrary opinions are not. Instead, she suggests that the ALJ failed to weigh the non-qualifying May 4, 2022 pulmonary function study against Dr. Ammisetty's total disability diagnosis. However, our dissenting colleague does not square her opinion with the ALJ's permissible decision to give equal

Kincaid v. Island Creek Coal Co., 26 BLR 143, 1-49-52 (2023) (ALJ erred by crediting non-qualifying blood gas study over qualifying ones "solely on the basis of recency"); *Smith v. Kelly's Creek Res.*, BLR , (2023); *see also Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993) ("A bare appeal to recency" in evaluating medical opinions "is an abdication of rational decision-making.").

Employer next argues the ALJ erred in discrediting the opinions of Drs. Fino and Vuskovich. Employer's Brief at 7-8 (unpaginated). We are not persuaded.

While Drs. Fino and Vuskovich opined Claimant is not totally disabled, they also acknowledged his pulmonary symptoms and limitations. Employer's Exhibits 2-5; 9. Specifically, Dr. Fino noted Claimant has shortness of breath and becomes dyspneic when performing manual labor. Employer's Exhibit 5 at 2. He opined Claimant is limited in what he can do because of his breathing, and that he has a respiratory impairment caused by an elevated diaphragm. *Id.* at 2, 9. Dr. Vuskovich did not examine Claimant, but noted his medical records indicate he has shortness of breath and agreed with Dr. Fino's opinion that his impairment is caused by an elevated diaphragm. Employer's Exhibits 2; 9 at 4.

Considering their awareness of Claimant's respiratory symptoms and physical limitations from shortness of breath, the ALJ permissibly found Drs. Fino and Vuskovich did not adequately explain how they concluded Claimant could perform the heavy manual labor his previous coal mine employment required. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir.1995) (physical

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weight to the qualifying September 2, 2020 study and the non-qualifying May 4, 2022 study. The ALJ found them in equipoise, meaning that the pulmonary function study evidence neither supports nor undermines a finding of total disability. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-73 (1994) ("equally probative" or "evenly balanced" evidence cannot preponderantly establish the fact for which it is proffered); *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 390-91 (4th Cir. 1999) (evidence that two opposite propositions are equally possible is insufficient to establish that either proposition "more likely than not" exists). Our colleague fails to explain how it was error for the ALJ to give greater weight to Dr. Ammisetty's credible total disability diagnosis than the equipoise pulmonary function studies. 20 C.F.R. §718.204(b)(2)(iv) (doctor may offer a reasoned medical opinion diagnosing total disability even if the ALJ finds the objective testing is non-qualifying). To the extent our colleague may be suggesting that the May 4, 2022 pulmonary function study should or could be given greatest weight simply because it is the most recent study, that argument is contrary to law. *Kincaid v. Island Creek Coal Co.*, 26 BLR 143, 1-49-52 (2023); *Smith v. Kelly's Creek Res.*, BLR , (2023); *see also Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993).

limitations described in a doctor's report are 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); Decision and Order at 11-13.

Finally, Employer asserts the ALJ "misstated that Dr. Vuskovich 'found the September 2, 2020 [pulmonary function study] invalid and did not rely upon it when rendering [his] disability opinion.'" Employer's Brief at 7 (unpaginated), *quoting* Decision and Order at 12. Employer asserts Dr. Vuskovich opined only the post-bronchodilator results of the September 2, 2020 study are invalid while "the pre-bronchodilator values showed that the miner 'had not experienced a material worsening of his pulmonary condition.'" *Id.*

Contrary to Employer's contention, Dr. Vuskovich opined the pre-bronchodilator values from the September 2, 2020 pulmonary function study are invalid because Claimant "prematurely terminated his expiratory effort which artificially lowered his FVC result." Employer's Exhibit 4 at 4-6. He then opined Claimant gave his best effort on the December 10, 2019 pulmonary function study which is non-qualifying and demonstrates Claimant is not disabled. *Id.* 6-7. In a supplemental report, Dr. Vuskovich reviewed the May 4, 2022 pulmonary function study and opined that it is valid and shows a mild impairment, but is non-qualifying. Employer's Exhibit 9 at 2. He further opined that comparing Claimant's December 10, 2019 and May 4, 2022 pulmonary function study results showed he had not experienced a material worsening of his pulmonary condition. *Id.* at 4.

Thus, we discern no error in the ALJ's finding that Dr. Vuskovich's opinion is not documented because he opined the qualifying September 2, 2020 pulmonary function study is invalid pre-bronchodilator, contrary to her finding it is valid. Nor did she err in finding his opinion undermined by his reliance on the December 10, 2019 pulmonary function study which the ALJ found is invalid. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 12.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13. We further affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 13-14. Thus, we affirm her finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[9] 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). The ALJ found Employer failed to rebut the presumption by either method.[10]

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Fino and Vuskovich that Claimant does not have legal pneumoconiosis.[11] Decision and Order at 18-19. Dr. Fino opined there is insufficient objective medical evidence to justify a diagnosis of legal pneumoconiosis and that any impairment is caused by Claimant's elevated diaphragm. Employer's Exhibit 5. Dr. Vuskovich generally opined that Claimant does not have an impairment caused by coal mine dust exposure and suggested his weight is causing his shortness of breath. Employer's Exhibits 2-4; 9 at 4. The ALJ found the opinions of Drs. Vuskovich and Fino are inadequately reasoned and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 18-19.

[9] "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).

[10] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 17.

[11] The ALJ correctly found Dr. Ammisetty's opinion that Claimant is totally disabled due to legal pneumoconiosis does not aid Employer in rebutting the presumption. Decision and Order at 18; Director's Exhibits 10, 73.

Employer asserts the ALJ "did not reveal an accurate understanding of the opinions of Drs. Vuskovich and Fino." Employer's Brief at 8 (unpaginated). However, because Employer does not identify any specific error in the ALJ's credibility findings, we affirm her determination that their opinions are not credible on legal pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

As the ALJ discredited the only opinions supportive of Employer's burden, we affirm her finding that Employer failed to rebut the presumption that Claimant has legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 19. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The ALJ next considered whether Employer 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); Decision and Order at 19. The ALJ permissibly discounted Drs. Fino's and Vuskovich's opinions on the cause of Claimant's total disability because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 19. Employer does not challenge the ALJ's finding that it failed to rebut disability causation. Thus, we affirm her determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711. Consequently, we affirm the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's holding to affirm the ALJ's finding that the pulmonary function study evidence is in equipoise and thus does not support total disability at 20 C.F.R. §718.204(b)(2)(i). Additionally, I concur with the majority's decision to affirm the ALJ's crediting of Dr. Ammisetty's medical opinion because the physician relied on the September 2, 2020 pulmonary function study results that are valid and qualifying and displayed an accurate understanding of the exertional requirements of Claimant's last coal mine job as a production supervisor. *See Milburn Colliery v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); Decision and Order at 11.

However, I respectfully dissent from the majority's affirmance of the ALJ's finding that Claimant established total disability after weighing the evidence overall, and therefore also dissent from the affirmance of the award of benefits. In weighing the medical evidence at 20 C.F.R. §718.204(b)(2), the ALJ found "the medical opinion evidence weighs in favor of demonstrating that Claimant is totally disabled," based on her crediting of Dr. Ammisetty's opinion. Decision and Order at 14. However, the ALJ erred by failing to

adequately explain the basis for her weighing of the evidence overall and her finding that the preponderance of the medical evidence establishes total disability. *Id*.

It is well established that, pursuant to 20 C.F.R. §718.204(b)(2), the ALJ "must weigh all relevant probative evidence together, both like and unlike, with the burden of proof always on [C]laimant to establish total respiratory disability by a preponderance of the evidence." *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); *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). The "term contrary probative evidence is not limited to medical evidence of the same category or type; rather, the term refers to all evidence (medical and otherwise) which is contrary and probative." *Rafferty*, 9 BLR at 1-232. Consequently, the ALJ must consider the relevant evidence of record under each category of 20 C.F.R. §718.204(b)(2)(i)-(iv) to determine whether it supports a finding of total disability, and then determine whether the record contains any contrary probative evidence. If so, the ALJ must assign this evidence appropriate weight, and determine whether it outweighs the evidence supportive of a finding of total disability. *Fields v. Island Creek Coal Co.*,10 BLR 1-19, 1-21 (1987).

While the ALJ set forth her determination to find the medical opinion is supportive of total disability under 20 C.F.R. §718.204(b)(2)(iv), she did not explain why this evidence outweighed the contrary probative evidence of record consisting of pulmonary function study evidence she found was "in equipoise" and arterial blood gas study evidence that is not supportive of total disability. Decision and Order at 6-9. Here, Dr. Ammisetty relied on the September 2, 2020 qualifying pulmonary function study, but was unaware of the more recent May 4, 2022 pulmonary function study that produced non-qualifying values. Director's Exhibit 10. Although the ALJ indicated there was conflicting evidence, she failed to identify it and explain why Dr. Ammisetty's opinion that Claimant is totally disabled is worthy of determinative weight overall, in light of the evidence he did not consider that indicates Claimant is not disabled. Thus the ALJ failed to critically analyze the evidence, render necessary findings, and explain her conclusion as the Administrative Procedure Act (APA)[12] requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must conduct an appropriate analysis of the evidence to support his or her conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12

[12] 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).

BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

It is neither our role nor within our authority to create an explanation for the ALJ. *See Hicks*, 138 F.3d at 533; *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (When the ALJ fails to make necessary factual findings, the proper course for the Board is to remand the case to the ALJ rather than attempt to fill the gaps in the ALJ's opinion). Thus, I would vacate the ALJ's finding that Claimant established total disability based on the evidence as a whole at 20 C.F.R. §718.204(b)(2) and remand for the ALJ to provide the required consideration, analysis, and explanation. Because I would vacate her finding of total disability, I also would vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits. Since I would vacate the ALJ's determination to invoke the Section 411(c)(4) presumption, I would decline to address, as premature, Employer's argument that the ALJ erred in finding the Section 411(c)(4) presumption unrebutted. *See* Employer's Brief at 8-9 (unpaginated).

JUDITH S. BOGGS
Administrative Appeals Judge