U.S. Department of Labor

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

BRB No. 21-0363 BLA

GERALDINE R. MULLINS (Widow of DONALD C. MULLINS)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	
and	)	
SELF-INSURED THROUGH THE PITTSTON COMPANY	)	DATE ISSUED: 04/17/2023
Employer/Carrier- Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Kendra Prince (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer and its Carrier.

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

BUZZARD and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Granting Modification and Awarding Benefits (2018-BLA-06237), rendered on a survivor's claim[1] filed on May 23, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a June 1, 2017 Decision and Order Denying Benefits, ALJ William T. Barto credited the Miner with 27.92 years of coal mine employment based on the parties' stipulation. However, ALJ Barto found that Claimant did not establish the Miner had a totally disabling respiratory impairment and thus could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] He further found the evidence did not establish complicated pneumoconiosis and therefore Claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. Considering entitlement to benefits without a presumption, ALJ Barto found that while Claimant established the Miner had pneumoconiosis, she did not establish his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b). Accordingly, he denied benefits.

Claimant timely requested modification, and the case was reassigned to ALJ Clark (the ALJ). 2020 Notice of Hearing; Hearing Transcript at 5. In his March 10, 2021 Decision and Order Granting Modification and Awarding Benefits, the subject of this appeal, the ALJ found the Miner had a totally disabling respiratory or pulmonary

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[1] Claimant is the widow of the Miner, Donald C. Mullins, who died on February 3, 2014. Director's Exhibit 11. Section 422(*l*) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2018). As there is no indication in the record that the Miner was determined to be eligible to receive benefits at the time of his death, Claimant cannot benefit from Section 422(*l*).

[2] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that the Miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

impairment at the time of his death, and thus determined there was a mistake in a determination of fact in ALJ Barto's decision denying benefits. 20 C.F.R. §§718.204(b)(2), 725.310(a). Based on these determinations, the ALJ found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis and found Employer did not rebut it. 20 C.F.R. §718.305. He also found that granting modification would render justice under the Act and awarded benefits.

On appeal, Employer asserts the ALJ erred in granting modification. It argues he erred in finding the Miner totally disabled and therefore in finding Claimant invoked the Section 411(c)(4) presumption.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

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.[4] 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).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. 20 C.F.R. §725.310; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). A party need not submit new evidence, as the ALJ may correct mistakes of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Employer asserts that the ALJ erred in finding ALJ Barto made a mistake of fact in determining the qualifying blood gas studies obtained during the Miner's terminal hospitalization could not be relied upon to find total disability. Employer's Brief at 5.

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[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had 27.92 years of coal mine employment, with at least twenty-three years underground, and that granting modification would render justice under the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 10, 12.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, Claimant must establish he "had at the time of his death, a totally disabling respiratory or pulmonary impairment . . . ." 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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 qualifying pulmonary function studies or arterial blood gas studies,[5] 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 consider all relevant evidence and weigh the evidence supporting 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).

The ALJ found Claimant established total disability based on the blood gas studies and the weight of the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2); Decision and Order at 11-12. For the reasons that follow, we affirm that finding.

Arterial Blood Gas Studies

The ALJ considered two blood gas studies contained in the Miner's treatment records, performed on February 1 and 2, 2014, during the Miner's terminal hospitalization.[7] Director's Exhibit 14. Both studies were performed at rest and were qualifying for total disability. Decision and Order at 9. ALJ Barto declined to consider the studies because he

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

[6] The record contains no pulmonary function studies and no evidence of cor pulmonale with right-sided congestive heart failure; thus, the ALJ found no mistake in ALJ Barto's findings that Claimant could not establish total disability on these bases. 20 C.F.R. §718.204(b)(2)(i), (iii). Decision and Order at 11. He found the medical opinions on the issue to be equivocal. 20 C.F.R. §718.204(b)(2); Decision and Order at 11.

[7] The Miner was admitted to Buchanan General Hospital on February 1, 2014 with pneumonia. Director's Exhibit 14. The Miner's condition deteriorated, and he was transported to Clinch Valley Medical Center; however, he died upon arrival at that hospital. *Id*.

found they were not accompanied by a physician's report establishing the results were produced by a chronic respiratory or pulmonary condition,[8] as required by 20 C.F.R. §718.105(d).[9] *See* 2017 Decision and Order at 9.

On modification, the ALJ reconsidered the blood gas studies. Decision and Order 8-10. He concluded there was no mistake in ALJ Barto's finding with respect to Dr. Patel's records, agreeing they did not meet the requirement of 20 C.F.R. §718.105(d) by linking the blood gas studies to a chronic respiratory or pulmonary condition. Decision and Order at 9; Director's Exhibits 14, 15. However, he disagreed with ALJ Barto's conclusion that no other physician's report addressed whether the blood gas studies reflected a chronic respiratory or pulmonary condition.

The ALJ noted that Dr. Perper also discussed the blood gas studies in his medical report and opined they showed "severe hypoxemia and hypercapnia during the Miner's last hospitalization." Claimant's Exhibit 2 at 34, 43.[10] Dr. Perper reviewed the Miner's treatment records dating from 2000 and noted he was diagnosed with chronic obstructive pulmonary disease (COPD), coal workers' pneumoconiosis, asthma, chronic bronchitis, and obstructive airway disease. Decision and Order 9; Claimant's Exhibit 2 at 4-18. Dr.

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[8] ALJ Barto found that Dr. Patel's discharge summary was the only physician's report associated with the blood gas studies and that it described the Miner's deteriorating respiratory condition as suggestive of acute respiratory distress syndrome. 2017 Decision and Order at 9. He found Dr. Patel's discharge summary did not provide an opinion on whether the studies reflected a chronic condition rather than an acute condition and thus did not satisfy 20 C.F.R. §718.105(d). *Id.*

[9] The regulation provides:

> If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.

20 C.F.R. §718.105(d).

[10] The exhibits admitted before ALJ Barto are now included in Director's Exhibit 34. For ease of reference, we refer to them as they were admitted before ALJ Barto and as they are referenced by the ALJ. Decision and Order at 2 n.2.

Perper noted the Miner had documented symptoms of "chronic lung disease" beginning in 1998, and explained the Miner's respiratory symptoms "not only continued progressively but also gradually worsened and were accompanied by worsening radiological findings, increased objective evidence of abnormal respiratory functions, incremental decrease in diffusion of pulmonary gasses and hypoxemia, leading to very poor quality of life [and] eventually to death." Decision and Order at 10; Claimant's Exhibit 2 at 33-34.

Based on these statements, the ALJ found Dr. Perper's opinion satisfied the requirements of 20 C.F.R. §718.105(d) by linking the Miner's terminal blood gas study results with a chronic lung condition. Decision and Order at 10. Thus, the ALJ found a mistake in a determination of fact in ALJ Barto's findings that the blood gas studies could not be used to establish a totally disabling respiratory impairment and thus in finding Dr. Perper's total disability opinion was entitled to no weight because he relied on invalid blood gas studies. *Id.*

Employer argues the ALJ improperly used Dr. Perper's opinion to satisfy 20 C.F.R. §718.105(d) as Dr. Perper did not explicitly state the blood gas studies were produced by a chronic respiratory or pulmonary condition. Employer's Brief at 7. It argues the ALJ mischaracterized his opinion, as Dr. Perper's "broad" statement does not specifically reference the hospitalization blood gases. *Id.* We disagree.

As the ALJ found, Dr. Perper discussed the hospitalization blood gas studies and found they demonstrated severe hypoxemia and hypercapnia. Decision and Order at 10; Claimant's Exhibit 2 at 34. He further discussed the Miner's chronic respiratory diseases referenced throughout his treatment records, including coal workers' pneumoconiosis, COPD, chronic bronchitis, and asthma; he explained that they continued to progress over time, as demonstrated by worsening symptoms, worsening radiographic findings, and abnormal blood gases, and that the progression of the Miner's respiratory diseases contributed to the Miner's poor quality of life and then his death. Decision and Order at 10; Claimant's Exhibit 2 at 4-18, 33-34. Specifically, Dr. Perper concluded the medical records of the Miner's final hospitalization "document respiratory failure complicating coal workers' pneumoconiosis with bilateral pneumonia and acute respiratory distress syndrome." Decision and Order at 10; Claimant's Exhibit 2 at 34, 43. Furthermore, Dr. Perper addressed and rejected Dr. Caffrey's assessment that "coal worker's pneumoconiosis did not cause" the acute conditions present at Claimant's death,[11] i.e., "the

[11] Dr. Caffrey acknowledged the Miner had "significant lung damage" from acute conditions but opined the acute conditions "wouldn't have anything to do with [his] coal workers' pneumoconiosis pro or con." Employer's Exhibit 2 at 9. The ALJ analyzed Dr. Caffrey's opinion in detail but found it falls "well short" of being adequately explained

acute bronchitis, the acute pneumonia or the diffuse alveolar damage[,] the pathological counterpart of the clinical acute respiratory distress syndrome," stating:

> I strongly disagree with this conclusion because significant and substantial coal workers' pneumoconiosis and significant and substantial legal pneumoconiosis (COPD/emphysema) as documented . . . in [the Miner's] case are often complicated by severe pulmonary infection and pneumonia prior to death, of both bacterial and etiology, associated with a decrease in immunoresistance.

Claimant's Exhibit 2 at 46.[12]

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because the physician's failure to address whether the Miner had legal pneumoconiosis appears to have been based on an "assumption that the Miner did not suffer from COPD [which] is belied by the recurrent diagnosis of COPD in the Miner's treatment records." Decision and Order at 16-19. He also found Dr. Caffrey's opinion was "equivocal" because he relied on a textbook that does not list coal workers' pneumoconiosis as a cause of diffuse alveolar damage but then conceded on cross-examination "that coal workers' pneumoconiosis 'certainly can' contribute to diffuse alveolar damage." *Id.*, *quoting* Employer's Exhibit 2 at 19. Employer does not address or identify any error in these findings, *see Skrack*, 6 BLR at 1-711; it simply summarizes portions of Dr. Caffrey's opinion and broadly asserts it "corroborates" Dr. Castle's opinion. Employer's Brief at 8-9. Our dissenting colleague also fails to identify any error in these findings or explain how further consideration of Dr. Caffrey's "inadequately explained" and "equivocal" opinion could undermine the ALJ's crediting of Dr. Perper's opinion.

[12] Our dissenting colleague concludes the acute conditions present at the Miner's terminal hospitalization may have caused his disabling blood gas values, thus undermining the ALJ's finding that the disability was "produced" by a chronic condition. *See* 20 C.F.R. §718.105(d). But this overlooks a salient fact: Dr. Perper, whose opinion the ALJ found credible, attributed the acute respiratory injury present at the Miner's death to his underlying chronic and progressively worsening coal dust-induced diseases. *See*, *e.g.*, Claimant's Exhibit 2 at 46.

Our dissenting colleague also takes issue with the ALJ's discrediting of Dr. Castle's opinion that the blood gas values "should [not] be used to determine impairment" because "there [are] no baseline studies" to compare them to. Decision and Order at 12. However, Employer does not challenge the ALJ's finding that Dr. Castle's opinion is not credible because it "imposes an additional requirement for deathbed [blood gas studies] that is not

Thus, we conclude the ALJ permissibly found Dr. Perper's opinion sufficient to establish the hospitalization blood gases were produced by a chronic respiratory condition, as it is supported by substantial evidence.[13] 20 C.F.R. §718.105(d); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (as the trier-of-fact, the ALJ must evaluate the evidence, weigh it, and draw his own conclusions); Decision and Order at 10.

Citing *Donadi v. Director, OWCP*, 12 BLR 1-166 (1989), Employer also argues any error in ALJ Barto's conclusion regarding 20 C.F.R. §718.105(d) is an error of law, which cannot be remedied on modification. Employer's Brief at 5-7. We disagree.

In *Donadi*, the Board held an ALJ's failure to properly apply a regulation when setting the commencement date for benefits was an error of law. Because no facts were in dispute, it held the party challenging that finding should have pursued a timely appeal, not modification. Here, however, the fact of whether the Miner was totally disabled is in dispute, as is the ultimate fact of Claimant's entitlement to benefits; thus modification proceedings are appropriate to correct the alleged mistake. *Stanley*, 194 F.3d at 497. Moreover, contrary to Employer's argument, unlike *Donadi*, the ALJ here did not find ALJ Barto misapplied a regulation, but rather found he did not fully consider Dr. Perper's opinion when he addressed the hospital blood gas studies under 20 C.F.R. §718.105(d). Decision and Order at 9-10. Given the breadth of an ALJ's discretion to correct mistakes of fact on modification, we reject Employer's argument that the ALJ could not remedy ALJ Barto's mistake. *See Stanley*, 194 F.3d at 497. Therefore, we affirm the ALJ's finding of a mistake in a determination of fact. Based on the foregoing, we also affirm the ALJ's finding that the arterial blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 11.

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contained" in the regulations. *Id.*; *see Skrack*, 6 BLR at 1-711. Nor does our dissenting colleague, other than speculating that without an earlier blood gas study in the record, Dr. Perper's diagnosis might not be credible. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012) (Because the ALJ is the trier of fact, "we must be careful not to substitute our judgment for that of the ALJ.").

[13] Moreover, the ALJ indicated that Dr. Perper's finding the Miner suffered from a chronic respiratory or pulmonary condition is supported by Dr. Castle's opinion, who also noted a history of chronic asthma and concluded the Miner probably had asthma. Decision and Order at 10 n.6, *citing* Employer's Exhibit 3 at 2-3. Neither Employer nor our dissenting colleague addresses this finding.

Medical Opinions

The ALJ next addressed the opinions of Drs. Perper and Castle. Decision and Order at 11. Dr. Perper opined that the Miner's hospitalization records demonstrate respiratory failure and severe hypoxemia and hypercarbia. Claimant's Exhibit 2 at 43. Dr. Castle indicated he was unable to determine if the Miner had a disabling respiratory impairment without baseline blood gas studies. Employer's Exhibit 1 at 14-15.

The ALJ found both opinions equivocal and entitled to minimum weight. Decision and Order at 11. The ALJ determined that Dr. Perper did not "definitively" answer the question of total disability and Dr. Castle did not provide an opinion on the issue because the record lacked baseline blood gas studies. Decision and Order at 11; Claimant's Exhibit 2; Employer's Exhibits 1, 3. Thus, the ALJ found the medical opinion evidence weighed neither for nor against total disability. Decision and Order at 11. Employer does not challenge these findings beyond its argument that in his earlier decision ALJ Barto made no mistake in fact regarding the blood gas study evidence or in discrediting Dr. Perper's opinion for relying on that evidence. Employer's Brief at 5. Thus, we affirm the ALJ's findings regarding the medical opinion evidence. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

Weighing the evidence together, the ALJ found that the medical opinion evidence does not "directly contradict" the qualifying blood gas studies. Decision and Order at 12. While noting Dr. Castle's opinion that the terminal hospitalization blood gases should not be relied upon without a "baseline" study for comparison, he found this position would impose an additional requirement not provided by the regulations. *Id.* Thus, the ALJ found the qualifying arterial blood gases are not outweighed by any other evidence and therefore establish total disability. *Id.*; *see* 20 C.F.R. §718.204(b)(2) (credible evidence in any of the four categories "shall establish" total disability in the "absence of contrary probative evidence"). Employer does not specifically challenge the ALJ's weighing of the evidence beyond its argument that the arterial blood gas studies should not be relied upon. Employer's Brief at 5-7. Thus, we affirm the ALJ's finding that Claimant established total disability and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305; *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 12.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis, or that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.]

§718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

Employer generally argues the evidence demonstrates the Miner's death was not due to pneumoconiosis[14] but does not challenge the ALJ's findings that it failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 8-10. Thus, we affirm the ALJ's findings that Employer failed to rebut the Section 411(c)(4) presumption as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 13, 19.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's affirmance as to the ALJ findings that Claimant established total disability and thus invoked the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018). The determinative issue in this regard is whether Dr. Perper's medical opinion meets the requirements of 20 C.F.R. §718.105(d) and thus whether the Miner's terminal arterial blood gas studies, the only evidence found to establish a totally disabling respiratory impairment, may be considered. However, the ALJ did not adequately address (1) whether Dr. Perper's opinion, considered in its entirety, established that the qualifying arterial blood gas studies were produced by a chronic respiratory or pulmonary condition, not an acute condition; (2) whether, if Dr. Perper's opinion did meet the requirements of a 20 C.F.R. §718.105(d) physician's report, it was well-reasoned and supported by substantial evidence; and (3) if so, whether his opinion outweighed relevant, contrary evidence. Therefore, I would vacate the ALJ's finding that Dr. Perper's opinion meets the

[14] Employer acknowledges the presence of clinical pneumoconiosis. Employer's Brief at 8.

requirements of 20 C.F.R. §718.105(d) and his dependent findings that the arterial blood gas evidence and the evidence when weighed together as a whole establish total disability.

Initially, assuming the "physician's report" required by the regulation may be encompassed in a medical opinion[15] such as Dr. Perper's, as Employer argues, Dr. Perper did not specifically address whether the qualifying arterial blood gas studies were produced by a chronic, and not an acute, respiratory condition. 20 C.F.R. §718.105(d); Employer's Brief at 7. The sections quoted by the ALJ indicate Dr. Perper believed the Miner had various chronic respiratory or pulmonary conditions which caused deterioration in his health. Decision and Order at 10. However, they do not on their face establish that the qualifying results of the blood gas studies were produced by those chronic conditions (assuming Dr. Perper's opinion as to their existence is correct), rather than the acute respiratory or pulmonary conditions the Miner suffered from during his terminal hospitalization.

Dr. Perper recognized that the Miner suffered from respiratory and pulmonary conditions during his hospitalization that Dr. Perper did not characterize as chronic, and that are generally understood to be acute. For example, Dr. Perper specifically stated the blood gas studies were obtained during the Miner's terminal hospitalization "when Mr. Mullins had contacted [sic] pneumonia and respiratory distress syndrome." Claimant's Exhibit 2 at 34. The ALJ did not address this and other statements in Dr. Perper's report relevant to whether the results were produced by a chronic respiratory or pulmonary condition, rather than reflecting an acute condition. Instead, he focused on Dr. Perper's statements that the Miner had a chronic lung disease and the arterial blood gases demonstrated severe hypoxemia and hypercapnia.[16] Decision and Order at 10. The general

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[15] The regulation provides that a blood gas study obtained during a terminal hospitalization "must be accompanied by" a physician's report. 20 C.F.R. §718.105(d). While the regulations do not explain what form this physician's report must take, the phrase "accompanied by" would seem to imply a report specifically addressing the arterial blood studies at issue, rather than a physician's general report.

[16] The full sentence from Dr. Perper's report is: "Arterial blood gases data also were not documented in the submitted records except for the severe hypoxemia and hypercapnia *during the terminal 2014 hospitalization when Mr. Mullins had contacted pneumonia and respiratory distress syndrome*." Claimant's Exhibit 2 at 34 (emphasis added). Dr. Perper also acknowledged the existence of acute respiratory conditions at other points in his report. *See, e.g., id.* at 43 ("The medical records of the terminal hospitalization at Buchanan General Hospital in February 2014, clearly document respiratory failure *complicating* coal workers' pneumoconiosis *with bilateral pneumonia and acute respiratory distress*

statements cited by the ALJ, which Dr. Perper made when addressing the presence of pneumoconiosis, do not equate to a report establishing that the test results "were produced by a chronic respiratory or pulmonary condition," particularly given Dr. Perper's acknowledgment that the studies were obtained when the Miner was terminally ill with acute respiratory conditions. 20 C.F.R. §718.105(d); 65 Fed. Reg. 79,920, 79,935-36 (Dec. 20, 2000) (indicating the requirement of a physician's report is necessary because a qualifying test during a terminal hospitalization may be related to an acute condition, as well as to establish a "nexus between 'deathbed' blood gas studies and a chronic pulmonary disease").[17] Consequently, at the very least, the ALJ has not provided an adequate explanation for his findings and determinations as required by the Administrative Procedure Act (APA).[18] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Even if the ALJ had adequately explained how Dr. Perper's opinion constituted a report that the qualifying blood gas studies were produced by a chronic, not an acute, respiratory condition, the ALJ did not make any findings regarding whether this opinion

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syndrome.") (emphasis added), 47 ("Mr. Mullins [sic] death was caused, contributed to and hastened by his clinical and legal pneumoconiosis *complicated by severe pneumonia and acute respiratory distress syndrome/Diffuse alveolar damage (ARDS/DAD)*.") (emphasis added).

[17] The ALJ found Dr. Perper's report "linked" the testing to a chronic lung condition. Decision and Order at 10. However, the regulation requires the report to establish that a chronic respiratory or pulmonary condition "produced" the test results. 20 C.F.R. §718.105(d) ("any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition"). To "link" is to "connect, couple, join, relate," while to "produce" is to "accomplish, cause, create, yield." *See* Roget's International Thesaurus (4th ed. 1997). There is a significant difference between the two words. When the meaning of the word "produced" is considered, the regulation thus requires the report to establish that a *chronic respiratory or pulmonary condition* actually *created* the test results, not merely that a chronic pulmonary or respiratory condition had some relationship to the test results. Indeed, the wording ("were produced by") indicates that the *chronic* impairment is to be the sole cause of the qualifying blood gas studies. It thus appears that the ALJ did not apply the correct criterion.

[18] 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).

was well-reasoned or supported by the evidence of record.[19] Instead, he summarily reached his conclusion without any critical analysis. Decision and Order at 10. In order to credit the report and the blood gas studies, the ALJ must examine the report's reasoning and underlying documentation. The ALJ did not do so, nor did he adequately explain his reasoning for crediting Dr. Perper on this issue as required by the APA. 5 U.S.C. §557(c)(3)(A); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 531-33 (4th Cir. 1998).

Additionally, he failed to weigh Dr. Perper's report against the contrary evidence. *Hicks*, 138 F.3d at 531-33; *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Circ. 1997) (an ALJ must consider all the relevant and material evidence bearing on a claimant's entitlement to benefits under the Black Lung Benefits Act); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012) (it is the duty of the ALJ to make findings of fact and to resolve conflicts in evidence).

For example, Dr. Castle explained the arterial blood gases were obtained while the Miner was "severely ill with acute pneumonia" and thus should not be used to determine impairment.[20] Employer's Exhibit 1 at 15. Dr. Caffrey explained the biopsy slides demonstrated diffuse alveolar damage which "most likely occurred in the background of *acute* bronchitis and *acute pneumonia*" as indicated in the treatment records, and also noted that the Miner was treated with antibiotics prior to his death. Director's Exhibit 16 at 4

[19] Significantly, the regulation requires that the report "establish" the requisite facts. Use of the word "establish" indicates that the report must successfully carry the burden of proof as to those facts. The preamble to the final rulemaking for the regulation confirms that this is the case. 65 Fed. Reg. 79,920, 79,935-36 (Dec. 20, 2000).

[20] The ALJ did not consider Dr. Castle's reasoning when determining that Dr. Perper's report enabled the blood gas studies to be credited, although he did subsequently note Dr. Castle's opinion in analyzing the medical opinion evidence. At that point in his decision, he had already concluded Dr. Perper's report satisfied the regulatory requirements. While he acknowledged Dr. Castle's reasoning was likely "quite reasonable from a scientific standpoint," he rejected Dr. Castle's criticism that there was no "baseline" arterial blood gas study to determine total disability on the grounds it would set in place a requirement not made by the regulation and Dr. Perper's report had already satisfied the regulatory requirements. Decision and Order at 12. However, this begs the question of how reliable a report ostensibly meeting the regulatory requirements can be without the physician having any objective basis for determining the extent of any respiratory or pulmonary abnormality present when the acute conditions are absent. In this respect it is notable that Dr. Perper acknowledges the only blood gas data available to him were the blood gas studies conducted during the terminal illness. Claimant's Exhibit 2 at 34.

(emphasis added); *see also* Employer's Exhibit 2 at 8-10. Citing to medical literature, he indicated that "infection is one of the most common causes of *acute* lung injury leading to diffuse alveolar damage." Director's Exhibit 16 at 4 (emphasis added). The treatment records are also replete with notes and reports diagnosing acute respiratory and pulmonary conditions of recent onset and caused by infection, such as the Buchanan Hospital note dated January 31, 2014, which recounted that "[p]atient had been in a reasonable state of health until five or six days ago when the patient developed upper respiratory tract infection symptoms," that the patient had temperature of 101 degrees Fahrenheit, and provided "IMPRESSION: 1. *Acute* bronchitis and possible left lower lobe *pneumonia*." Director's Exhibit 14 (emphasis added).

Because the ALJ did not properly and adequately consider and weigh the evidence when finding Dr. Perper's opinion sufficient to meet the requirements of a physician's report under 20 C.F.R. §718.105(d), to allow reliance on the terminal hospitalization blood gas studies, I would vacate his determination that the evidence supports a finding of total disability and thus invokes the Section 411(c)(4) presumption.

Consequently, I also would vacate his determinations relating to rebuttal of the presumption, and his ultimate determination of entitlement. I would remand for further consideration in accordance with this opinion. If, on remand, the ALJ found that total respiratory or pulmonary disability has not been established, I would instruct him to determine whether pneumoconiosis arising out of coal mine employment hastened the Miner's death, and if Claimant is thereby entitled to survivor's benefits under the Act.

JUDITH S. BOGGS
Administrative Appeals Judge