U.S. Department of Labor

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

BRB No. 21-0271 BLA

CLARA FUSON (Widow of KENNETH D. FUSON) Claimant-Petitioner v. BILLY RAY CARROLL CONSTRUCTION and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/27/2023 DECISION and ORDER

Appeal of the Decision and Order Denying Claimant's Request for Modification and Denying Benefits of Scott R. Morris, Administrative Law Judge, Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant[1] appeals[2] Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Claimant's Request for Modification and Denying Benefits (2019-BLA-06016) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of the denial of a survivor's claim filed on June 20, 2013.[3]

The ALJ credited the Miner with twenty-four years of qualifying coal mine employment, based on the parties' stipulation, but found Claimant failed to establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. He thus found Claimant could not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] Considering entitlement

[1] Claimant is the widow of the Miner, who died on December 21, 2009. Director's Exhibit 11. Because the Miner was not awarded benefits on a claim filed prior to his death, Claimant is not eligible for benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*).

[2] After previously requesting an extension of time, on May 31, 2021, Claimant filed her Petition for Review and brief accompanied by a motion to accept her untimely Petition for Review and pleading. Claimant's Brief. By order dated June 4, 2021, the Benefits Review Board granted Claimant's motion and accepted Claimant's Petition for Review and brief as part of the record. June 4, 2021 Order; 20 C.F.R. §§802.211, 802.217.

[3] Claimant filed a survivor's claim on June 20, 2013. Director's Exhibit 2. ALJ Adele Higgins Odegard issued a Decision and Order Denying Benefits on January 30, 2017, finding Claimant failed to establish total disability, pneumoconiosis, and death due to pneumoconiosis. Director's Exhibit 89. The Board affirmed the denial of benefits on February 13, 2018. Director's Exhibit 97. Claimant timely requested modification. 20 C.F.R. §725.310; Director's Exhibit 100. The district director denied the claim on April 16, 2019, and forwarded it to the Office of Administrative Law Judges for a hearing. Director's Exhibit 110. ALJ Morris (the ALJ) held a hearing on September 10, 2020.

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

under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish the Miner had either clinical or legal pneumoconiosis, or that his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b). Finding no mistake in a determination of fact, the ALJ denied benefits. 20 C.F.R. §725.310.

On appeal, Claimant asserts the ALJ erred in admitting medical reports from Drs. Oesterling and Castle, arguing they exceed the evidentiary limitations. Claimant further argues the ALJ erred in finding she did not establish total disability, pneumoconiosis, and death causation. Employer responds, urging affirmance of the denial of benefits. Claimant filed a reply, reiterating her contentions.[5] The Director, Office of Workers' Compensation Programs, has not 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.[6] 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).

Evidentiary Issues

ALJs are afforded significant discretion in rendering evidentiary orders. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's actions represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Claimant initially contends the ALJ erred by admitting Drs. Oesterling's and Castle's medical reports into the record. Claimant's Brief at 21-22. Claimant's argument has merit.

During the proceedings before ALJ Odegard, Claimant designated Dr. Bensema's September 29, 2005 biopsy report and Dr. Uyi's March 10, 2008 pulmonary function study as affirmative evidence, and Employer submitted Drs. Oesterling's and Castle's reports as

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similar surface employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, that Claimant established the Miner had twenty-four years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5.

rebuttal evidence. Director's Exhibits 12 at 17; 61;[7] 78;[8] 84 at 215; 86 at 3, 6; 87 at 16, 22. On modification, Claimant redesignated the September 29, 2005 biopsy report and March 10, 2008 pulmonary function study as treatment records, while Employer again designated Drs. Oesterling's and Castle's reports as rebuttal evidence. *See* Claimant's Evidence Summary Form at 8; Employer's Evidence Summary Form at 3, 10; Hearing Tr. at 8. Claimant thus objected to the admission of Drs. Castle's and Oesterling's reports at the hearing before the ALJ, arguing their admission would not comply with the regulatory limitations on evidence, which do not permit rebuttal of treatment records. Hearing Tr. at 6-8; *see* 20 C.F.R. §725.414. Employer responded it had relied on Claimant's previous designations, it had not been given notice of the change in designation until eight days prior to the twenty-day deadline imposed by 20 C.F.R. §725.456, and Claimant should not be permitted to change her designation of evidence at that point in the proceedings. Hearing Tr. at 7-9.

The ALJ admitted Drs. Castle's and Oesterling's reports but indicated he would allow the parties to argue in their post-hearing briefs whether the reports comply with the evidentiary limitations as well as how the evidence should be categorized. *Id.* at 9. He indicated that the issue seemed to be not if the evidence should be admitted, but rather how the evidence should be designated. *Id.* Claimant reiterated and expanded on her objection to the admission of Dr. Castle's report in her post-hearing brief, arguing it should not be given any consideration. Claimant's Post-Hearing Brief at 29-30. However, the ALJ did not further address Claimant's arguments but rather only addressed Drs. Castle's and Oesterling's reports in terms of ALJ Odegard's findings. Decision and Order at 8 n.4; 23.

We agree the ALJ erred by not addressing Claimant's arguments that Employer did not comply with 20 C.F.R. §725.414 when submitting Drs. Castle's and Oesterling's reports. As Claimant argues, the regulations do not provide for rebuttal of treatment records. 20 C.F.R. §725.414(a)(3)(ii). Thus, if Claimant were permitted to redesignate the underlying evidence as treatment records, Employer cannot submit Drs. Castle's and Oesterling's reports absent a showing of "good cause." 20 C.F.R. §725.456(b)(1). The ALJ provisionally admitted Drs. Castle's and Oesterling's reports and advised the parties that they could provide additional arguments regarding how the evidence should be designated, Hearing Tr. at 9, but then did not subsequently resolve the issue. The ALJ thus abused his discretion in admitting Drs. Castle's and Oesterling's reports. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239; *see also L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en

[7] Dr. Castle's report also appears at Director's Exhibit 72.

[8] Dr. Oesterling's report also appears at Director's Exhibit 81.

banc) (in the context of evidentiary limitations, in accordance with principles of fairness and efficiency, "the ALJ should render his or her evidentiary rulings before issuing the Decision and Order.") We therefore vacate the ALJ's admitting Drs. Castle's and Oesterling's reports into the record.[9]

Modification

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *See* 20 C.F.R. §725.310(a); *Wojtowicz*, 12 BLR at 1-164. An ALJ has broad discretion to grant modification based on a mistake in fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Moreover, an ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, Claimant must establish the Miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). Total disability is established if the Miner's pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on

[9] Claimant further argues the ALJ abused his discretion in allowing Employer to submit evidence in response to Dr. Krefft's supplemental report, which Claimant submitted three days after the twenty-day deadline, without also allowing her to submit evidence responding to Employer's new evidence. Claimant's Brief at 22-24 (citing 20 C.F.R. §456(b)(2)). As Employer correctly argues, however, the regulations only require the ALJ to hold the record open to allow additional evidence to be submitted in *response* to late-submitted evidence, not for evidence in *reply*. Employer's Response at 5-6 (quoting 20 C.F.R. §725.456(b)(4)). Claimant also argues the ALJ "inequitably" allowed Employer to submit seven reports in contrast to the two reports submitted by Claimant. Claimant's Brief at 24. However, the only new report on modification submitted by Employer was a medical opinion report by Dr. Sargent. Employer's Exhibits 3 and 8. The remaining reports enumerated by Claimant are supplemental reports by doctors whose original medical reports were previously submitted and are thus considered part of their original medical reports. 20 C.F.R. §725.414(a).

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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ determined Claimant failed to establish total disability by any category of evidence.[10]

Pulmonary Function Studies

The ALJ considered five pulmonary function studies of record dated November 10, 2005, December 2, 2005, March 10, 2008, May 28, 2008, and May 19, 2009, all of which were previously considered by ALJ Odegard. Decision and Order at 8; Director's Exhibit 89 at 13-15. She found the only qualifying[11] study, conducted March 10, 2008, invalid and thus found the pulmonary function study evidence insufficient to support total disability.[12] Decision and Order at 8. The ALJ found no mistake of fact in ALJ Odegard's analysis, noting it was previously upheld by the Board. *Id.* In addition, no new pulmonary function

[10] Claimant does not specifically argue the ALJ erred in finding the arterial blood gas studies do not support total disability under 20 C.F.R. §718.204(b)(2)(ii) but in her discussion of the medical opinion evidence states that just because the studies were taken during an acute illness does not necessarily mean they should not be considered. Claimant's Brief at 64. Claimant did not challenge the finding that the arterial blood studies failed to support total disability when this case was previously before the Board and no new testing was submitted. Director's Exhibit 97 at 3 n.6; Decision and Order at 8. Moreover, arterial blood gas studies are not to be performed "during or soon after an acute respiratory or cardiac illness." 20 C.F.R. Part 718, Appendix C. The ALJ permissibly found no mistake in the prior determination that the arterial blood gas studies taken during the Miner's hospitalizations are unreliable for purposes of establishing total disability. *See Jericol Mining Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 8-9. We therefore affirm the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 9.

[11] 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 yields values exceeding those values. 20 C.F.R. §718.204(b)(2)(i).

[12] The May 28, 2008 and May 19, 2009 studies, which were non-qualifying, were also found invalid. Director's Exhibit 89 at 13-14.

study evidence was submitted on modification. *Id.* at 7. Thus, the ALJ found the pulmonary function study evidence does not support a finding of total disability. *Id.* at 8.

In determining there is no mistake of fact with ALJ Odegard's finding that the pulmonary function studies do not establish total disability, the ALJ noted the Board previously affirmed ALJ Odegard's analysis of the pulmonary function studies and findings regarding the validity of the March 10, 2008 study. *Id.*; Director's Exhibit 97 at 5-7. However, ALJ Odegard's finding that the March 10, 2008 study is invalid relied on Dr. Castle's opinion. Director's Exhibit 89 at 14-15. Because the ALJ's error in not resolving the evidentiary issues with regard to this study and Dr. Castle's opinion may affect his evaluation of the validity of the March 10, 2008 study and the pulmonary function studies as a whole, we vacate his finding that the March 10, 2008 study is invalid and that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(1).[13]

Medical Opinions

ALJ Odegard previously considered the medical opinions of Drs. Chavda and Baker that the Miner was totally disabled and the contrary opinions of Drs. Rosenberg and Fino that he was not. As the ALJ noted, the Board previously affirmed ALJ Odegard's findings that Dr. Baker's and Chavda's opinions were undermined and thus insufficient to support total disability. Decision and Order at 10; Director's Exhibit 97 at 7-9, 8 n.18. We decline to disturb these previous findings of the Board.[14] *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

[13] Claimant further asserts the ALJ erred in finding no mistake of fact in ALJ Odegard's determination that the December 2, 2005 pulmonary function study did not produce qualifying values. Claimant's Brief at 29-30. The Board previously rejected this argument. Director's Exhibit 97 at 7 n.15. The Board's holding remains the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Because Claimant has not shown the Board's decision was clearly erroneous or established any other exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley*, 14 BLR at 150-51.

[14] In addition, Claimant's contentions with regard to Drs. Baker's and Chavda's opinions do not identify any error on the part of the ALJ but rather constitute a request for the Board to reweigh the evidence, which we are not empowered to do. *See Sarf v. Director, OWCP*, 10 BLR, 1-119, 1-120-21; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Claimant's Brief at 46, 49-50.

On modification, the ALJ considered the newly submitted medical opinions of Drs. Sargent and Krefft as well as supplemental reports of Drs. Rosenberg and Fino.[15] Decision and Order at 10-19. Dr. Krefft opined the Miner was totally disabled at the time of his death, while Drs. Sargent, Rosenberg, and Fino opined he was not. Director's Exhibit 104; Employer's Exhibits 1-3, 7-10; Claimant's Exhibits 1,7. The ALJ found each physician "well-qualified" and that each had a "reasonably accurate" understanding of the exertional requirements of the Miner's last coal mine employment.[16] Decision and Order at 18. He further determined each physician's opinion is well-documented and reasoned. Decision and Order at 18-19. Weighing the evidence together, the ALJ indicated he was "equally or more persuaded" by the opinions of Drs. Rosenberg, Fino, and Sargent who relied on the most recent pulmonary function tests of record to support their opinions. *Id.* Thus, he found the medical opinion evidence does not establish total disability. *Id.*

Claimant initially contends the ALJ failed to consider much of Dr. Krefft's opinion, including that the Miner's carbon monoxide diffusion capacity (DLCO) values indicated a severe impairment as well as her opinion that his impairment was severe based on the chronic obstructive pulmonary disease (COPD) "GOLD" guidelines. Claimant's Brief at 39-41. Contrary to Claimant's assertion, the ALJ addressed Dr. Krefft's explanation that the Miner had "at least class 3 impairment" and his DLCO value, need for supplemental oxygen, increasing COPD exacerbations, persistently reduced FVC and FEV1 results on pulmonary function testing, and hypoxemia at rest all rendered the Miner totally disabled.[17] Decision and Order at 18; Claimant's Exhibits 1, 7. Thus, he did not ignore "most of" Dr.

[15] ALJ Odegard provided Dr. Rosenberg's initial opinion (Director's Exhibits 15, 77) no weight for failing to specify whether the Miner had a totally disabling respiratory impairment. Director's Exhibit 89 at 23. She provided Dr. Fino's initial opinion that the Miner was not totally disabled (Director's Exhibits 67, 87) "slightly more weight" than the opposing opinion of Dr. Chavda. Director's Exhibit 89 at 24. Because his opinion did not support a finding of total disability, the Board declined to address ALJ Odegard's findings regarding Dr. Fino's opinion. Director's Exhibit 97 at 9 n.20.

[16] The ALJ found Claimant's usual coal mine employment was working as a mechanic, which required heavy labor. Decision and Order at 7. The parties do not contest this finding; thus, it is affirmed. *Skrack,* 6 BLR at 1-711.

[17] While the ALJ did not specifically address the GOLD guidelines, his crediting of Dr. Krefft's opinion incorporated her explanation that total disability should not be based solely on the Miner's pulmonary function testing but also his symptoms, frequency of exacerbations, and treatment. *See* Decision and Order at 18; Claimant's 1 at 8.

Krefft's opinion and permissibly provided her opinion with "normal probative weight."[18] Decision and Order at 18-19; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002).

Claimant further argues the ALJ erred in determining Drs. Rosenberg's, Fino's, and Sargent's opinions weighed against a finding of total disability. Claimant's Brief at 59-61. Claimant asserts their opinions support a finding of total disability because they opined the Miner's impairment was due to a cardiac condition rather than a respiratory condition, but that the effects of a cardiac condition can still be considered a pulmonary impairment if it affects the lungs. *Id.* We agree, in part.

The issues of total disability and the issue of disability causation are distinct issues, with the inquiry into the presence of a totally disabling respiratory or pulmonary impairment governed by 20 C.F.R. §718.204(b), and the cause of the impairment governed by 20 C.F.R. §718.204(c). Moreover, if a non-respiratory or non-pulmonary condition or disease causes a chronic respiratory or pulmonary impairment, "that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a)

While Dr. Rosenberg stated Claimant was not disabled from a pulmonary perspective, he also explained the Miner was disabled due to a cardiac condition that caused variations in the Miner's respiratory status and compromised his airway function. Director's Exhibits 15 at 23; 77 at 6; Employer's Exhibits 1 at 6; 9 at 5. Thus, though Dr. Rosenberg's opinion indicates the cause of the Miner's respiratory pulmonary impairment was his cardiac condition, it is not clear that his opinion supports a finding that the Miner did not have a totally disabling respiratory or pulmonary impairment. We thus vacate the ALJ's finding that Dr. Rosenberg's opinion weighs against a finding of total disability. Decision and Order at 19.

We disagree, however, with Claimant's argument that the ALJ failed to consider that Drs. Fino and Sargent found Miner disabled from a pulmonary perspective "before flipping [their] opinions." Claimant's Brief at 60-61. While Dr. Fino opined the Miner was

[18] Claimant argues the ALJ also failed to address Dr. Krefft's opinion that the Miner likely had cor pulmonale with right-sided congestive heart failure. Claimant's Brief at 43-46. Contrary to her argument, the ALJ found Claimant cannot establish the Miner was totally disabled under Section 718.204(b)(2)(iii) as he found pneumoconiosis was not established. Decision and Order at 9; 20 C.F.R. §718.204(b)(iii) (claimant may establish total disability if "[t]he miner has pneumoconiosis *and* has been shown . . . to be suffering from cor pulmonale with right-sided congestive heart failure.") (emphasis added).

disabled due his cardiac disease, he did not opine that his heart disease resulted in a respiratory or pulmonary impairment. Director's Exhibits 67, 87. Rather, Dr. Fino pointed to the most recent pulmonary function studies to find they demonstrated non-disabling obstruction, indicating his last FEV1 was "normal" to support his finding the Miner was not totally disabled. Director's Exhibit 67 at 7; Director's Exhibit 87; Employer's Exhibit 10. Similarly, Dr. Sargent agreed the Miner had impairment in his heart function but opined the Miner did not suffer from a disabling respiratory impairment as evidenced by "nearly normal" lung function testing on May 19, 2009. Director's Exhibit 104; Employer's Exhibits 3, 8. Thus, the ALJ's finding that Drs. Fino's and Sargent's opinions do not support total disability is supported by substantial evidence. Decision and Order at 19; *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005).

Claimant next contends the ALJ erred in finding Drs. Rosenberg's, Fino's, and Sargent's opinions well-reasoned and documented, and more persuasive than Dr. Krefft's opinion based on their reliance on the most recent, invalid non-qualifying pulmonary function studies. Claimant's Brief at 42-43. We agree.

The ALJ credited the opinions of Drs. Rosenberg, Sargent, and Fino primarily because they relied on the non-qualifying May 19, 2009 pulmonary function study, indicating "it was proper for these physicians to rely on the most recent pulmonary function test" because "more weight may be accorded to the results of a recent ventilator study over the results of an earlier study."[19] Decision and Order at 19 (citing *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-14 (1993)). He acknowledged this study was invalid but found the doctors' reliance on it did not undermine their opinions because pulmonary function studies are "effort dependent" and that while it is generally accepted that "spuriously low" values are possible, "spuriously high" values are not. Decision and Order at 19.

Contrary to the ALJ's analysis, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held it irrational to credit evidence solely on the basis of recency where the miner's condition has improved. *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992). In explaining the rationale behind the "later evidence rule," the court reasoned that a "later test or exam" is a "more reliable indicator of [a] miner's condition than an earlier one" where a "miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. Since

[19] The ALJ also found their opinions consistent with his review of the pulmonary function studies as a whole. Decision and Order at 19. However, we have vacated the ALJ's findings regarding the pulmonary function studies. *Supra*.

the results of "the tests or exams"[20] do not conflict in such circumstances, [a]ll other considerations aside, the later evidence is more likely to show the miner's current condition." *Id.* But if "the later tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply;" one must be incorrect, "and it is just as likely that the later evidence is faulty as the earlier." *Id*. An ALJ must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id*.; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJs must perform a qualitative analysis of conflicting tests when they indicate a miner's condition has improved).

We further agree with Claimant that the ALJ's rationale—that, although the May 19, 2009 pulmonary function study was invalid, it did not undermine Drs. Rosenberg's, Sargent's, and Fino's opinions because spuriously high values are not possible—cannot be upheld. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Greer v. Director, OWCP*, 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). While a non-qualifying study that represents poor cooperation may still be a valid measure of lack of disability, the most recent study here was not found unreliable due to poor effort but due to an insufficient number of trials. *See Anderson v. Youghiogheny & Ohio Coal Co*., 7 BLR 1-152, 1-154 (1984) (non-qualifying ventilatory study that represents poor cooperation is still a valid measure of the lack of respiratory disability); Decision and Order at 9; Director's Exhibit 89 at 14.

Based on the foregoing, the ALJ failed to adequately explain why he found Drs. Rosenberg's, Fino's and Sargent's opinions were well-reasoned and documented and outweighed Dr. Krefft's conflicting opinion, which he also found to be well-reasoned and documented. Therefore, we vacate the ALJ's finding that the medical opinion evidence is insufficient to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).[21]

[20] Employer argues that the "later evidence" rule applies only to x-ray evidence. Employer's Response at 11. However, the court did not limit its reasoning to x-rays, but referred to "tests or exams." *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) (applying the holding in *Adkins* to medical opinions); *Gray v. Director*, OWCP, 943 F.2d 513, 520-21 (4th Cir. 1991) (addressing whether the ALJ improperly applied a "later evidence rule" when analyzing arterial blood gas studies).

[21] We reject Claimant's argument that the ALJ must also consider if the Miner would be disabled based on Social Security disability standards. *See* Claimant's Brief at 61-63. While the Act provides that standards under federal black lung claims defining disability

Decision and Order at 19. We must also vacate his finding that Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2). Because we vacate the ALJ's finding that Claimant failed to establish total disability, we also vacate his finding that she is unable to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. Decision and Order at 20; 20 C.F.R. §718.305.

Remand Instructions

On remand, the ALJ must address Claimant's argument that Drs. Castle's and Oesterling's reports should not be considered given their designation as rebuttal evidence to treatment records, including whether Employer demonstrated good cause to exceed the evidentiary limitations. *See* 20 C.F.R. §725.456(b)(1) (medical evidence that exceeds the evidentiary limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause."). The ALJ should also consider Employer's argument that Claimant should not have been permitted to redesignate her evidence given its reliance on her prior designations. In rendering his findings, the ALJ must explain his determinations in compliance with the requirements of the Administrative Procedure Act (APA).[22] 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The ALJ may allow the parties to brief this issue more fully on remand.

The ALJ must also reconsider the validity of the March 10, 2008 pulmonary function study. He must render findings as to whether the study is sufficiently reliable and whether it is in substantial compliance with the regulatory quality standards, and then weigh that study against the other studies of record, explaining how he resolves any conflicts in the evidence. *See* 20 C.F.R. §§718.101(b), 718.103(c).

He must then reweigh the medical opinions on total disability, comparing the exertional requirements of Claimant's usual coal mine work with the physician's descriptions of his pulmonary impairment and physical limitations. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine work);

"shall not provide more restrictive criteria" than those applicable under the Social Security Act, the ALJ is not required to consider whether a miner is totally disabled under the specific criteria set forth in the Social Security Act. *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 489-490 (6th Cir. 1985).

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

see 20 C.F.R. §718.204(b)(2)(iv). In assessing the probative weight to which the medical opinions are entitled, the ALJ must consider the physicians' qualifications, the documentation underlying their medical judgments, all relevant portions of their opinions, and the sophistication of and bases for their conclusions.[23] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). If Claimant establishes total disability at 20 C.F.R. §718.204(b)(2)(i), or (iv) or both, the ALJ must then weigh all of the relevant evidence together to determine if Claimant has a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, she will have established a mistake in fact and invoked the Section 411(c)(4) presumption. Thereafter, the ALJ must determine whether Employer rebutted the presumption.[24] 20 C.F.R. §718.305. In rendering his conclusions, the ALJ must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[23] Claimant argues the ALJ failed to sufficiently consider whether the medical opinion evidence was consistent with the Miner's treatment records, as well as Claimant's testimony regarding the Miner's condition at the time of his death. Claimant's Brief at 25-26, 46. The ALJ did not specifically address the treatment records in his analysis of total disability but indicated he would incorporate ALJ Odegard's "thorough and detailed" description of the treatment records. Decision and Order at 25. The Board previously affirmed ALJ Odegard's finding that while the treatment records reflected heart disease and respiratory symptoms, they do not establish total disability. Director's Exhibit 97 at 9. Nonetheless, when analyzing the medical opinion evidence, the ALJ may consider if they are consistent with the treatment records. The ALJ also did not specifically address Claimant's testimony regarding the Miner's condition at the time of his death in weighing the evidence. Claimant's Brief at 26. However, given that there is relevant evidence on the issue of total disability in this case of a deceased miner, lay testimony from the Claimant to invoke the presumption of death due to pneumoconiosis is precluded. 20 C.F.R. §718.305(b)(4); *Coleman v. Director, OWCP*, 829 F.2d 3, 5 (6th Cir. 1987); *Sword v. G & E Coal Co.*, 25 BLR 1-127, 131 -32 (2014).

[24] Because we have vacated the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption, we decline to address, as premature, Claimant's arguments regarding whether the ALJ erred in finding she did not establish death causation.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Claimant's Request for Modification and Denying Benefits, and we remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge