U.S. Department of Labor

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

BRB Nos. 20-0342 BLA
and 20-0342 BLA-A

THOMAS HATFIELD	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	DATE ISSUED: 12/14/2021
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

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

Thomas Hatfield, Kingston, Tennessee.

Laura Metcoff Klaus and Michael Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals and Employer cross-appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Denying Benefits (2018-BLA-05967) rendered on a claim filed on August 7, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least fifteen years of underground coal mine employment. Decision and Order at 3. She further found Claimant failed to establish a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Because he failed to establish an essential element of entitlement under 20 C.F.R. Part 718, she denied benefits.[3]

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. On cross-appeal, Employer challenges the ALJ's determination that it is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response to Claimant's appeal. He filed a response to Employer's cross-appeal arguing that if the Board determines remand on entitlement is necessary, it should also remand for the ALJ to consider Employer's liability arguments.

[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the administrative law judge's (ALJ) decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

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

[3] The ALJ correctly found the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act is not applicable because there is no evidence of complicated pneumoconiosis in the record. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 3-4, 25.

In an appeal a claimant files without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis 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, 1-2 (1986) (en banc).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work.[5] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See 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).

Pulmonary Function Studies

When considering pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence supporting an

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 10.

[5] The ALJ found Claimant's usual coal mine employment "required heavy manual labor as established by Claimant's testimony that he had to lift and carry heavy equipment." Decision and Order at 21.

ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985). Compliance with the quality standards in 20 C.F.R. Part 718, Appendix B "shall be presumed" unless there is "evidence to the contrary." 20 C.F.R. §718.103(c).

Claimant performed three pulmonary function studies on November 11, 2015, August 18, 2016, and August 17, 2018 that produced qualifying values[6] for total disability, and three studies on March 19, 2014, July 29, 2015, and June 20, 2017 that produced non-qualifying values. Director's Exhibits 2, 20, 26; Employer's Exhibit 3 at 27, 39. The ALJ found all three qualifying studies invalid. Decision and Order at 7-8.

On November 11, 2015, Dr. Ajjarapu, from Stone Mountain Health Services, administered a pulmonary function study as part of the Department of Labor (DOL)-sponsored complete pulmonary evaluation. Director's Exhibit 21. We discern no error in the ALJ's finding this study is invalid. Dr. Ajjarapu interpreted the study and opined it is suboptimal due to the "lack of adequate push off and plateau," further noting Claimant had difficulty performing the test due to "chemotherapy induced nausea."[7] Director's Exhibit 21 at 3, 7. In a supplemental report, she explained the test is suboptimal because only two of the three flow-volume curves reflect adequate effort, and one curve reflects a large dip indicating variable effort. Director's Exhibit 31. Dr. Gaziano reviewed the study and checked a box signifying it is acceptable. Director's Exhibit 25. The ALJ permissibly assigned greater weight to Dr. Ajjarapu's opinion because she provided a "more thorough discussion and assessment of the flow-volume curves" while Dr. Gaziano only "checked a box" for his opinion. Decision and Order at 7; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Revnack*, 7 BLR at 1-773. Thus we affirm the ALJ's decision to reject the November 11, 2015 study as invalid.

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

[7] Claimant testified at his deposition that he was diagnosed with Non-Hodgkin's lymphoma in 2005. Employer's Exhibit 7 at 39-45.

Claimant performed a subsequent pulmonary function study on August 18, 2016. Director's Exhibit 26. Stone Mountain Health Services[8] submitted this study to the district director, noting it was validated by Dr. Ajjarapu, the physician who performed the DOL-sponsored examination. *Id.* We conclude the ALJ's decision to discredit this study as invalid is supported by substantial evidence. The ALJ noted Claimant attempted to perform this test only two times, as reflected by the two flow-volume and two electronically derived volume-time curves. Decision and Order at 7-8; Director's Exhibit 26. Thus the ALJ correctly found this study does not comply with the quality standards.[9] 20 C.F.R. §718.103(c); Decision and Order at 7-8. Further, the technician who conducted the August 18, 2016 study indicated Claimant "could not complete [the] test without gagging and coughing." Director's Exhibit 26. Dr. Rosenberg also reviewed the study and opined it is not valid because the "two best FVC measurements varied by 377 cc and the two FEV1 values varied by 271 cc." 20 C.F.R. Part 718, Appendix B(2)(ii)(G); Director's Exhibit 27. In light of the foregoing, the ALJ permissibly found this study is invalid. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Revnack*, 7 BLR at 1-773.

Finally the ALJ noted Dr. Rosenberg opined Claimant performed the August 17, 2018 qualifying study with incomplete effort. Decision and Order at 8; Employer's Exhibit 2 at 4. Further the technician who conducted the study indicated Claimant "vomited after every spirometry maneuver." Employer's Exhibit 2 at 4. The ALJ permissibly credited Dr. Rosenberg's opinion along with the notations of the technician as sufficient to invalidate this study. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Revnack*, 7 BLR at 1-773.

As this record contains no valid qualifying pulmonary function study, we affirm the ALJ's finding Claimant failed to establish total disability based on this evidence.[10] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 20-21.

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[8] Claimant selected Stone Mountain Health Services as his DOL examination provider. Director's Exhibit 19. Individuals from Stone Mountain also acted as his lay representatives in proceedings before the ALJ. Director's Exhibit 32.

[9] The quality standards indicate all "pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings." 20 C.F.R. §718.103(c).

[10] The record contains two non-qualifying arterial blood gas studies conducted on November 11, 2015 and August 17, 2018. Director's Exhibit 21; Employer's Exhibit 2. Thus the ALJ accurately found Claimant did not establish total disability at 20 C.F.R.

Medical Opinions

The ALJ weighed Dr. Ajjarapu's opinion on the issue of total disability. In her initial report, dated November 11, 2015, Dr. Ajjarapu noted Claimant's usual coal mine employment involved working as a general laborer, which required him to install conveyer belts, run equipment, and lift and bend. Director's Exhibit 21 at 1. She diagnosed mild resting hypoxemia on arterial blood gas testing and acknowledged the November 11, 2015 pulmonary function study is qualifying for total disability. Director's Exhibit 21 at 7. She concluded, however, that total disability "could not be established" because Claimant "was not able to perform the [pulmonary function study] adequately due to chemotherapy induced nausea." *Id*. She noted this pulmonary function study is "the only test that meets the requirements [for total disability], but . . . it is not a good measure of his true pulmonary picture." *Id*.

In a supplemental report, dated August 3, 2016, Dr. Ajjarapu diagnosed "chronic bronchitis/legal pneumoconiosis based on [Claimant's reported symptoms] of sputum production, dyspnea on ambulation, and shortness of breath." Director's Exhibit 29. She concluded Claimant is "totally disabled" and his coal mine dust exposure "has [a] material adverse effect" on total disability. *Id*. In a second supplemental report, dated February 7, 2018, she reiterated Claimant has mild hypoxemia, but that his November 11, 2015 pulmonary function study "is sub-optimal and therefore should not be used to determine disability." Director's Exhibit 31. She concluded, however, that "despite inadequate testing technique [Claimant does not] have the physical strength to climb up and down the equipment, [or] lift and carry any significantly heavy objects, which he described as an essential part of his job requirement." *Id*. She stated that, "[f]or this reason, he is totally and completely disabled and [does not] have the pulmonary capacity to do his previous coal mine employment." *Id*.

Dr. Ajjarapu also addressed Dr. Rosenberg's criticism of her opinion. Director's Exhibit 31. She noted Dr. Rosenberg "believes that [Claimant's] immune system was compromised due to chemotherapy and, at the time of [her] exam, [Claimant] may have gotten a cold or upper respiratory infection causing him to have cough and sputum production." *Id*. at 3. Dr. Ajjarapu agreed that "chemotherapy can compromise [an] immune system and predispose a person to infections." *Id*. She concluded, however, that "this was not the case at the time of [her] exam." *Id*. She explained Claimant was

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§718.204(b)(2)(ii). Decision and Order at 21. Further, she correctly found the record contains no evidence of cor pulmonale with right-sided congestive heart failure, which precludes a finding of total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 21.

"diagnosed with Lymphoma in 2005. The oropharyngeal surgeries and removal of lymph nodes all were completed by 2008." As she examined Claimant on November 11, 2015, she concluded that his disabling "cough with sputum production, wheezing and dyspnea are a result of his chronic bronchitis/legal pneumoconiosis." *Id*.

The ALJ noted, however, that in her initial report, Dr. Ajjarapu stated Claimant has "follicular lymphoma, currently on chemotherapy," and indicated Claimant could not perform pulmonary function testing at the November 11, 2015 examination because of "chemotherapy induced nausea." Decision and Order at 22, *quoting* Director's Exhibit 21 at 7. The ALJ also noted Claimant testified he was "treated with chemotherapy four times, the last time in December 2016." Decision and Order at 5, 22, *citing* Employer's Exhibit 7 at 39-45. The ALJ rationally found Dr. Ajjarapu's opinion unpersuasive because she "erroneously stated in her February 2018 supplemental statement that Claimant was not receiving chemotherapy at the time she examined him in November 2015," thus undermining her opinion that Claimant is totally disabled by respiratory symptoms. Decision and Order at 22-23; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. As Dr. Ajjarapu's opinion is the only one supportive of Claimant's burden of establishing total disability, we conclude the ALJ rationally found Claimant failed to establish total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23.

We also affirm the ALJ's finding that this medical evidence, weighed separately and together, fails to establish total respiratory or pulmonary disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 23.

Complete Pulmonary Evaluation

Although we affirm the ALJ's finding that the evidence is insufficient to establish total disability, we conclude remand is still necessary. The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. §923(b) "when it pays for an examining physician who (1) performs all of the [required] medical tests . . . and (2) specifically links each conclusion in his or her medical opinion to those medical tests." *See Green v. King James*, 575 F.3d 628, 642 (6th Cir. 2009).

When a DOL-sponsored pulmonary evaluation test is not administered, is not in substantial compliance with the quality standards set forth at 20 C.F.R. Part 718, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director "shall schedule the miner for further

examination and testing." 20 C.F.R. §725.406(c). Where deficiencies in a pulmonary function test are "the result of lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result." 20 C.F.R. §725.406(c). Relatedly, "[i]f the [ALJ] concludes that . . . any part [of the complete pulmonary evaluation] fails to comply with the applicable quality standards . . . the [ALJ] shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing." 20 C.F.R. §725.456(e).

As noted above, the ALJ found the November 11, 2015 pulmonary function study administered as part of the DOL-sponsored medical examination is invalid based on Dr. Ajjarapu's opinion that the results are suboptimal, as Claimant had difficulty performing the test due to chemotherapy. Decision and Order at 7; Director's Exhibit 21 at 3, 7. The district director was required to schedule Claimant for additional testing because the November 11, 2015 test was found to be invalid based on Claimant's inability to perform the test, thus entitling Claimant to "one additional opportunity to produce a satisfactory result." 20 C.F.R. §725.406(c).

It is unclear whether Claimant was provided an opportunity to perform a second test. *See* 20 C.F.R. §§725.406(c), 725.456(e). The record reflects Claimant selected Stone Mountain Health Clinic as the "medical facility to perform" his DOL-sponsored complete pulmonary evaluation. Director's Exhibit 19. Dr. Ajjarapu of Stone Mountain Health Services completed DOL Form CM-988 setting forth the results of this examination, including the results of the November 11, 2015 study the ALJ ultimately found invalid. *Id.* Thereafter, Claimant's lay representative from Stone Mountain Health Services submitted additional pulmonary function testing conducted at its St. Charles clinic in response to the district director's Schedule for the Submission of Additional Evidence. Director's Exhibit 26. The lay representative specifically submitted the August 18, 2016 pulmonary function study and indicated Dr. Ajjarapu validated the study. *Id.* The lay representative further argued this evidence "supports that [Claimant] does suffer from coal worker's pneumoconiosis and is totally disabled from a respiratory impairment due to this disease." *Id.*

It is unclear if Claimant performed the August 18, 2016 study because the DOL scheduled him "for further examination and testing" in light of Dr. Ajjarapu's opinion invalidating the DOL-sponsored November 11, 2015 study as required by 20 C.F.R. §725.406(c), or if he performed this study independent of his DOL-sponsored pulmonary evaluation. If the August 18, 2016 study constitutes Claimant's "one additional opportunity to produce a satisfactory result" pursuant to 20 C.F.R. §725.406(c), then the DOL has satisfied its obligation to provide Claimant a complete pulmonary evaluation. 20

C.F.R. §§718.101(a), 725.406; *see Hodges*, 18 BLR at 1-89-90. If, however, Claimant performed this study independently, then the DOL failed to satisfy its obligation. *Id*.

As the Board lacks the authority to render factual findings, we must vacate the denial of benefits and remand the case for further consideration of this issue. 20 C.F.R. §802.301(a); *see Director, OWCP, v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). On remand, the ALJ must determine if the DOL scheduled the August 18, 2016 study as part of its obligation to provide Claimant with a complete pulmonary evaluation. 20 C.F.R. §725.406(c). If Claimant performed this study as part of his DOL-sponsored pulmonary evaluation, the ALJ may reinstate her denial of benefits. *Id*.; *see Trent*, 11 BLR at 1-27. If Claimant performed this study independent of his DOL-sponsored pulmonary evaluation, she should remand this case to the district director to obtain such additional evidence as is required to remedy the defect. *See* 20 C.F.R. §725.456(e). Should this case be remanded to the district director for further testing, upon its return to the Office of Administrative Law Judges the ALJ must first determine whether Claimant established entitlement to benefits in light of the new evidence.[11] If the ALJ finds Claimant has established entitlement to benefits, she must consider Employer's arguments regarding its designation as responsible operator. *See* Director's Brief at 1-2.

Responsible Operator

Employer argues the ALJ abused her discretion in denying its discovery requests. Employer's Combined Response and Cross-Petition for Review at 25-29. Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

On March 28, 2018, the district director issued a Proposed Decision and Order identifying "Apogee Coal Company LLC self-insured through Arch Coal, Inc." as the responsible operator/carrier. Director's Exhibit 50. Because Employer did not submit any liability evidence in response to any Notice of Claim or to the district director's Schedule

[11] If Claimant establishes total disability, then he may invoke the Section 411(c)(4) presumption and the burdens of proof may change. Thus we decline to address, as premature, Employer's arguments pertaining to the weighing of the evidence on the issues of legal pneumoconiosis. Employer's Combined Response and Cross-Petition for Review at 14-18.

for the Submission of Additional Evidence, the district director concluded Employer would be precluded from submitting liability evidence in future proceedings. *Id*. Nor did Employer designate any liability witness while the claim was before the district director.

Before the ALJ, Employer requested subpoenas to obtain deposition testimony and documents from Michael Chance and Kim Kasmeier, two DOL Office of Workers' Compensation employees. *See* June 20, 2018 and Jan. 19, 2019 Subpoena Requests. The requested discovery related to various liability-related topics, including Employer's argument that the DOL improperly used Black Lung Benefits Act Bulletin 16-01 to determine the responsible operator/carrier in this case. *Id*.

The ALJ quashed the subpoenas because the requested documents would be inadmissible insofar as the regulations require her to exclude liability evidence when it is not first submitted to the district director, without regard to when it was obtained, unless extraordinary circumstances are established. Feb. 27, 2019 Order Quashing Subpoenas for Documents and for Mr. Chance and Ms. Kasmeier (Feb. 27, 2019 Discovery Order); *see* 20 C.F.R. §725.465(b)(1). The ALJ also held that Employer is precluded from deposing the two DOL employees because the regulations also require it to designate liability witnesses while the claim is before the district director, which Employer failed to do. Feb. 27, 2019 Discovery Order; *see* 20 C.F.R. §725.414(c). Because Employer did not argue extraordinary circumstances for its failure to timely seek or submit the evidence or designate liability witnesses, the ALJ denied the discovery request.

Notwithstanding the timeliness issue, the ALJ also denied the subpoenas because they "(1) are not authorized by statute or law; . . . (3) Employer has failed to use due diligence in pursuing the requested discovery; . . . (7) the subpoenas seek documents that are privileged under the deliberative process, attorney-client, and/or work-product doctrines, irrelevant, and inadmissible; (8) the subpoenas are unduly burdensome; (9) the subpoenas seek personal opinions of current and former officials regarding Patriot Coal Corp. (Patriot) matters, which are irrelevant and inadmissible; (10) the subpoenas are unnecessary because documents in the record speak for themselves; and (11) the subpoenas would impose an undue burden on the witnesses and the [DOL]." *Id*.

Employer argues it was entitled to the requested discovery and thus the ALJ erred in denying its request.[12] Employer's Combined Response and Cross-Petition for Review

[12] To the extent Employer argues the district court's holding in *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018) entitles it to discovery in the instant case, we disagree. As the Director correctly points out, *Acosta* directs "that parties must follow the

at 25-29. It generally maintains the ALJ abused her discretion because she incorrectly assumed the request "was 'untimely,' 'irrelevant,' or solely concerned 'liability evidence.'" *Id*. We disagree.

Employer has not explained how the ALJ erred in finding the requests are untimely or irrelevant. Nor does it explain how she erred in finding the evidence related solely to liability issues. Further, Employer does not challenge the additional enumerated reasons the ALJ gave for denying the requested subpoenas. Because Employer has not adequately set forth its basis for arguing the ALJ abused her discretion in denying its requested discovery, we affirm her Feb. 27, 2019 Discovery Order. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). Decision and Order at 35; Employer's Brief at 15.

We agree with arguments raised by Employer and the Director, however, that the ALJ erred in resolving the responsible operator issue. Director's Brief at 1-2; Employer's Combined Response and Cross-Petition for Revie at 18-25. Specifically, the ALJ rendered inconsistent findings in that she found "Apogee self-insured through Arch" is the properly designated responsible operator and carrier, but also found Arch was relieved of liability in 2005. Decision and Order at 19. The ALJ also erred in failing to address several arguments raised in Employer's Post-Hearing Brief to support its contention that it should be dismissed as the responsible operator/carrier. Employer's Closing Brief at 24-31. If the ALJ ultimately finds Claimant is entitled to benefits in this case, she should address these

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black lung regulations regarding the development of liability evidence." Director's Response Brief at 2. As noted above, Employer did not do so in this case.

arguments. If, however, she finds he is not entitled to benefits, she need not address these arguments as they would be moot.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge