U.S. Department of Labor

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

BRB No. 21-0485 BLA

DOROTHY E. NOVAK (Widow of CHARLES NOVAK) Claimant-Respondent v. HELEN MINING COMPANY and VALLEY CAMP COAL COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/24/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding 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.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

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

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2017-BLA-05528) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim[1] filed on May 27, 2016, and is before the Benefits Review Board for a second time.

In his initial Decision and Order Awarding Benefits, the ALJ credited the Miner with at least fifteen years of underground coal mine employment. He found the pulmonary function and arterial blood gas testing does not establish total disability. 20 C.F.R. §718.204(b)(2)(i), (ii). In addition, he found the medical opinion evidence does not establish total disability,[2] finding the opinions of Drs. Begley and Spagnolo that the Miner was not totally disabled are well-reasoned and documented.[3] 20 C.F.R. §7l8.204(b)(2)(iv).

Although Claimant failed to establish total disability at 20 C.F.R. §7l8.204(b)(2)(i)-(iv), the ALJ noted the record contains lay testimony from the Miner's surviving son, Anthony Novak, regarding the Miner's difficulty breathing and walking and use of supplemental oxygen at the time of his death. The ALJ found the Miner's treatment records and medical history at the time of his death buttress Mr. Novak's lay testimony and, together, support a finding of total disability. Because the regulations recognize pneumoconiosis as a progressive and an irreversible disease, the ALJ assigned "more weight to the [M]iner's medical examination and treatment records and Mr. Novak's testimony than to the [M]iner's [earlier] non-qualifying" objective testing. Initial Decision and Order at 16. Therefore, he found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis,[4] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant is the widow of the Miner, who died on January 23, 2016. Director's Exhibit 7.

[2] Because there was no evidence of cor pulmonale with right-sided congestive heart failure, the ALJ found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

[3] The ALJ also found Dr. Perper did not address the issue of total disability and thus there are no medical opinions diagnosing total disability.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially

In consideration of Employer's appeal, the Board affirmed the ALJ's finding of at least fifteen years of underground coal mine employment and rejected Employer's constitutional challenge to the Section 411(c)(4) presumption. *Novak v. Helen Mining Co.*, BRB No. 19-0064 BLA, slip op. at 3 n.3 (Dec. 17, 2019) (unpub.). With respect to Employer's argument that the ALJ erred in relying on Mr. Novak's lay testimony to find total disability established in this survivor's claim because the record contains evidence relevant to the Miner's pulmonary condition, the Board disagreed. *Id*. at 7. Specifically, the Board held that Claimant can establish total disability through lay testimony pursuant to 20 C.F.R. §718.305(b)(4)[5] if the ALJ finds the medical evidence neither establishes nor refutes total disability. *Novak*, BRB No. 19-0064 BLA, slip op. at 5-6. The Board noted this case arises under the jurisdiction of the United States Court of Appeals for the Third Circuit[6] and explained that in *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 289 (3d Cir. 1988), that court interpreted an analogous provision at 20 C.F.R. §727.203(a)(5) to hold that consideration of lay evidence is permissible where the medical evidence of record is "insufficient to establish total disability or lack thereof," not that it is merely absent. *Novak*, BRB No. 19-0064 BLA, slip op. at 5-6, *quoting Koppenhaver*, 864 F.2d at 289.

The Board agreed with Employer, however, that the ALJ erred by failing to consider relevant evidence. *Novak*, BRB No. 19-0064 BLA, slip op. at 6-7. Although the ALJ had found the Miner's objective testing conducted eight months before the Miner's death was

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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); *see* 20 C.F.R. §718.305.

[5] 20 C.F.R. §718.305(b)(4) provides:

> In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

20 C.F.R. §718.305(b)(4).

[6] The Board will apply the law of the United States Court of Appeals for the Third Circuit because the Miner performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

less reliable than the Miner's subsequent treatment records, the Board explained that Dr. Spagnolo had reviewed the Miner's more recent treatment records and his autopsy evidence and opined that the Miner was not totally disabled. *Id*., *citing* Employer's Exhibit 12 at 10. Thus, the Board held that the ALJ erred by failing to address whether Dr. Spagnolo's opinion is sufficient to refute a finding of total disability. *Id*. Because "this evidence, if credited, could refute a finding of total disability, precluding reliance upon Mr. Novak's testimony to establish total disability," the Board vacated the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption[7] and therefore the award of benefits, and remanded the case for further consideration. *Id*.

Considering the case on remand, the ALJ found the evidence neither establishes nor refutes total disability. He then found Claimant established total disability through Mr. Novak's lay testimony and the Miner's treatment records. 20 C.F.R. §718.305(b)(4). Thus he found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer again argues that lay testimony cannot be used to establish total disability under 20 C.F.R. §718.305(b)(4) if the record contains any medical evidence relevant to total disability. It also argues the ALJ erred in finding Mr. Novak's testimony and the Miner's treatment records sufficient to establish total disability, thereby invoking the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), indicated he will not file a substantive response unless specifically requested to do so by the Board.

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. 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 (1965).

Law of the Case Doctrine

As discussed above, the Board previously held that lay evidence may be used in this survivor's claim to invoke the Section 411(c)(4) presumption if the ALJ finds the medical evidence neither establishes nor refutes total disability. *Novak*, BRB No. 19-0064 BLA, slip op. at 5-6. Employer concedes the Board's holding constitutes the law of the case.

[7] The Board declined to address, as premature, Employer's arguments pertaining to the ALJ's findings regarding rebuttal of the Section 411(c)(4) presumption. *Novak*, BRB No. 19-0064 BLA, slip op. at 7 n.12.

Employer's Brief at 7-12. It argues, however, that a valid exception applies to that doctrine because the Board's holding is clearly erroneous. *Id*.

Employer contends that the regulation at 20 C.F.R. §727.203(a)(5) that the Third Circuit interpreted in *Koppenhaver* is not analogous to 20 C.F.R. §718.305(b)(4). Employer's Brief at 8-9. It also argues that that the underlying facts of *Koppenhaver* are distinguishable from the case at bar.[8] *Id*. Thus Employer maintains *Koppenhaver* is of limited precedential value. *Id*. Based on our review of the applicable regulations and the Third Circuit's holding in *Koppenhaver*, we conclude our prior holding is not clearly erroneous. *In re City of Philadelphia Litig.*, 158 F.3d 711, 722 (3d Cir. 1998) (declining to depart from a prior panel's holding where its interpretation of Supreme Court precedent was "plausible" and "reasonable"); *see also Hillibush v. U.S. Dept. of Labor*, 853 F.2d 197, 203-05 (3d Cir. 1988) (applying similar rule with respect to the use of lay evidence under 20 C.F.R. §718.305(b)).

Employer also argues the Board's holding in *Sword v. G & E Coal Co.*, 25 BLR 1-127 (2014) conflicts with its holding in this case. But the facts are distinguishable from *Sword* -- a case arising within the jurisdiction of the Sixth Circuit, where the ALJ relied solely on lay testimony to find total disability established. Because the record in *Sword* contained extensive medical evidence addressing the miner's pulmonary status at the time of his death, including multiple pulmonary function studies, arterial blood gas studies, medical reports and the miner's treatment notes, the Board agreed with the employer's argument that, under the Sixth Circuit's holding in *Coleman v. Director, OWCP*, 829 F.3d 3 (6th Cir. 1987),[9] it was inappropriate for the ALJ to rely solely on the lay testimony to

[8] The Board also cited *Cook v. Director, OWCP*, 901 F.2d 33, 36 (4th Cir. 1990) (consideration of lay evidence is available where the medical evidence of record is insufficient to establish total disability) and *Pekala v. Director, OWCP*, 13 BLR 1-1, 1-5 (1989) (use of lay testimony by itself to establish total disability is permissible when the available medical evidence is insufficient to affirmatively prove that no disease or disability was present) to support its holding. *Novak*, BRB No. 19-0064 BLA, slip op. at 5-6.

[9] In *Koppenhaver*, the Third Circuit noted that the Sixth Circuit's holding in *Coleman* conflicts with the Seventh Circuit's holding in *Dempsey v. Director, OWCP*, 811 F.2d 1154, 1159 (7th Cir. 1987). 864 F.2d at 289. The Third Circuit agreed with "the *Dempsey* court's reasoning that the reading of [20 C.F.R. §727.203(a)(5)]" allowing lay testimony to establish total disability only where there is no evidence of record "would unfairly penalize miners' widows with access to legally insufficient medical evidence, while permitting widows with access to no evidence to take advantage of the liberal presumption." *Id*.

find total disability established. *Sword*, 25 BLR at 1-131. In the present case, the ALJ did not rely exclusively on the Miner's testimony, but credited it as supported by the limited medical evidence of record establishing the Miner's respiratory condition at the time of his death. Further, this case arises within the Third Circuit's jurisdiction and therefore we must apply *Koppenhaver* as controlling precedent. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Finally, we conclude the Board's prior holding does not result in shifting the burden of proof to Employer to establish total disability. Employer's Brief at 7-8. Contrary to Employer's argument, Claimant is still required to establish total disability through credible lay evidence that is sufficient to meet his burden of proof under 20 C.F.R. §718.305(b)(4).

As Employer has not shown that the Board's prior holding was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior determination. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989).

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

Employer argues the ALJ's total disability findings on remand do not satisfy the explanatory requirements of the Administrative Procedure Act (APA).[10] Employer's Brief at 14. We disagree.

On remand, the ALJ explained his basis for finding the lay testimony, considered in conjunction with the Miner's treatment records, establishes total disability. The ALJ found the evidence establishes total disability because the treatment records reflect the Miner experienced shortness of breath and difficulty walking as early as 2014, and Mr. Novak testified that the Miner's shortness of breath and difficulty walking, along with his added use of supplemental oxygen, continued up until the time of his death. Decision and Order on Remand at 16. The ALJ specifically noted Mr. Novak's detailed testimony chronicling the Miner's deteriorating respiratory condition:

> Here, Mr. Novak testified that the [M]iner had difficulty breathing. He stated that the [M]iner's breathing declined from when he left coal mine employment in 1993 to his death on January 23, 2016. He said the [M]iner had difficulty walking from one point to another and that the [M]iner's

[10] The Administrative Procedure Act (APA) provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

> primary care physician, Dr. Barns, put him on oxygen. Mr. Novak testified that the [M]iner started out on oxygen 'so often a day' and in a matter of months, the [M]iner was on oxygen constantly. Mr. Novak further testified that the [M]iner had labored breathing when he got up to use the bathroom.

He then corroborated that testimony with the Miner's treatment records:

> The [M]iner's medical examination and treatment records support Mr. Novak's testimony. The [M]iner was hospitalized in August 2014 after several days of experiencing shortness of breath and lightheadedness, which caused difficulty walking. After an April 21, 2015 consultation with Dr. Ure Mezu-Chukwu at the Indiana Regional Medical Center, the [M]iner was found to have "multiple breathing issues" after reporting chronic shortness of breath. On May 1, 2015, the [M]iner appeared for a physical examination in which Dr. Jagadeesha Shetty noted diminished bilateral breathing. During the [M]iner's November 2015 hospitalization for abdomen pain and shortness of breath, Dr. David Cash observed the [M]iner's difficulty breathing. These records also include notes that the [M]iner had difficulty moving around the hospital room without shortness of breath. The [M]iner's record from Indiana Regional Medical Center, dated December 11, 2015, notes that the [M]iner's condition "is improved by rest, is improved with oxygen and is improved with sitting upright." Accordingly, as the treatment records support Mr. Novak's testimony that the [M]iner used supplemental oxygen prior to his death, the undersigned finds that Mr. Novak's testimony is credible.

Decision and Order at 16, *citing* Hearing Tr. at 21-25; Employer's Exhibit 3.

Pursuant to the Board's remand instructions, the ALJ fully summarized Dr. Spagnolo's opinion and deposition testimony and found it not credible by comparison. Decision and Order on Remand at 14-15. Noting "pneumoconiosis is latent and progressive," the ALJ found Dr. Spagnolo's opinion outweighed because newer evidence "contradicts [his] conclusion[] that the [M]iner was not totally disabled" at the time of his death and the "lay testimony and treatment records provide the most recent status of the [M]iner's health before his death." *Id*. at 16-17; *see Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Koppenhaver*, 864 F.2d at 289; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). The ALJ acted within his discretion in so finding. *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir 1993) (noting that physician reports may be outweighed by newer evidence showing a deterioration of a miner's condition given the progressive nature of pneumoconiosis because "a comparison of medical reports and tests over a longer period" may provide "a better perspective").

Specifically, Dr. Spagnolo's rationale for excluding total disability was based on the non-qualifying 2015 objective testing that the ALJ found does not refute total disability at the later time of the Miner's death on January 23, 2016. In his initial report dated April 21, 2018, Dr. Spagnolo opined the Miner was not totally disabled at the time of his death because the "single spirometry test done in June 2015 did not demonstrate an obstructive defect." Director's Exhibit 26. He concluded "there is no objective evidence of a disabling respiratory impairment" in this case. *Id*.

Although Dr. Spagnolo reviewed additional medical records prior to his deposition, he again excluded total disability based on the 2015 pulmonary function testing. Specifically, he testified that he reviewed additional medical records and autopsy reports[11] and opined this evidence revealed the Miner had a "degree of [coal workers' pneumoconiosis] in a very small amount" and emphysema, and both conditions were not disabling. Employer's Exhibit 12 at 10, 23-25. Although he acknowledged the degree of emphysema ranged from mild to moderate, he explained the emphysema is not disabling because the Miner's 2015 pulmonary function studies are "entirely normal." *Id*. at 19-21, 36. As discussed above, however, the ALJ found the non-qualifying 2015 objecting testing does not refute a finding of total disability because pneumoconiosis is a progressive and irreversible disease and the objective testing was completed six months before the Miner's death. Decision and Order on Remand at 16-17.

Further, Dr. Spagnolo did not address whether the Miner was totally disabled at the time of his death based on his shortness of breath and use of supplemental oxygen. He stated that the Miner's "clinical findings and complaints including [] shortness of breath, were not caused by, contributed to, or hastened by coal workers' pneumoconiosis or any chronic lung disease arising out of coal mine employment."[12] Employer's Exhibit 7 at 9. But the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death; the cause of that

[11] Dr. Spagnolo testified he reviewed "treatment records from Indiana Regional Medical Center, Dr. Swedarky's [sic] autopsy report, the Lee Regional Hospital records that were part of Dr. Begley's exam, and Dr. Begley's complete exam from May 22, 2015 on behalf of the Department of Labor, and, finally, the original autopsy prosector's report." Employer's Exhibit 12 at 10. He stated these records include "lung function tests, blood gases, numerous chest x-rays, a pretty thorough amount of material dating back as far back as 1999 up to the time of [the Miner's] death in January of 2016." *Id*. at 11.

[12] Dr. Spagnolo noted the Miner's autopsy reflects "changes that were suggestive of heart failure with the accumulation of fluid in the lung and vascular congestion." Employer's Exhibit 12 at 10, 23-25.

impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

Because we can discern the ALJ's rationale underlying his total disability finding, we are not persuaded by Employer's argument that his Decision and Order does not satisfy the APA.[13] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation under the APA is satisfied).

Employer argues the ALJ erred in crediting Mr. Novak's lay testimony because it is contradicted by aspects of the Miner's treatment records. Employer's Brief at 14-15. The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (declining to reweigh witness testimony on smoking history in spite of alleged inconsistencies that the employer identified); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Employer's argument again amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

We therefore affirm the ALJ's finding that Claimant established total disability based on Mr. Novak's lay testimony and the Miner's treatment records and thus invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305.

[13] Our dissenting colleague asserts that the majority has "helpfully created an explanation" or "substitutes speculation" for the ALJ's explanation of his total disability finding. We respectfully disagree for, as we note, the ALJ's rationale underlying his total disability finding is plainly discernable on the face of his decision: given the progressive nature of pneumoconiosis, the more recent testimony and treatment records that together show an obvious deterioration of the Miner's condition prior to his death outweigh Dr. Spagnolo's dated opinion, based on a single spirometry test done in the year prior to the Miner's death. Decision and Order at 16. Thus, contrary to our dissenting colleague, the ALJ adequately explained his conclusion as the APA requires and acted in his discretion under the law. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).

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,[14] or that "no part of the [M]iner'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 rebut the presumption by either method.

Employer does not challenge the ALJ's determination that it failed to disprove the existence of clinical pneumoconiosis; thus we affirm this determination. 20 C.F.R. §718.305(d)(2)(i)(B); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 17-26; *see* Employer's Brief at 18. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i). Nonetheless, we address Employer's arguments on legal pneumoconiosis as they are relevant to death causation.

Legal Pneumoconiosis

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

The ALJ considered the opinions of Drs. Begley and Spagnolo. Decision and Order on Remand at 26. Dr. Begley opined the Miner had a pulmonary impairment demonstrated by a mild reduction in his FVC value on his pulmonary function studies and mild resting hypoxemia on his blood gas studies. Employer's Exhibit 10. He attributed the impairment to the Miner's obesity and concluded it was unrelated to coal mine dust exposure. *Id*. Dr. Spagnolo opined the Miner did not have legal pneumoconiosis, but conceded he had emphysema that "could" have been caused by coal mine dust exposure or cigarette smoking. Employer's Exhibit 12 at 30. The ALJ found the opinions of Drs. Begley and Spagnolo inadequately reasoned and thus insufficient to rebut the presumption of legal

[14] "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). "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).

pneumoconiosis. Decision and Order on Remand at 26. Employer does not identify any specific error in these credibility findings. We therefore affirm them. *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); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §802.211(b).

Employer argues the ALJ erred in crediting Dr. Perper's opinion that the Miner has legal pneumoconiosis. Employer's Brief at 17-20. Because the ALJ discredited the opinions of Drs. Begley and Spagnolo, the only opinions supportive of Employer's burden, any error by the ALJ in crediting Dr. Perper's opinion would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 17-20. We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner did not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

Death Causation

The ALJ next considered whether Employer established "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)(ii). Employer argues the ALJ erred in his weighing of the medical evidence and finding it insufficient to satisfy its burden. Employer's Brief at 20-24. We disagree.

Dr. Barnes completed the Miner's death certificate and listed metastatic prostate carcinoma as the sole cause of the Miner's death. Director's Exhibit 7. The ALJ permissibly assigned less weight to the death certificate because "Dr. Barnes provided no explanation for his determination." Decision and Order on Remand at 30; *see Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163. Dr. Spagnolo also opined the Miner's death was due solely to prostate cancer. Employer's Exhibit 12. The ALJ permissibly discredited Dr. Spagnolo's opinion because the physician did not diagnose legal pneumoconiosis, contrary to his determination that Employer failed to disprove the Miner had the disease.[15] 20 C.F.R. §718.305(d)(2)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Big Branch*

[15] The ALJ also considered and discredited Dr. Swedarsky's opinion because Dr. Swedarsky was unable to opine whether the Miner's clinical pneumoconiosis and emphysema hastened his death. Decision and Order on Remand at 30-31; Employer's Exhibit 5. As Employer has not challenged the ALJ's determination, we affirm it. *See Skrack*, 6 BLR at 1-711.

Res., Inc. v. Ogle, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order on Remand 31-32.

Dr. Oesterling diagnosed small micronodular clinical coal workers' pneumoconiosis but opined the limited structural change would not have hastened, contributed to, or caused the Miner's death. Employer's Exhibit 1 at 4. In addition, he diagnosed emphysema that was "insufficient to cause significant alteration in lung function." *Id*. He opined the Miner had arteriosclerotic cardiovascular disease which caused passive pulmonary congestion and acute bronchopneumonia of the left lower lobe of his lung that "may have contributed to [the Miner's] death." *Id*.

The ALJ permissibly found Dr. Oesterling did not adequately explain his finding that the Miner's legal pneumoconiosis in the form of emphysema did not cause any alteration in lung function, particularly in light of the Miner's treatment records reflecting the Miner had shortness of breath and was on supplemental oxygen at the time of his death. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order on Remand at 31. Further, because Dr. Oesterling conceded that "[w]ithout other organ systems," he "was unable to give a conclusive cause of death," the ALJ permissibly found the doctor's conclusions on death causation not credible. Employer's Exhibit 1 at 4; *see Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order on Remand at 31.

Employer also argues the ALJ erred in crediting the opinions of Drs. Perper and Zezulak regarding rebuttal of death causation. Employer's Brief at 25-27. We need not address Employer's allegations of error because these physicians opined pneumoconiosis hastened the Miner's death and therefore their opinions do not assist Employer in rebutting the Section 411(c)(4) presumption. *See Larioni*, 6 BLR at 1-1278. Thus we affirm the ALJ's finding that Employer failed to establish that no part of the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); Decision and Order on Remand at 30-34; Director's Exhibit 7; Claimant's Exhibits 1, 4.

Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's holding that Employer has not shown the Board's prior holding was clearly erroneous, or set forth a valid exception to the law of the case doctrine. Consequently, I agree not to disturb our prior holding that lay evidence may be used in this survivor's claim to invoke the Section 411(c)(4) presumption if the ALJ finds the medical evidence neither establishes nor refutes total disability. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989). However, I respectfully dissent from the majority's affirmance of the ALJ's finding that Claimant established total disability and therefore also dissent from their affirmance of the award of benefits.

In weighing the medical evidence at 20 C.F.R. §718.204(b)(2), the ALJ erred by failing to adequately explain his basis for finding the evidence neither establishes nor refutes total disability. *See* Employer's Brief at 14-17. In its previous decision, the Board held the ALJ erred by not addressing whether Dr. Spagnolo's medical opinion and deposition testimony, which reflects that he reviewed the Miner's treatment records at the time of his death and the autopsy report, were sufficient to refute a finding of total disability, *Novak*, BRB No. 19-0064 BLA, slip op. at 6. We noted, "… this evidence, if

credited, could refute a finding of total disability, precluding reliance upon Mr. Novak's testimony to establish total disability." Accordingly we remanded the case for the ALJ to properly consider the total disability issue, including whether Dr. Spagnolo's opinion and deposition could refute a finding of total disability. *Id*.

The ALJ did not carry out the Board's instructions. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

On remand, the ALJ found:

> In this matter, the evidence neither establishes nor refutes the existence of total disability. The record includes treatment records that document the [M]iner's respiratory impairment including his difficulty breathing. Although the medical opinions of Drs. Begley and Spagnolo are supported by other evidence in the record, there is evidence that contradicts their conclusions that the [M]iner was not totally disabled. The medical evidence in this case is at odds and fails to either establish or refute a finding of total disability. Thus, the undersigned turns to the lay evidence of record.

Decision and Order on Remand at 16. Although the ALJ indicated there was conflicting evidence, he failed to identify it and explain why Dr. Spagnolo's opinion does not refute a finding of total disability. Thus he failed to critically analyze the evidence, render necessary findings, and explain his conclusion as the Administrative Procedure Act (APA)[16] requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *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);

[16] 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).

Wojtowicz v. Duquesne Light Co., 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

The majority has helpfully created an explanation for the ALJ. *See supra* at 6-10. However, it is neither our role nor within our authority to do so. *See 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). The majority's approach exceeds the Board's scope of review and substitutes speculation for his required explanation. *Id*.

Thus, I would vacate the ALJ's finding that Claimant established total disability based on the lay testimony and treating records, and 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 his finding of total disability, I also would vacate his finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits. 30 U.S.C. §921(c)(4). 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 17-27.

JUDITH S. BOGGS
Administrative Appeals Judge