

U.S. Department of Labor

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



BRB No. 22-0285 BLA

RICKY D. MCQUEEN)

Claimant-Respondent)

v.)

NORTH FORK COAL CORPORATION c/o)

ARN, INCORPORATED)

and)

BRICKSTREET MUTUAL INSURANCE)

GROUP INCORPORATED A/K/A)

ENCOVA MUTUAL INSURANCE GROUP)

Employer/Carrier-)

Respondents)

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)

STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 8/11/2023

DECISION and ORDER

Appeal of the Corrected Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Corrected Decision and Order Awarding Benefits (2020-BLA-05233) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2018) (Act). This case involves a miner's subsequent claim filed on November 26, 2018.¹

The ALJ credited Claimant with 14.09 years of underground coal mine employment and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).² Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis³ and a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). Thus, Claimant established a change in an applicable condition of entitlement,⁴ 20 C.F.R. §725.309, and the ALJ awarded benefits.

¹ Claimant filed a previous claim on November 2, 2015, which the district director denied by reason of abandonment. Director's Exhibit 1. The regulations provide that, "[f]or purposes of [20 C.F.R.] §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

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

³ "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁴ When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because his prior claim was denied by reason of abandonment, Claimant must submit new

On appeal, Employer contends the ALJ erred in finding Claimant established total disability and legal pneumoconiosis. Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed 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.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Entitlement Under 20 C.F.R. Part 718

Without the Section 411(c)(3) or (4) presumptions, Claimant must establish disease (pneumoconiosis);⁶ disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,⁷ evidence of

evidence establishing at least one element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

⁵ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

⁶ The ALJ found Claimant did not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 23-25, 28-29.

⁷ A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence under any category “shall establish a miner’s total disability” absent “contrary probative evidence.” 20 C.F.R. §718.204(b)(2). The ALJ found Claimant established total disability based on the pulmonary function and blood gas studies, the medical opinions, and the weight of the evidence as a whole.⁸ Decision and Order at 22.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies, all of which were qualifying for total disability.⁹ Decision and Order at 12-13. Dr. Ajjarapu’s January 8, 2019 study produced qualifying pre-bronchodilator and post-bronchodilator results. Director’s Exhibit 15 at 11. Dr. Dahhan’s May 13, 2019 study produced qualifying pre-bronchodilator and post-bronchodilator results. Director’s Exhibit 25 at 7. The July 17, 2019 study conducted at St. Charles Respiratory Center produced qualifying pre-bronchodilator results.¹⁰ Director’s Exhibit 20. Dr. Schuldheisz’s April 13, 2020 study produced qualifying pre-bronchodilator results.¹¹ Claimant’s Exhibit 2. Dr. Sharma’s July 27, 2020 study produced qualifying pre-bronchodilator and post-bronchodilator results. Claimant’s Exhibit 3 at 10.

⁸ The ALJ found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 14.

⁹ Because the pulmonary function studies reported varying heights for Claimant ranging from 70 to 72 inches, the ALJ calculated an average height for Claimant of 71.3 inches. Because the table height at Appendix B of Part 718 matches Claimant’s average height, the ALJ used 71.3 inches for determining the qualifying or non-qualifying results of the studies. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 12.

¹⁰ Post-bronchodilator results were not obtained. Director’s Exhibit 20.

¹¹ Under “post test comments,” it states that “per protocol no bronchodilation was performed due to FEV1/FVC greater than 70%.” Claimant’s Exhibit 2.

Although the ALJ found the January 8, 2019, May 13, 2019 and July 17, 2019 studies invalid¹² based on Dr. Vuskovich's opinion,¹³ he noted Dr. Vuskovich had not addressed the validity of the remaining two qualifying studies from April 13, 2020 and July 27, 2020, and that Dr. Dahhan specifically validated the July 27, 2020 study. Decision and Order at 12-13. Thus, relying on the only valid studies of record dated April 13, 2020 and July 27, 2020, both of which are qualifying, the ALJ concluded Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).¹⁴ *Id.*

Employer correctly contends the ALJ failed to address Dr. Vuskovich's opinion that the July 27, 2020 pulmonary function study is invalid and weigh it against Dr. Dahhan's

¹² When weighing pulmonary function studies that are conducted in anticipation of litigation, the ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in his role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). Pulmonary function studies found not in substantial compliance, however, "shall [not] constitute evidence of the presence or absence of a respiratory or pulmonary impairment." 20 C.F.R. §718.103(c).

¹³ Dr. Vuskovich invalidated the January 8, 2019, May 13, 2019, July 17, 2019, and July 27, 2020 studies. Director's Exhibit 22; Employer's Exhibits 2, 4. He opined the results from the January 8, 2019, May 13, 2019, and July 27, 2020 studies indicated Claimant had an insufficient respiratory rate and tidal volume to generate a valid MVV result, and that Claimant did not put forth the effort required for valid FVC and FEV1 results. Director's Exhibit 22; Employer's Exhibits 2 at 4, 12-13, 4 at 3-4. He also opined the July 17, 2019 study "could not be validated because [the] start of test was not displayed on graphics." Employer's Exhibit 2 at 12-13.

¹⁴ The ALJ noted the record contains an additional qualifying pulmonary function study conducted by Dr. Ajarapu on February 20, 2019, that was not designated by either party. Decision and Order at 12 n.10; Director's Exhibit 10. He further noted Dr. Gaziano validated the study and Dr. Vuskovich invalidated the study. Decision and Order at 13; Director's Exhibit 13; Employer's Exhibit 2 at 10-11. Given all of the previous studies of record were qualifying, he determined that consideration of an additional qualifying study would not change his conclusions at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 12 n.10.

opinion that the study is valid.¹⁵ Employer’s Brief at 9; Employer’s Exhibit 4. However, even if the ALJ were to find the study invalid, and thus not probative as to the “presence or absence” of an impairment, *see* 20 C.F.R. §718.103(c), his finding of total disability at 20 C.F.R. §718.204(b)(2)(i) remains supported by one valid, qualifying and uncontradicted study. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the “error to which [it] points could have made any difference”); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As Employer does not challenge the validity of the qualifying April 13, 2020 study, we affirm the ALJ’s finding that Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i).

Blood Gas Studies

The ALJ considered three blood gas studies. Decision and Order at 13-14. Dr. Ajarapu’s December 19, 2018 study had qualifying values at rest, Dr. Dahhan’s May 13, 2019 study had qualifying values at rest and non-qualifying values after exercise, and Dr. Sharma’s July 27, 2020 study had qualifying values at rest and after exercise. Director’s Exhibits 15, 25; Claimant’s Exhibit 3. The ALJ determined all of the resting studies had qualifying values and the most recent exercise study also had qualifying values. He therefore concluded Claimant established total disability by the blood gas study evidence. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 14. We affirm this finding as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13-14.

¹⁵ Dr. Vuskovich opined that the July 27, 2020 pulmonary function study was not valid because the “flow volume loops show variable configurations and flow rates which showed that [Claimant’s] initial efforts were not maximum efforts which artificially lowered his FEV1 results.” Employer’s Exhibit 4 at 3. He also determined that “[v]ariable volumes read on [Claimant’s] volume time tracings showed that his initial deep breath efforts were variable,” which could artificially lower his FVC and FEV1 values. *Id.* In addition, he stated “the computer printout [of the] volume-time display scale factor ratio does not comply with [American Thoracic Society] standards” and “artificially shows poor-initial-effort volume time tracings as maximum effort tracings,” which could cause an individual validating this study to confuse poor initial effort volume time tracings for maximum effort. *Id.* at 3-4.

Medical Opinions

The ALJ also considered four medical opinions.¹⁶ Decision and Order at 14-22. Dr. Ajarapu conducted the Department of Labor (DOL) complete pulmonary evaluation of Claimant on December 19, 2018. Director's Exhibit 15. She opined Claimant's December 19, 2018 pulmonary function study results¹⁷ showed a severe pulmonary impairment and his blood gas study showed severe resting hypoxia. *Id.* at 7. She further opined he is totally disabled and could not continue his previous coal mine employment. *Id.*

Dr. Dahhan examined Claimant on May 13, 2019 and reviewed his medical records. Director's Exhibit 25. He opined Claimant has a totally disabling respiratory impairment based on the objective testing. *Id.* at 5. Specifically, during his deposition, Dr. Dahhan explained Claimant's pulmonary function results showed a restrictive defect and reiterated his opinion that Claimant is totally disabled. Employer's Exhibit 1 at 12-15. In an August 20, 2020 supplemental report, he also explained Claimant has "a restrictive ventilatory impairment that is associated with resting and exercise induce[d] hypoxemia." Employer's Exhibit 5 at 2.

Dr. Sharma examined Claimant on July 27, 2020, and opined Claimant's pulmonary function study results showed a restrictive pattern and that Claimant had a significant respiratory impairment based on his FEV1 value which was 46% of predicted. Claimant's Exhibit 3 at 3-4. Relying on the American Medical Association Guidelines to Permanent Impairment, he diagnosed a class IV impairment based on Claimant's pulmonary function study results. *Id.* at 4. He opined Claimant could not return to his last coal mine work based on his "significant respiratory impairment." *Id.* at 5.

Dr. Vuskovich reviewed Claimant's medical records. Employer's Exhibits 2, 4. After invalidating four of the five qualifying pulmonary function studies discussed previously, he opined "coal mine dust exposure was not a substantially contributing cause of any current disabling pulmonary impairment." Employer's Exhibit 2 at 19-20. He also

¹⁶ We affirm, as unchallenged, the ALJ's finding that Claimant's last coal mine work required sustained heavy and very heavy levels of exertion. *Skrack*, 6 BLR at 1-711; Decision and Order at 10-11.

¹⁷ Dr. Ajarapu based her opinion, in part, on a pulmonary function study obtained on December 19, 2018; however, that study was later invalidated by Dr. Gaziano. Director's Exhibits 12, 15. Claimant underwent additional pulmonary function studies on January 18, 2019 and February 20, 2019. Director's Exhibits 10, 15 at 11. Dr. Vuskovich invalidated the January 18, 2019 study and the ALJ excluded the February 20, 2019 study. Decision and Order at 12 n.10; Director's Exhibit 22.

opined that with weight loss and smoking cessation, Claimant's health would significantly improve and that he would likely be able to return to his last coal mine work from a pulmonary perspective. *Id.* at 20.

The ALJ found Drs. Ajjarapu, Dahhan, and Sharma agree Claimant is totally disabled by a respiratory or pulmonary impairment, while Dr. Vuskovich did not discuss whether Claimant has the respiratory or pulmonary capacity to return to his last coal mine work in view of the qualifying blood gas study evidence. Decision and Order at 21-22. Thus, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. *Id.* at 22. Employer has not challenged, and we therefore affirm, the ALJ's crediting of Dr. Dahhan's opinion as supporting a finding of total disability and his discrediting of Dr. Vuskovich's opinion. *Skrack*, 6 BLR at 1-711.

Instead, Employer contends the ALJ erred in crediting the opinions of Drs. Ajjarapu and Sharma because they relied on invalid pulmonary function studies. Employer's Brief at 9-11. However, Dr. Ajjarapu determined Claimant is totally disabled based on pulmonary function study results that showed a severe pulmonary impairment *and* arterial blood gas studies that showed severe resting hypoxia. Director's Exhibit 15 at 7. As Dr. Ajjarapu's opinion on total disability is supported by the December 19, 2018 qualifying blood gas study she obtained, any error in failing to consider the impact of the invalid January 8, 2019 pulmonary function study on Dr. Ajjarapu's opinion is harmless. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; *see also Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984) (because blood gas studies and pulmonary function studies measure different types of impairment, results of arterial blood gas studies are not called into question by contemporaneous pulmonary function testing). Similarly, Dr. Ajjarapu's opinion also conforms to the ALJ's finding that the overall weight of the pulmonary function study evidence establishes disability, which we already have affirmed. *See Shinseki*, 556 U.S. at 413.

Likewise, we hold the ALJ's failure to consider whether Dr. Vuskovich's invalidation of the July 27, 2020 pulmonary function study would have impacted the weight to accord Dr. Sharma's opinion to also be harmless error. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Claimant's Exhibit 3 at 3-5. Even if the ALJ found that study invalid and then discredited Dr. Sharma's opinion for relying on it, the ALJ's determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) is still supported by the opinions of Drs. Ajjarapu and Dahhan and there are no contradictory medical opinions.

Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established total disability based on the medical opinion evidence at 20

C.F.R. §718.204(b)(2)(iv). Further, because we have affirmed the ALJ's findings that the pulmonary function studies, blood gas studies, and medical opinions support a finding of total disability, we affirm the ALJ's conclusion that Claimant established total disability in consideration of the evidence as a whole. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 22.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The United States Court of Appeals for the Sixth Circuit has held that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the opinions of Drs. Ajjarapu, Sharma, Dahhan and Vuskovich and Claimant's treatment records. Decision and Order at 25-29. All of the physicians agree that Claimant has a respiratory impairment but disagree about its etiology.¹⁸ Decision and Order at 22, 26-28. Dr. Ajjarapu observed Claimant's pulmonary function and blood gas studies "meet DOL criteria for total and complete pulmonary impairment." Director's Exhibit 15 at 6. She opined that although "tobacco use compounded [Claimant's] existing pulmonary decline," his work "in coal mines is the major contributing factor to his pulmonary disability." Director's Exhibit 15 at 7. She further diagnosed chronic bronchitis based on respiratory symptoms including coughing and shortness of breath, and stated it was due to both smoking and coal mine dust exposure. *Id.* at 7. She concluded Claimant is "totally and completely disabled due to his coal dust exposure." *Id.* Dr. Sharma attributed Claimant's respiratory impairment to his history of smoking and coal mine dust exposure. Claimant's Exhibit 3 at 5.

Conversely, Dr. Dahhan opined Claimant's pulmonary impairment is primarily caused by his "lengthy and continued" smoking history and is consistent with his morbid

¹⁸ We affirm, as unchallenged, the ALJ's determinations that all of the physicians are well qualified and entitled to equal weight based on their qualifications; they possess an adequate understanding of the exertional requirements of Claimant's coal mine job, and his smoking and coal mine employment histories; and they are "well positioned" to offer an opinion on pneumoconiosis. *Skrack*, 6 BLR at 1-711; Decision and Order at 25.

obesity. Director's Exhibit 25 at 5. He further opined there was "no evidence" that Claimant's disability was "related to, contributed to or aggravated by" the inhalation of coal dust. *Id.*; see Employer's Exhibit 1 at 16-17. Dr. Vuskovich opined that "coal mine dust exposure did not cause, significantly contribute to, or substantially aggravate [Claimant]'s morbid obesity and hypercapnia." Employer's Exhibit 2 at 19.

The ALJ found Drs. Ajjarapu's and Sharma's opinions well-reasoned and discredited Dr. Dahhan's opinion as inadequately explained and inconsistent with the regulations. Decision and Order at 26-28. The ALJ found Dr. Vuskovich did not address whether coal mine dust exposure contributed to Claimant's disabling hypoxemia or provide any rationale or support for his conclusion that Claimant does not have legal pneumoconiosis. *Id.* at 28. The ALJ also reviewed Dr. Schuldheisz's treatment records from April 14, 2020 and May 18, 2020 and noted she diagnosed Claimant with coal workers' pneumoconiosis as well as a variety of pulmonary impairments, but she did not discuss the etiology of those impairments.¹⁹ Decision and Order at 29; Claimant's Exhibit 2.

Initially, we reject Employer's argument that the ALJ applied an incorrect legal standard by requiring Drs. Dahhan and Vuskovich to "rule out" coal mine dust as a cause of Claimant's impairment. Employer's Brief at 4-5, 8. The ALJ properly noted Claimant must demonstrate he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); Decision and Order at 22, 25-26. Moreover, as explained below, the ALJ permissibly gave their opinions less weight because they are inadequately reasoned and not because they failed to satisfy an incorrect heightened legal standard. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 26-28.

Employer asserts the ALJ mischaracterized Dr. Dahhan's opinion in concluding he did not adequately address whether coal mine dust exposure contributed to Claimant's obstructive lung disease. Employer's Brief at 6-8. Employer contends Dr. Dahhan only diagnosed a restrictive impairment and thoroughly explained why it was not related to coal mine dust exposure. *Id.* Contrary to Employer's contention, Dr. Dahhan stated in his initial report that:

The possibility of [Claimant's] obstructive airway disease being caused or significantly aggravated by inhalation of coal dust is not supported by the

¹⁹ The ALJ reviewed the September 30, 2014 and May 4, 2020 computed tomography (CT) scans and determined they do not assist Claimant in proving he suffers from legal pneumoconiosis. Decision and Order at 28.

facts since the amount of loss in his FEV1 cannot be accounted for by the obstructive impact of coal dust on the respiratory system that is estimated in the literature to be 5-9cc loss per year.

Director's Exhibit 25 at 5; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 26; Employer's Brief at 7. We see no error in the ALJ's interpretation of Dr. Dahhan's opinion as indicating Claimant may have an obstructive impairment (as diagnosed by Dr. Ajjarapu), nor his independently dispositive determination that Dr. Dahhan's opinion is not credible because he relied on general statistics to exclude coal mine dust as a causative factor and not the specific facts of Claimant's case.²⁰ *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (ALJ may permissibly discount a physician's reasoning because it is based on generalities and not the specifics of a claimant's case). Further, the ALJ permissibly found Dr. Dahhan failed to adequately explain why, even if Claimant's restrictive impairment evidenced on the pulmonary function and blood gas studies was due primarily to smoking and obesity, coal dust did not also contribute.²¹ *Banks*, 690 F.3d at 489; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 26-27; Director's Exhibit 25; Employer's Exhibits 1, 5.

Additionally, contrary to Employer's assertion, the ALJ permissibly discredited Dr. Vuskovich's opinion because although he "speculated that Claimant's obesity, obstructive

²⁰ The ALJ noted, "Dr. Dahhan relied on his assessment of the statistical chances for the development of COPD due to coal mine dust exposure, and his conclusion that based on these statistics, the amount of Claimant's loss of FEV1 was not consistent with the estimated effect of coal dust on the respiratory system. But Claimant is not a statistic, and Dr. Dahhan did not explain why, in his circumstances, his history of coal mine dust exposure could not be a factor in his airway obstruction." Decision and Order at 26.

²¹ At his deposition, Dr. Dahhan explained that the pulmonary function and blood gas studies show Claimant has a restrictive impairment. Employer's Exhibit 1 at 16. He stated he could not "rule in coal dust as a causative factor" for that impairment because "the data in this individual is the data I've seen in patients who have not worked in the mining industry, yet have the same maladies, the obesity, sleep apnea and diabetes, that will present with the same picture." *Id.* at 17. Dr. Dahhan further stated that Claimant's smoking history was also "a significant factor" based on the bronchodilator response during pulmonary function testing. *Id.* In his supplemental report, he again indicated that Claimant's "morbid obesity was sufficient to cause his restrictive ventilatory impairment." Employer's Exhibit 5 at 2.

sleep apnea, and obesity hypoventilation syndrome ‘degraded’ his arterial blood gas profile,” he did not adequately explain why coal dust could not have independently contributed to Claimant’s disabling hypoxemia.²² Decision and Order at 28 (quoting Employer’s Exhibit 2 at 14); *see Banks*, 690 F.3d at 489; *Napier*, 301 F.3d at 713-14; Employer’s Exhibit 2 at 6-10, 15-20. We therefore affirm the ALJ’s determination that the opinions of Drs. Dahhan and Vuskovich are entitled to less weight.²³ Decision and Order at 28.

Employer next argues the ALJ erred in crediting the opinions of Drs. Ajarapu and Sharma. Employer’s Brief at 9-11. As previously noted, Dr. Ajarapu diagnosed Claimant with chronic bronchitis based on “the presence of respiratory symptoms,” which included coughing and shortness of breath. Director’s Exhibit 15 at 6. She explained that the etiology of Claimant’s chronic bronchitis was “his work in the mines and tobacco use, and both cause airway inflammation leading to bronchospasm and cause excessive airway secretions and bronchitic symptoms.” *Id.* She also diagnosed total disability based in part on valid, qualifying blood gases showing “severe resting hypoxia” and stated coal dust exposure is the “major contributing factor” to Claimant’s “pulmonary decline” and “total[] and complete[]” disability. *Id.* at 7. Thus, contrary to Employer’s contention, Dr. Ajarapu diagnosed legal pneumoconiosis independent of the invalid pulmonary function study.²⁴

²² Dr. Vuskovich indicated that “[b]esides thirteen years of coalmine dust exposure, [Claimant] had a number of serious medical conditions that degraded his pulmonary state of health and his overall state of health.” Employer’s Exhibit 2 at 14. He then explained how morbid obesity can affect an individual’s ability to expand his lungs and increases bronchial resistance to air flow. *Id.* at 15. Dr. Vuskovich also determined Claimant had hypercapnia due to his obesity. *Id.* at 16-18. In addition, he stated that “[f]rom a pulmonary oxygen transfer perspective[,] [Claimant] did not have legal pneumoconiosis” as he had normal pulmonary oxygen transfer on his May 13, 2019 blood gas study. *Id.* at 18-19. He then generally concluded that Claimant’s medical records show “morbid obesity and hypercapnia (and consequent low PaO₂) did not arise in whole or in part out of coal dust exposure” and that Claimant did not have legal pneumoconiosis. *Id.* at 19.

²³ As the ALJ has provided permissible reasons for finding Drs. Dahhan’s and Vuskovich’s opinions undermined, we need not address Employer’s additional contentions of error regarding their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer’s Brief at 4-8.

²⁴ Dr. Ajarapu’s diagnosis of a disabling pulmonary or respiratory impairment is also consistent with the ALJ’s overall finding that Claimant establish total disability at 20 C.F.R §718.204(b)(2)(i), (ii). There is no contrary evidence to undermine that Claimant has a totally disabling respiratory impairment shown on pulmonary function and blood gas

Moreover, Employer raises no specific error with regard to the ALJ's crediting of her diagnosis of chronic bronchitis or coal dust-induced disabling impairment on blood gas testing. *Skrack*, 6 BLR at 1-711; *see* Employer's Brief at 9-10. Consequently, as the ALJ permissibly credited Dr. Ajjarapu's opinion on legal pneumoconiosis and discredited the only contrary opinions of record from Drs. Dahhan and Vuskovich, we affirm the ALJ's finding that Claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).²⁵ 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *Martin*, 400 F.3d at 305; Decision and Order at 26, 28.

Disability Causation

To establish disability causation, Claimant must prove his legal pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

The ALJ found the opinions of Drs. Ajjarapu and Sharma adequately reasoned and documented to support a finding that Claimant is totally disabled due to legal pneumoconiosis. Decision and Order at 30. Employer raises the same challenges to the ALJ's crediting of their opinions on disability causation as it did with regard to legal pneumoconiosis. Employer's Brief at 9-11. Contrary to Employer's contention, the ALJ was not obligated to discredit Dr. Ajjarapu for relying in part on an invalid pulmonary function study. As previously discussed, her diagnosis is consistent with the overall weight of the qualifying pulmonary function study evidence, *see supra* at 12-13 n.24, and she specifically based her opinion on additional evidence – a qualifying blood gas study whose validity is not in question – to conclude that Claimant is totally disabled and his "work at

testing. Thus, the sole determinative issue with respect to Dr. Ajjarapu's opinion is whether she credibly attributed Claimant's impairment to coal dust exposure. Employer has not explained why Dr. Ajjarapu's opinion that Claimant's chronic bronchitis and severe hypoxia are due in part to coal mine dust exposure is not credible. *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

²⁵ Because Dr. Ajjarapu's opinion constitutes substantial evidence to support the ALJ's finding of legal pneumoconiosis, we need not address Employer's contentions that the ALJ erred in relying on Dr. Sharma's opinion at 20 C.F.R. §718.202(a)(4).

the coal face in coal mines is the major contributing factor to his pulmonary disability” and “[h]e is totally and completely disabled due to his coal dust exposure.” Director’s Exhibit 15 at 7. The ALJ also permissibly found Dr. Dahhan’s and Vuskovich’s opinions lacked credibility on the issue of total disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding Claimant has the disease. *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453 (6th Cir. 2013); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989); Decision and Order at 29-30. As the ALJ permissibly credited Dr. Ajarapu’s opinion²⁶ and there are no credible contrary opinions, we affirm the ALJ’s finding that Claimant established total disability causation.²⁷ 20 C.F.R. §718.204(c); Decision and Order at 30.

²⁶ Because Dr. Ajarapu’s opinion constitutes substantial evidence to support the ALJ’s finding of total disability causation, we need not address Employer’s contentions that the ALJ erred in relying on Dr. Sharma’s opinion at 20 C.F.R. §718.204(c).

²⁷ We disagree with our colleague’s contention that under Board precedent errors categorically require remand whether they could affect the outcome of a case or not. Instead, the Board has long recognized that under the Black Lung Benefits Act “[i]t is well established that error which does not affect the disposition of a case is harmless[,]” *Larioni*, 6 BLR at 1-1278, and the United States Supreme Court has more recently confirmed that under the APA an appellant must explain how the “error to which [it] points could have made any difference” to prevent tribunals from becoming “impregnable citadels of technicality.” *Shinseki*, 556 U.S. at 407, 413 (citation omitted).

Missing from our colleague’s discussion is the identification of any such error -- and it is difficult to imagine one on this record. The two elements under which our colleague appears to allege flaws concern disability and disability causation. But with regard to disability: all five of the pulmonary function tests of record qualified (as well as an additional test contained in Claimant’s DOL sponsored exam that might have been improperly excluded); every one of the three resting blood gas studies qualified (which under black letter law provides a different avenue to disability); and all four of the physicians of record agreed Claimant suffered from a respiratory impairment preventing him from working (even Dr. Vuskovich acknowledged the impairment; he just attributed it to obesity and smoking, stating Claimant would require weight loss and smoking cessation to return to work).

Our colleague’s one specific allegation of error -- that the ALJ failed to consider Dr. Vuskovich’s attempted invalidation of the July 27, 2020 pulmonary function test -- while true, appears utterly inconsequential in light of these facts. Indeed, our colleague has not attempted to articulate *how* it *could* make a difference, particularly where the ALJ may

have improperly invalidated or excluded four other *qualifying* pulmonary function tests and where the blood gas studies provide an independent basis for disability.

The error, in our view, similarly cannot reasonably be seen to affect disability causation: even if the ALJ found the July 2020 test to be invalid (and reaffirmed his finding the other qualifying pulmonary function tests are also invalid or not properly in the record) the only remaining pulmonary function test in the record would *still* be qualifying. And our colleague provides no explanation why that one remaining qualifying test would not provide the same basis for both Dr. Ajjarapu's and Dr. Sharma's disability causation opinions. Moreover, Dr. Ajjarapu relied on the December 19, 2018 blood gas study in diagnosing disability, and on Claimant's history of coal dust exposure in attributing that disability to legal pneumoconiosis. Director's Exhibit 15 at 6-7.

Given the ALJ's specific determination that Dr. Ajjarapu's opinion is credible, it is unclear why our dissenting colleague thinks we have exceeded the scope of our review authority by affirming that finding. Contrary to her assessment, and consistent with our statutory mandate, we have not rendered our own finding but, rather, have considered whether *the ALJ's finding* is supported by substantial evidence, and whether any alleged error could make a difference, applying longstanding harmless error precedent. 33 U.S.C. §921(b)(3) ("findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole").

Finally, while it is difficult to see how any error affected the outcome of this case, it is impossible to ignore how remanding this case for several rounds and likely years of additional litigation only to arrive at the same inevitable conclusion significantly harms this unrepresented Claimant. As courts have long lamented, for decades protracted delays in processing cases have plagued eligible beneficiaries to this subsistence-level benefits program. *See, e.g., Amax Coal Co. v. Franklin*, 957 F.2d 355, 356 (7th Cir. 1992) ("As so often in black lung cases, the processing of the claim has been protracted scandalously . . . delay in processing these claims is especially regrettable" because most black lung claimants "are middle-aged or elderly and in poor health, and therefore quite likely to die before receiving benefits if their cases are spun out for years."); *Lango v. Director, OWCP*, 104 F.3d 573, 575-76 (3d Cir. 1997) ("many cases languish while waiting for an ALJ or the [Board] to hear them" such that "the magnitude of the delays is also likely to affect the legal representation available to claimants") (citation omitted). We refuse to needlessly contribute to that problem.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the award of benefits. The ALJ committed error in his consideration of the pulmonary function study evidence which had a compounding effect on his consideration of, and credibility findings with regards to, the medical opinions on the relevant issues of entitlement.

The ALJ considered five qualifying pulmonary function studies and credited Dr. Vuskovich's invalidation of the three studies dated January 8, 2019, May 13, 2019, and July 17, 2019. Decision and Order at 12-13; Director's Exhibit 22; Employer's Exhibit 2. The ALJ found Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) based on the qualifying April 13, 2020 and July 27, 2020 studies, noting that Dr. Vuskovich did not assess either study. Decision and Order at 13.

Employer correctly contends that the ALJ failed to consider Dr. Vuskovich's August 26, 2020 report invalidating the qualifying pulmonary function study obtained by Dr. Sharma on July 27, 2020. Employer's Brief at 9; Employer's Exhibit 4. It also correctly asserts that the ALJ failed to consider that Dr. Ajarapu and Dr. Sharma relied, in part, on invalid pulmonary function testing to diagnose Claimant as totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 204(b)(2)(iv), (c).

Contrary to the majority's disposition, the Board's long-standing precedent is to remand a case when an ALJ fails to consider relevant evidence. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant

evidence requires remand). Moreover, in concluding the ALJ's errors are harmless, the majority exceeds the Board's review authority by effectively finding Dr. Ajarapu's opinion is adequately documented and reasoned to satisfy Claimant's burden of proof.²⁸ 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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc) (Board's scope of review is a narrow one that can be exceeded if it engages in the initial consideration of evidence, which is the responsibility of the ALJ). Absent an appropriate analysis of the evidence and explanation of the weight accorded to it in the decision before the Board, we cannot determine whether substantial evidence supports the ALJ's findings. See *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 254 (4th Cir. 2016) (stating that the court could not "guess at what the ALJ meant to say, but didn't"); *King v. Califano*, 615 F.2d 1018, 1020 (4th Cir. 1980) ("[e]ven if legitimate reasons exist for rejecting [or crediting] certain evidence, the ALJ cannot do so for no reason or for the wrong reason").

The ALJ failed to consider Dr. Vuskovich's August 26, 2020 report invalidating the July 27, 2020 pulmonary function study. Employer's Brief at 9; Employer's Exhibit 4. He failed to address whether the opinions of Drs. Ajarapu and Sharma are documented and reasoned despite their reliance on invalid studies. Employer's Brief at 9-11; Decision and Order at 13, 21-22. The Administrative Procedure Act (APA) requires every adjudicatory decision 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); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the ALJ failed to consider relevant evidence, resolve conflicts in the evidence, and explain his credibility determinations in compliance with the

²⁸ Although the majority believes Dr. Ajarapu's diagnosis of chronic bronchitis constitutes a credible diagnosis of legal pneumoconiosis without regard to the pulmonary function study evidence, this is a determination for the ALJ to make in the first instance. 20 C.F.R. §802.301(a). The majority declines to address Dr. Sharma's opinion on legal pneumoconiosis and disability causation since he clearly discusses Claimant's reduced FEV1 obtained on pulmonary function testing to support his diagnosis of a restrictive impairment related to coal mine dust exposure.

APA, I would vacate his award of benefits and remand the case for further consideration of the evidence pursuant to 20 C.F.R. §718.202(a)(4), 718.204(b), (c).

For these reasons, I respectfully dissent.

MELISSA LIN JONES
Administrative Appeals Judge