U.S. Department of Labor

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

BRB No. 21-0501 BLA

FREDERICK B. BATEMAN Claimant-Respondent v. BLUFF SPUR COAL CORPORATION and AMERICAN INTERNATIONAL SOUTH/CHARTIS Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/12/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits Upon Remand of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia.

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

GRESH, Chief Administrative Appeals Judge, and ROLFE:

Employer and its Carrier (Employer) appeal Administrative Law Judge Dana Rosen's Decision and Order Awarding Benefits Upon Remand (2016-BLA-05994)

rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on May 28, 2014,[1] and is before the Benefits Review Board for a second time.

In consideration of Employer's previous appeal, the Board rejected its arguments that the ALJ was not properly appointed in accordance with the Appointments Clause of the Constitution. The Board, however, vacated the ALJ's determinations that Claimant had 21.75 years of qualifying coal mine employment, established total disability, and invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Thus, the Board vacated the award of benefits and remanded the case for reconsideration.

On remand, the ALJ determined Claimant had 21.01 years of qualifying coal mine employment and established total disability. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the Section 411(c)(4) presumption. She further determined that Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant had 21.01 years of qualifying coal mine employment and is totally disabled, and thus erred in invoking the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it failed to rebut the presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

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.[3] 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).

[1] Claimant's prior claim was withdrawn. Decision and Order at 4 n.9. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

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

[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 Virginia. *See Shupe*

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

Length of Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]" 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold an ALJ's determination based on a reasonable method of calculation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). The regulations permit an adjudicator to rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year . . . ." 20 C.F.R. §725.101(a)(32)(iii).

On remand, the ALJ reconsidered all of Claimant's employment history.[4] Decision and Order on Remand at 4-7. The ALJ credited Claimant with 5.26 years of coal mine employment for Employer from 2002 to 2007, based on the stipulation of the parties and the exact days of employment provided by Employer. *Id*. at 6; Hearing Transcript at 6; Director's Exhibit 6. She further credited Claimant with 6.75 years of coal mine employment from August 1971 to April 1978, based on the dates of employment Claimant

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v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 6.

[4] The Board previously affirmed the ALJ's crediting of Claimant with 5.25 years of coal mine employment for Employer from February 8, 2002 to October 21, 2007. *Bateman v. Bluff Spur Coal Corp.*, BRB No. 19-0008 BLA, slip op. at 6 (Jan. 13, 2020) (unpub.). However, it vacated the ALJ's determination that Claimant had an additional 16.5 years of coal mine employment from 1971 to 2001, as the ALJ provided no explanation for her findings, and remanded the case back to the ALJ for reconsideration of the length of Claimant's coal mine employment. *Id*. at 6-7. The ALJ reconsidered all of her findings on remand.

listed on his CM-911a Coal Mine Employment History Form. Decision and Order on Remand at 6-7. Similarly, she credited Claimant with three years of coal mine employment in 1997, 1998, and 2001 as Claimant worked for an individual employer in each of those years for one full year. *Id*. at 7. Finally, applying the formula at 20 C.F.R. §725.101(a)(32)(iii), the ALJ credited Claimant with an additional 6 years of coal mine employment in 1978, 1981, 1995, 1996, 1999, and 2000. *Id*. Thus, the ALJ found Claimant had 21.01 years of coal mine employment. *Id*.

Employer initially contends the ALJ erred in failing to explain how she determined Claimant had 5.26 years of coal mine employment with it from 2002 to 2007, and argues he only worked for it for approximately 5.20 years. Employer's Brief at 6. However, stipulations of fact fairly entered into are binding on the parties. *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013). As Employer is bound by its stipulation that Claimant worked for it for 5.26 years, we affirm this finding.

However, there is merit to Employer's argument that the ALJ erred in crediting Claimant with 6.75 years of coal mine employment from August 1971 to April 1978. Employer's Brief at 6. The ALJ credited Claimant with a continuous 6.75 years of coal mine employment from August 1971 to April 1978 based on his CM-911a form. Decision and Order on Remand at 6-7. However, Claimant's CM-911a form indicates he worked in coal mine employment in July 1971 and then from July 1973 to April 1978, as the ALJ indicated earlier in her decision.[5] *Id*. at 5; Director's Exhibit 3. Claimant's Social Security Earnings Record (SSER) also indicates Claimant received income from coal companies in 1971 and from 1973 to 1978, and from non-coal mine employers from 1971 to 1973, in 1975, and from 1977 to 1978. Director's Exhibit 5. Consequently, because it is not adequately explained, we vacate the ALJ's determination that Claimant worked in coal mine employment continuously from August 1971 to April 1978 for 6.75 years.[6] *Muncy*, 25 BLR at 1-27.

[5] Claimant's CM-911a form indicates he worked for The Pittston Company in July of 1971, for 3-D Coal Corporation from July 1963 to October 1976, for Porter Coal from October 1974 to April 1978, for Baker Energy Corporation in November 1975, for United Castle Coal Company from October 1976 to March 1977, for MetCo, Inc. in June 1977, and for Buchanan and Sons Coal from 1977 to 1978. Director's Exhibit 3.

[6] The ALJ also later credits Claimant with an entire year of coal mine employment in 1978, appearing to credit Claimant with more than a year of cumulative employment in 1978. Decision and Order on Remand at 7. Claimant's CM-911(a) form states he worked

To the extent Employer contends that the ALJ erred in crediting Claimant with full years of coal mine employment in 1997, 1998, and 2001, we disagree. Employer's Brief at 6-8. The ALJ accurately found there is no evidence of the exact dates of Claimant's remaining coal mine employment. Decision and Order on Remand at 7. However, because Claimant continuously worked for Betty B Coal Company from 1996 to 1999, she rationally determined Claimant worked an entire calendar year in 1997 and in 1998. *Id*.; *see Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280; 20 C.F.R. §725.101(a)(32). Similarly, because Claimant worked continuously for El Paso Coal Holding, LLC from 2000 to 2002, the ALJ reasonably inferred Claimant worked an entire calendar year for this company in 2001.[7] *Id*.

Finally, for the remaining years for which the beginning and ending dates of Claimant's coal mine employment could not be determined, the ALJ indicated she applied the calculation method in 20 C.F.R. §725.101(a)(32)(iii) to find full years of employment for the years 1978, 1981, 1995, 1996, 1999, and 2000. Decision and Order on Remand at 7. As Employer notes, the ALJ did not provide her calculations or analysis beyond stating she applied the method at 20 C.F.R. §725.101(a)(32)(iii). *Id.*; Employer's Brief at 6-7.

In determining whether a miner established at least one year of coal mine employment, the ALJ must first determine whether the miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36. If the threshold requirement of a one-year period is met, then the ALJ must determine whether the miner worked for at least 125 days during that one-year period. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36; *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment). Because the ALJ did not provide her calculations or explanations for her findings, we cannot determine if the ALJ made the necessary threshold determination prior to determining whether Claimant worked 125 days in coal mine employment. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36.

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for Porter Coal Company from October 1974 to April 1978, and for Buchanan and Sons Coal from 1977 to 1978. Director's Exhibit 3.

[7] Because Claimant worked for a single employer for a full calendar year in 1997, 1998, and 2001, it is presumed he worked there for 125 days. 20 C.F.R. §725.101(a)(32)(ii). Moreover, Employer's own calculations show Claimant worked for greater than 125 days in 1997, 1998, and 2001. Employer's Brief at 8.

Moreover, in calculating Claimant's cumulative yearly earnings, it appears the ALJ did not include Claimant's income from Grand Canyon Mining Company in 1993 despite finding it constituted coal mine employment. Decision and Order on Remand at 6. She also included Claimant's income for Teays Mining, despite finding there was no evidence to establish it constituted coal mine employment. *Id*. In addition, she did not consider Claimant's work for El Paso Coal in 2002 and credited Claimant with more than one year of coal mine employment in 1978. *Id*. at 5-7. As the ALJ did not adequately set forth her findings in compliance with the requirements of the Administrative Procedure Act (APA),[8] 5 U.S.C. §557(c)(3)(A), we cannot affirm her determination that Claimant worked in coal mine employment for 6 years from 1978 to 2002. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Muncy*, 25 BLR at 1-27.

We therefore vacate the ALJ's determination that Claimant established more than fifteen years of underground coal mine employment and invoked the Section 411(c)(4) presumption.

20 C.F.R. §718.204(b)(2) - Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function tests, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The Board vacated the ALJ's determination that the pulmonary function studies, medical opinion evidence, and the evidence as a whole established total disability.[9]

[8] The APA requires that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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).

[9] The ALJ correctly found that none of the arterial blood gas studies establish total disability and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 13, 26. Thus, she found Claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(ii)-(iii). *Id.*

Bateman v. Bluff Spur Coal Corp., BRB No. 19-0008 BLA, slip op. at 8-10 (Jan. 13, 2020) (unpub.). On remand, the ALJ reconsidered the evidence and again found Claimant established total disability based upon the pulmonary function studies, medical opinions, and evidence as whole. Decision and Order on Remand at 8-12.

The ALJ considered six pulmonary studies conducted on April 8, 2014, July 9, 2014, May 18, 2015, May 24, 2016, August 1, 2017, and December 13, 2017. Decision and Order on Remand at 8. The April 8, 2014 study was non-qualifying.[10] Employer's Exhibit 1. The July 9, 2014 study was qualifying both before and after bronchodilators. Director's Exhibit 11. The May 18, 2015 study was non-qualifying before bronchodilators, but was qualifying after. Director's Exhibit 12. The May 24, 2016 and August 1, 2017 studies were performed without bronchodilators and were both qualifying. Claimant's Exhibits 5, 6. Finally, the December 13, 2017 study was non-qualifying both before and after the administration of bronchodilators. Employer's Exhibit 9. In total, three pre-bronchodilator results were qualifying and three were non-qualifying; two of the three post-bronchodilator results were qualifying and one was non-qualifying. Decision and Order on Remand at 8.

The ALJ found the April 8, 2014 pulmonary function study entitled to little weight as the oldest test in the record. Decision and Order on Remand at 9. However, she found the July 9, 2014 study to be worthy of "significant weight." *Id.* at 9. The ALJ further found the May 18, 2015 pulmonary function study supported a finding of total disability, determining that the qualifying post-bronchodilator study results "more accurately show Claimant's ability to perform his last coal mine employment." *Id.* at 10. However, she found the May 24, 2016 study[11] invalid and provided it little weight. *Id.* at 11. Rejecting Dr. Fino's opinion that the August 1, 2017 study was also invalid, the ALJ found the study entitled to "significant weight." *Id.*

Finally, the ALJ found the December 13, 2017 pulmonary function study entitled to little weight as an outlier because it had markedly higher values than the other contemporaneous studies and because it was the only test to show improvement post-bronchodilator. Decision and Order on Remand at 10-11. In doing so, she did not credit

[10] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[11] In her summary of her findings regarding the pulmonary function studies, the ALJ indicated she gave little weight to the May 25, 2015 study based on expert opinions that it was invalid. Decision and Order on Remand at 12. This appears to be a typographical error.

Dr. McSharry's explanation that the miner underperformed on each of the prior tests and that the December 2017 study thus should be given controlling weight as representing Claimant's "best lung function." *Id* at 10, 13. Nor did she credit his explanation for reversing his earlier opinion that Claimant was disabled based on the prior studies because the higher values of the December 2017 study established that an unknown acute respiratory condition other than pneumoconiosis -- which Dr. McSharry did not identify and which was not mentioned in Claimant's treatment records -- must have resolved in the meantime. *Id.* at 13 ("Dr. McSharry's discrediting of the earlier pulmonary function test results based upon either the poor effort or the resolution of a disease process is not supported by the evidence in the record."). Based on the significant weight she gave to the qualifying July 2014 and May 2015 post-bronchodilator studies, and the August 2017 study, which is the most recent fully-credited test given her decision to afford the December 2017 study little weight, the ALJ concluded the pulmonary function test evidence establishes total disability.[12] 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 12.

We reject Employer's argument that the ALJ substituted her medical judgment for that of the physicians in discrediting Dr. McSharry's opinion the December 2017 study should be given controlling weight because its higher values better represent Claimant's true lung function. Employer's Brief at 10-12. The United States Court of Appeals for the Fourth Circuit has explicitly spurned that view, holding that because pneumoconiosis is a chronic condition, "on any given day, it *is* possible to do better, and indeed to exert more effort, than one's typical condition would permit." *Greer v. Director, OWC*P, 940 F.2d 88, 90-91 (4th Cir. 1991) (noting that the theory that it is impossible to overperform on a pulmonary function test but possible to produce "an artificially low result by giving a subpar effort" was "overstated, simplistic, and unfair to claimants."). She similarly acted in her discretion in refusing to credit Dr. McSharry's explanation that the lower values must have been the product of some unidentified (and yet) resolved acute condition. The existence of a disability and the cause of that disability are different issues; regardless, the Fourth Circuit similarly has held it permissible to discredit an opinion relying on an alternative diagnosis as a cause of an impairment when that diagnosis does not appear

[12] Employer does not challenge the ALJ's determinations that the July 9, 2014 qualifying pulmonary function study is entitled to "significant weight," that the August 1, 2017 qualifying pulmonary function study is valid and entitled to "significant weight," and that the May 18, 2014 study supports a finding of total disability and is entitled to "significant weight." Decision and Order on Remand at 9-10. Consequently, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

anywhere else in the record. *See, e.g., Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010).[13]

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (The Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license "to set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis."). Based on the ALJ's permissible rationale for providing the most weight to the qualifying July 2014 and May 2015 post-bronchodilator studies, and the August 2017 study, we affirm her finding the pulmonary function tests establish disability.[14]

[13] We respectfully disagree with our dissenting colleague's view that in so finding, the ALJ impermissibly invaded the realm of the experts. *Infra* at 14-15. As the authority that our colleague cites establishes, as a general principle, "the interpretation of objective data is a medical determination, and an administrative law judge may not substitute [her] opinion for that of a physician." *Marcum v. Director,* OWCP, 11 BLR 1-23, 1-24 (1987). But this is not a case of an ALJ impermissibly interpreting technical medical data beyond her ken to invalidate a pulmonary function test. Nor it is an example, as in *Marcum*, of an ALJ concluding solely on her own accord that a non-qualifying test result "merely evidenced the fact that claimant must have been having a day when his breathing was less troublesome." *Marcum*, 11 BLR at 1-24. Rather, it is a straightforward case of an ALJ weighing competing test results and reconciling conflicting expert opinion on the cause of the conflict -- which is her fundamental duty to do. *See, e.g, Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997). And because her findings are based on substantial evidence and comport with the relevant Fourth Circuit law on the subject, we therefore affirm them. 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).

[14] Given our finding, we need not consider Employer's remaining argument that ALJ erred in her weighing of the April 8, 2014 pulmonary function study, and therefore erred in her weighing of the pulmonary function study evidence as a whole. Employer's Brief at 10. Even if that study is given full weight, four of the remaining six results, including both of the remaining post-bronchodilator results, remain qualifying. Consequently, any error in discrediting the April 8, 2014 pulmonary function study is harmless as the ALJ permissibly found the weight of the pulmonary function studies support a finding of total disability -- which does not change with or without the April 2014 study. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the

The ALJ also reconsidered the medical opinions of Drs. Ajjarapu, McSharry, and Fino. Decision and Order on Remand at 12-14. Dr. Ajjarapu opined Claimant has a severe obstructive impairment that renders him totally disabled. Director's Exhibit 11. Dr. McSharry initially opined Claimant is totally disabled, but changed his opinion after consideration of the December 13, 2017 pulmonary function study. Director's Exhibit 12; Employer's Exhibit 10. Dr. Fino also opined Claimant is not totally disabled. Director's Exhibit 11. The ALJ found Dr. Ajjarapu's opinion to be well-documented and reasoned and supported by the objective testing and treatment records. Decision and Order on Remand at 13-14. Conversely, she accorded little weight to the opinions of Drs. McSharry and Fino as they relied on the December 13, 2017 pulmonary function study to find Claimant is not disabled and their opinions are not consistent with the weight of the pulmonary function study evidence. *Id*. at 13. Consequently, she found the medical opinion evidence establishes total disability. *Id*. at 14.

Employer contends that the ALJ's errors in her weighing of the pulmonary function study evidence requires the determination that the opinions of Drs. McSharry and Fino are entitled to little weight to be vacated. Employer's Brief at 14. However, as we have affirmed the ALJ's weighing of the pulmonary function study evidence, we reject Employer's arguments. Consequently, we affirm the ALJ's determination that the opinions of Drs. McSharry and Fino are not well-reasoned or documented. Decision and Order on Remand at 13.

We further reject Employer's argument that the ALJ erred in crediting the opinion of Dr. Ajjarapu. Employer's Brief at 14. Dr. Ajjarapu examined Claimant on July 9, 2014, considered his employment and exposure histories, conducted objective testing such as pulmonary function and arterial blood gas studies, and considered Dr. McSharry's subsequent examination of Claimant. Director's Exhibit 11. She noted Claimant reported symptoms consistent with chronic obstructive pulmonary disease (COPD) and that his pulmonary function studies demonstrated a moderate to severe impairment. *Id*. Based on this evidence, she concluded Claimant has a totally disabling obstructive impairment. *Id*. The ALJ permissibly credited Dr. Ajjarapu's opinion because it was based on her examination, is consistent with the preponderance of the qualifying pulmonary function study evidence, and is further supported by notes in Claimant's treatment records which reflect further treatment for his COPD. *See Island Creek Coal Co. v. Compton*, 211 F.3d

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"error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

203, 212 (4th Cir. 2000); *Milburn Colliery Co. 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 on Remand at 14; Director's Exhibit 11; Claimant's Exhibits 7, 9.

Because substantial evidence supports the ALJ's credibility determinations, we affirm her finding that the opinion of Dr. Ajjarapu establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 14. We further affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability at 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order on Remand at 14.

Smoking History

While it is premature to address whether the ALJ properly found Employer failed to rebut the Section 411(c)(4) presumption, in the interest of judicial economy, we address Employer's arguments regarding the ALJ's findings regarding Claimant's smoking history, as some of her findings regarding rebuttal rely on her finding of Claimant having no smoking history. Employer's Brief at 20-23.

The ALJ determined Claimant never smoked, crediting his testimony over the contrary evidence contained in his treatment records and in physician reports. Decision and Order at 4-7. On remand, the ALJ incorporated and adopted the "unchallenged" smoking history from her prior decision. Decision and Order on Remand at 7. However, as Employer asserts, it challenged the ALJ's consideration of Claimant's smoking history in the previous appeal before the Board. Employer's Brief at 20-21; Employer's 2019 Brief to the Board at 22-24. Further, while the Board declined to specifically address Employer's arguments relevant to rebuttal of the Section 411(c)(4) presumption as premature, it instructed the ALJ to consider the credibility of the medical opinion evidence if she reached rebuttal, "taking into consideration her determinations regarding the length of claimant's coal mine employment and his smoking history, if any." *Bateman*, 19-0008 BLA, slip op. at 11 n.20.

In resolving the conflicting evidence, the ALJ found Claimant's testimony that he never smoked but was exposed to secondhand smoke from multiple people to be credible. Decision and Order at 4-7. She credited this testimony over Claimant's treatment records, which contained conflicting smoking histories, and the report of Dr. McSharry that the results of his carboxyhemoglobin tests and serum cotinine test produced values which indicate a recent exposure to carbon monoxide that is most likely the result of smoking. Decision and Order at 4; Director's Exhibit 12. However, she failed to consider Dr. Fino's opinion that Claimant's cotinine levels are consistent with the use of tobacco products and Dr. Ajjarapu's revised opinion that Claimant's impairment is due in part to smoking based

on the test results. Director's Exhibit 11. She also did not explicitly consider several treatment records indicating Claimant was a smoker. Employer's Brief at 22, *citing* Employer's Exhibit 6 at 8, 9, 11.

Because the ALJ failed to consider and weigh all relevant evidence regarding Claimant's smoking history, we must vacate her determination that Claimant never smoked. *Hicks*, 138 F.3d at 533 (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Remand Instructions

On remand, the ALJ must first determine if Claimant had at least fifteen years of coal mine employment.[15] In doing so, she must explain her method of calculating the Miner's length of coal mine employment using any reasonable method of calculation. *Muncy*, 25 BLR at 1-27. She must first determine whether the evidence establishes the beginning and ending dates of Claimant's coal mine employment "by any credible evidence." 20 C.F.R. §725.101(a)(32); *Mitchell*, 479 F.3d at 334-36; *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016). Where the beginning and ending dates of a miner's employment cannot be determined, an ALJ may divide the miner's yearly reported income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS), and/or use another reasonable method of calculation. 20 C.F.R. §725.101(a)(32)(iii); *see* Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. However, if the ALJ uses this method, she must first determine whether Claimant was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36. If the threshold requirement of a one-year period is met, then the ALJ must determine whether

[15] Employer also generally argues the evidence is insufficient to establish more than fifteen years of qualifying coal mine employment, noting Claimant only specifically testified as to his job duties for Employer. Employer's Brief at 7. However, Employer acknowledges Claimant testified that all of his employment was underground and it does not allege the ALJ erred in relying on his testimony. Employer's Brief at 7; Hearing Transcript at 18. As the ALJ was within her discretion to credit Claimant's testimony, her finding that all of Claimant's coal mine employment is qualifying is affirmed. *See Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (ALJ "may rely on lay testimony regarding a miner's coal mine employment, especially if, as here, the testimony is not contradicted by any documentation of record"); 20 C.F.R. §718.305; Decision and Order on Remand at 20.

Claimant worked for at least 125 days during that one-year period. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36. Regardless of the method used, the ALJ should set forth her calculations, findings, and conclusions in accordance with the APA.

If Claimant establishes fifteen years of coal mine employment, the ALJ can again invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. If the presumption is invoked on remand, the ALJ must consider if Employer rebutted it.[16] In making such a determination, the ALJ must consider all relevant evidence.[17] In reaching her conclusions on remand, the ALJ must explain the bases for her credibility determinations and findings of fact as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the ALJ's Decision and Order Awarding Benefits Upon Remand is affirmed in part and vacated in part, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues that the ALJ erred in her determination that Claimant established at least fifteen years of coal mine employment. However, I respectfully dissent from the majority's affirmance of the ALJ's determination that the evidence establishes total disability. 20 C.F.R. §718.204(b)(2). Specifically, I agree with Employer that the ALJ erred in her weighing of the April 8, 2014 and December 13, 2017 pulmonary function

[16] We affirm, as unchallenged on appeal, the ALJ's finding that Employer failed to rebut the presumption of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 19.

[17] In addition to evidence regarding Claimant's smoking history, Employer argues the ALJ also again failed to consider Dr. McSharry's supplemental report in considering rebuttal of legal pneumoconiosis. Employer's Brief at 19; *Bateman*, 19-0008 BLA, slip op. at 10 n.20.

studies, and therefore erred in her weighing of the pulmonary function study evidence as a whole. Employer's Brief at 10-13.

The ALJ accorded "little weight" to the non-qualifying April 8, 2014 pulmonary function study because it was the oldest test of record. Decision and Order on Remand at 9. However, while recency can be a factor in providing weight to objective testing, the ALJ must explain the basis for her findings. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718-19 (4th Cir. 1993) (ALJ must explain reliance on recency in weighing objective studies). As Employer notes, there are only three months between the two earliest pulmonary function studies of record, yet the ALJ provides one study "little weight" and the other "significant weight." Employer's Brief at 10; Decision and Order on Remand at 9. As the ALJ does not explain how three months makes a significant difference in the credibility of the two studies, I would vacate her determination that the April 8, 2014 pulmonary function study is entitled to little weight. *See Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (two months is insignificant when evaluating a miner's entitlement); *see also Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (affirming ALJ's finding that pulmonary function studies conducted within seven months were "sufficiently contemporaneous").

Moreover, I would vacate the ALJ's determination that the December 13, 2017 pulmonary function study is entitled to little weight based on "irregularities in the test results." Decision and Order on Remand at 10. The ALJ determined the December 13, 2017 test showed "markedly higher" results than those conducted in 2015 and 2016, noted the test was "atypical" as the only one to show improvement post-bronchodilator, and indicated it was "not clear from the record" if the results were affected by treatments associated with Claimant's hospitalization in 2017.[18] *Id.*

However, as Employer asserts, no expert opined the December 13, 2017 study was affected by Claimant's hospitalization or that the improvement in post-bronchodilators was an irregularity. Employer's Brief at 15. Moreover, Drs. McSharry and Fino believed the study was sufficiently reliable to indicate Claimant is not disabled, and they explained that the improvement with bronchodilators was a result of better effort on Claimant's part. Employer's Exhibits 9, 10. While it is within the ALJ's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts and to assess the evidence of record and draw his own conclusions and inferences from it, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986), the interpretation of medical data is for the medical

[18] Dr. Fino reported that Claimant stated he was hospitalized in December 2017 due to a heart attack and triple bypass surgery, but there is no other information about this hospitalization in the record. Employer's Exhibit 9.

experts and an ALJ may not substitute her opinion for that of the experts. *Marcum v. Director,* OWCP, 11 BLR 1-23, 1-24 (1987). Here, the ALJ erred in substituting her opinion for those of the experts to determine the December 13, 2017 pulmonary function study was potentially unreliable. *Marcum*, 11 BLR at 1-24.

Moreover, Employer argued that the results of the December 13, 2017 pulmonary function study were not "markedly higher" than those of the April 8, 2014 and May 18, 2015 pre-bronchodilator studies. *Bateman*, BRB No. 19-0008 BLA, slip op. at 9 n.16. The ALJ summarily rejected this argument, because the results of the December 13, 2017 pulmonary function study were markedly higher than those of the May 18, 2015 study post-bronchodilator study and the invalid May 24, 2016 study. Decision and Order on Remand at 10-11. While the ALJ is not required to accept the highest test results, she must still explain the weight she accords to the tests. *See Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993) (imputing selective reliability to highest test results among valid pulmonary function tests is speculative); *Greer v. Director, OWC*P, 940 F.2d 88, 90-91 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level). Here, the ALJ failed to explain why the tests results were irregular when they are arguably not markedly higher than some of the studies. *See Wojtowicz,* 12 BLR at 1-165.

As the ALJ failed to adequately explain how she resolved the conflict in the pulmonary function study evidence, I would vacate the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Moreover, because the ALJ's credibility determinations regarding the medical opinion evidence rely on her findings and weighing of the pulmonary function studies,[19] I would also vacate her findings that Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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[19] The ALJ credited Dr. Ajjarapu's opinion that Claimant is totally disabled as supported by the valid, qualifying pulmonary function studies. Decision and Order at 14; Director's Exhibit 11. She discredited Drs. McSharry's and Fino's opinions that Claimant is not totally disabled given their reliance on the December 13, 2017 non-qualifying study. Decision and Order at 13-14; Employer's Exhibits 9, 10.