U.S. Department of Labor

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

BERNADETTE STATEN (Widow of DALE R. STATEN) Claimant-Respondent v. CONSOLIDATION COAL COMPANY and Self-Insured through CONSOL ENERGY INCORPORATED, c/o HEALTHSMART CCS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	BRB No. 22-0238 BLA DATE ISSUED: 01/05/2024
BERNADETTE STATEN (Widow of DALE R. STATEN) Claimant-Petitioner v. CONSOLIDATION COAL COMPANY and	)	BRB No. 23-0020 BLA

Self-Insured through CONSOL ENERGY INCORPORATED, c/o HEALTHSMART CCS	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Appeal of the Attorneys' Fee Order of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's[1] Decision and Order Awarding Benefits (2019-BLA-06067) rendered on a survivor's claim filed on April 19, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Claimant[2] also appeals the ALJ's September 14, 2022 Attorneys' Fee Order.

[1] ALJ Larry A. Temin conducted a formal hearing on October 13, 2020. ALJ Temin retired, and the case was reassigned to ALJ Golden (the ALJ) on August 16, 2021. ALJ's August 16, 2021 Order Regarding Reassignment.

[2] Claimant is the widow of the Miner, who died on January 4, 2017. Director's Exhibit 11. Because the Miner did not establish entitlement to benefits during his lifetime,

ALJ's Decision and Order Awarding Benefits

The ALJ found Claimant established the Miner had 28.15 years of underground coal mine employment and a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the ALJ erred in finding the Miner was totally disabled at the time of his death and therefore erred in finding Claimant invoked the Section 411(c)(4) presumption. It also contends the ALJ erred in finding it did not rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a 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'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

To invoke the Section 411(c)(4) presumption of death due to pneumoconiosis, a claimant must establish the miner "had at the time of his death, a totally disabling

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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, is not applicable in this case.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner had 28.15 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the Miner performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 32.

respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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 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). The ALJ found Claimant established total disability based on the medical opinion evidence and weighing the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18.

The ALJ considered the medical opinions of Drs. Chavda, Castle, and Farney.[7] Decision and Order at 15-18. Dr. Chavda opined that the Miner had a totally disabling pulmonary impairment as of May 30, 2013, based upon his qualifying pulmonary function study,[8] his "extremely low" diffusion capacity, and the desaturation on his pulse oximetry exercise test. Claimant's Exhibit 6 at 10-11; Employer's Exhibit 5 at 106. Further, Dr. Chavda opined that this chronic impairment developed into respiratory failure by December 2016, which led to the Miner's eventual death. Employer's Exhibit 5 at 106. Dr. Castle opined that he had "no way of knowing" if the Miner was chronically, totally disabled from a pulmonary perspective prior to his final hospitalization, but that he did not believe so based upon the March 23, 2016 non-qualifying pulmonary function study. Employer's Exhibit 4 at 41. However, he opined that the Miner developed acute respiratory failure later in December of 2016, which led to his death. *Id.* at 32-33. Similarly, Dr. Farney opined the Miner did not have a totally disabling pulmonary or respiratory impairment prior to his final hospitalization in December 2016 because the results from his reliable objective studies did not meet the Department of Labor (DOL)

[6] The ALJ found the pulmonary function studies and arterial blood gas studies do not establish total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 12-15.

[7] The ALJ determined that the Miner's usual coal mine employment was as a section foreman that the job required "some level of exertion, and likely included frequent bouts of walking, lifting, and pulling." Decision and Order at 11.

[8] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

criteria for disability. Employer's Exhibit 7 at 37-39. He testified the Miner developed respiratory failure in December 2016, which led to his death. *Id.* at 12.

The ALJ found Drs. Castle's and Farney's opinions not well-reasoned because they focused on the cause of the Miner's respiratory failure prior to his hospitalization and failed to adequately address whether the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. Decision and Order at 18. Employer argues the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 5-11. We disagree.

Initially, we reject Employer's argument that the ALJ erred in not requiring Claimant to establish the Miner's impairment was due to a "chronic" rather than an "acute" disease. Employer's Brief at 5-7. Nothing in the Act or regulations requires a showing that the Miner's total disability was chronic in order to invoke the Section 411(c)(4) presumption. *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). In *Tanner*, the Board squarely addressed this issue, holding that, "[u]nder the plain language of Section 411(c)(4) of the Act and the implementing regulation . . . [a miner] is not required to establish that his totally disabling respiratory or pulmonary impairment is chronic." *Tanner*, 10 BLR at 1-86. Thus, the relevant inquiry for invocation of the Section 411(c)(4) presumption is whether the deceased miner had a totally disabling respiratory impairment "at the time of his death," not whether the disability preceded the miner's death by some undefined time period to be considered "chronic." 20 C.F.R. §718.305(b)(1)(iii); *see generally Price v. Califano*, 468 F. Supp. 428 (N.D. W.Va. 1979) (inquiry under Section 411(c)(4) is whether the miner was totally disabled "at the time of death," not some point in time "prior to death"); *Lloyd v. Mathews*, 413 F. Supp. 1161 (E.D. Pa. 1976) (Because pneumoconiosis is a progressive disease, evidence that the miner was not disabled one month before his death "is not controlling if, in the space of those final weeks [of life], his physical condition deteriorated to the extent that he became 'totally disabled.'").

Moreover, the ALJ credited evidence that the Miner had a totally disabling respiratory impairment due to a chronic disease. Decision and Order at 16-18. Dr. Chavda reviewed the Miner's records from 2006 to 2016 and opined he had a disabling impairment as early as May 30, 2013, which developed into respiratory failure in December 2016. Claimant's Exhibit 6 at 10-11. Specifically, Dr. Chavda based his diagnosis of total disability on a May 30, 2013 pulmonary function study which he interpreted as showing a moderate reduction in the FEV1 and FVC and a reduced diffusion capacity. *Id.* at 2. He further noted that the May 30, 2013 exercise study showed a desaturation in oxygen to 87% of normal with two minutes of exercise and that the treating physician recommended the use of supplemental oxygen based on this test. *Id.* Consequently, Dr. Chavda opined that these studies, along with the Miner's symptom of shortness of breath on exertion, indicated

a severe respiratory impairment that would render him totally disabled. *Id.* at 10-11. He acknowledged that a pulmonary function study in March 2016 was non-qualifying but opined that this improvement was temporary, and the Miner's condition deteriorated later in December 2016. *Id.* In addition, Dr. Chavda noted that the Miner showed evidence of fibrosis on his computed tomography (CT) scans as early as April 27, 2012, which progressed to "relatively severe" fibrosis by December 21, 2016, mirroring the decline in his respiratory function.[9] *Id.* at 2, 6. He further opined that, irrespective of the 2013 testing, the Miner was totally disabled from a pulmonary standpoint in the days preceding his death as he was in respiratory failure and on a ventilator due to his chronic lung disease. Employer's Exhibit 5 at 108. The ALJ credited Dr. Chavda's opinion the Miner had a *chronic* respiratory impairment as reasoned and documented and supported by the Miner's treatment records. Decision and Order at 16-18.

Nor are we persuaded by Employer's argument that the ALJ erred in crediting Dr. Chavda's opinion that the Miner was totally disabled by May 30, 2013. Employer's Brief at 7-11. Contrary to Employer's argument, the ALJ was not required to discredit Dr. Chavda's opinion because he relied on an earlier pulmonary function study and not on the more recent non-qualifying study. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (it is irrational to credit evidence solely because of recency where the miner's condition has improved); *see also Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip. op. at 7-8 (Nov. 17, 2023); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Employer's Brief at 7-12. Moreover, the ALJ found the May 30, 2013 pulmonary function study on which Dr. Chavda relied to be sufficiently reliable for determining total disability, a finding Employer has not challenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13. Nor did Dr. Chavda ignore the May 2016 pulmonary function study. Rather, he opined the study showed "some improvement" at the time it was taken but did not represent a "cure" of the Miner's pulmonary fibrosis or a "reversal" of the Miner's disabling impairment evidenced on the May 2013 testing, which further deteriorated to respiratory failure by December 2016. Claimant's Exhibit 6 at 10.

Based on its argument that the ALJ should have discredited Dr. Chavda for "relying on the older [May] 2013 pulmonary function study," Employer in turn alleges the only

[9] The ALJ found that the Miner's treatment records support Dr. Chavda's opinion as they reflect fibrosis on an April 27, 2012 CT scan, the treating physicians attributed the change in the Miner's pulmonary function study in 2013 to his interstitial lung disease, and they attributed his death to acute respiratory failure with exacerbation of his underlying fibrosis. Decision and Order at 22-23; Director's Exhibits 11, 14, 16; Claimant's Exhibits 3, 4 at 205-11.

remaining "clinical or laboratory" bases for Dr. Chavda's disability assessment are a diffusion capacity test and a six-minute walk test. Employer's Brief at 9-10. However, as we have rejected Employer's unpersuasive argument that Dr. Chavda's reliance on the May 2013 test renders his opinion not credible, Employer is simply incorrect that his disability opinion hinges on the diffusion capacity test and walk test.

We also reject any suggestion Employer may be making that Dr. Chavda's partial reliance on the diffusion capacity test and walk test undermines his opinion. Employer's Brief at 9-10. Dr. Chavda acknowledged the limitations of the diffusion capacity testing for establishing total disability *on its own*, and further acknowledged there are no other walk tests in the record, but still opined the Miner was totally disabled based upon the *totality of evidence*. Employer's Exhibit 5 at 74-76; Employer's Brief at 9-10. Thus, Employer has not established the ALJ erred in not explicitly determining the reliability of these individual tests to establish total disability.[10] *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); Employer's Brief at 7-12. Nor does Employer directly challenge the ALJ's finding that Dr. Chavda provided a well-reasoned and documented opinion that the Miner was totally disabled prior to his death based on his need for a ventilator for respiratory failure. *See Skrack*, 6 BLR at 1-711; *see also Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Decision and Order at 17.

The ALJ properly considered the whole of Dr. Chavda's opinion that the Miner was totally disabled prior to his death from a chronic disease, and found that it was well-reasoned, documented, and supported by the objective testing and the Miner's treatment records. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the ALJ's

[10] In support of its argument that the walk test is not a valid measure of disability, Employer quotes Dr. Farney at length for the proposition that Dr. Chavda's reliance on the walk test renders his total disability opinion not credible "as a matter of law." Employer's Brief at 10-12. But Dr. Farney did not completely disavow the diagnostic value of a walk test as Employer seems to suggest. He stated in general terms that the way in which the data is collected affects its accuracy and thus physicians must be "really careful" when relying on it. Employer's Exhibit 7 at 47. He nevertheless confirmed it is a "screening procedure" and relied on it to opine the Miner's 87 percent oxygen saturation in this case "might indicate that there are some things that need to be done to verify that and to look into it more carefully." *Id*. at 47-48.

determination that Dr. Chavda gave a reasoned and documented opinion that the Miner was totally disabled from a respiratory standpoint prior to his death. Decision and Order at 17-18.

We also reject Employer's arguments that the ALJ erred in discrediting the opinions of Drs. Castle and Farney. Employer's Brief at 13-14. Dr. Castle reviewed the Miner's records and opined he did not believe the Miner had a chronic impairment during his life based upon the objective testing from March 23, 2016. Employer's Exhibit 4 at 30. While he did not address whether the Miner became totally disabled from a respiratory standpoint after March 23, 2016, he opined that the Miner died from acute respiratory failure. *Id*. Similarly, Dr. Farney opined that the Miner was not disabled as of the March 23, 2016 pulmonary function study, but did not address whether the Miner subsequently developed a totally disabling respiratory impairment, opining that he died from "hypoxic respiratory failure secondary to acute viral pneumonia." Employer's Exhibit 7 at 12. The ALJ permissibly found their opinions entitled to little weight as they did not address whether the Miner's acute respiratory failure, requiring the use of supplemental oxygen and a ventilator, would render him totally disabled from performing his usual coal mine employment. *See* 20 C.F.R. §718.305(b)(1)(iii); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Decision and Order at 18.

Moreover, while Employer is correct that the ALJ did not explicitly consider their opinions that the Miner's respiratory failure was acute and not chronic at 20 C.F.R. §718.204(b)(2)(iv), *see Tanner*, 10 BLR at 1-86, he did address them when determining if Employer rebutted the existence of pneumoconiosis. Decision and Order at 21; Employer's Brief at 13-14. Specifically, the ALJ accurately noted that both physicians attributed the Miner's respiratory failure to his fibrosis in the lungs due to pneumonia, opining that the Miner did not develop fibrosis or respiratory failure until December 2016 and he therefore suffered from an acute rather than chronic condition.[11] Decision and Order at 23;

[11] Our dissenting colleague does not dispute *Tanner's* precedential holding that a claimant need not establish a miner's impairment was chronic rather than acute to establish total disability and invoke the Section 411(c)(4) presumption. Nor can she dispute that, by regulation, the relevant inquiry for invoking the presumption is whether the miner had a totally disabling respiratory or pulmonary impairment "at the time of his death." 20 C.F.R. §718.305(b)(1)(iii). Yet, after devoting nearly the entirety of her dissent summarizing evidence that the Miner was in fact totally disabled at the time of his death, she nevertheless alleges, for purposes of total disability, "there is a distinction between the effect of an acute versus a chronic illness." *Infra*, p.18. Even assuming (without agreeing) that her assertion can be squared with *Tanner*, she is plainly incorrect that the ALJ "fail[ed] to recognize" any such distinction under the facts of this case. The ALJ credited Dr. Chavda's opinion

Employer's Exhibits 3, 4, 7. However, the ALJ permissibly found this reasoning unpersuasive as neither physician addressed the Miner's April 27, 2012 CT scan which was interpreted as showing findings of bilateral pulmonary interstitial infiltrates possibly due to pleuritis or pneumoconiosis. *See Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155; Decision and Order at 26-27; Claimant's Exhibit 4 at 209.

Consequently, we affirm the ALJ's determination that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), and that the evidence as whole establishes total disability. 20 C.F.R. §718.204(b)(2). We therefore affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[12] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b),

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that the Miner was totally disabled by his chronic lung disease which progressed to respiratory failure, while discrediting Drs. Castle's and Farney's views that the respiratory failure was simply acute in nature.

[12] "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Castle and Farney. Dr. Castle opined the Miner's respiratory symptoms and interstitial pulmonary fibrosis were unrelated to coal dust exposure because his disease developed rapidly, years after his coal mine employment ended in 2000, and because the Miner produced "normal" values during Dr. Istanbouly's 2006 testing. Employer's Exhibit 3 at 21-22; Director's Exhibit 17. Dr. Farney opined the Miner's symptoms were unrelated to coal mine dust exposure and the ground glass opacification seen in his lungs during his December 2016 hospitalization indicated he had viral pneumonia. Employer's Exhibit 7 at 14. He opined the Miner's disease was unrelated to coal dust exposure since coal dust produces focal, not diffuse, opacification. *Id.* at 21. The ALJ found their opinions were not well-reasoned or documented and accorded them little weight. Decision and Order at 26-27.

As Dr. Castle opined the Miner did not have legal pneumoconiosis because his symptoms did not appear until years after he quit his coal mine employment, the ALJ permissibly found his opinion inconsistent with the regulations and the preamble to the revised 2001 regulations, which recognize that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-07 (6th Cir. 2020); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017); 20 C.F.R. §§718.201(a)(2), (b), (c); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000). Further, the ALJ permissibly found Drs. Castle and Farney did not adequately explain how they "exclud[ed] [the] Miner's almost [thirty] years of coal mine dust exposure as a contributing or aggravating cause of his condition." *See Huscoal, Inc. v. Director, OWCP* [*Clemons*], 48 F.4th 480, 481 (6th Cir. 2022); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 26. To the extent Employer asserts the Miner did not have legal pneumoconiosis because the CT scan and x-ray evidence fail to establish clinical pneumoconiosis, the regulations provide that legal pneumoconiosis may be present even in the absence of clinical pneumoconiosis. *See Clemons*, 48 F.4th at 481; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. at 79,945; Employer's Brief at 14-23.

Because the ALJ provided valid reasons for discrediting Drs. Castle's and Farney's opinions, the only opinions supportive of Employer's burden on rebuttal, we affirm the ALJ's finding that Employer failed to establish the Miner did not have legal pneumoconiosis.[13] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir.

[13] Because we have affirmed the ALJ's finding that Employer failed to disprove legal pneumoconiosis, we need not address Employer's challenges to his finding it also

2013). We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1); Decision and Order at 27.

Death Causation

The ALJ next considered whether Employer established "no part of the [M]iner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27-28. The ALJ permissibly discredited the opinions of Drs. Castle and Farney on the cause of the Miner's pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to establish that the Miner did not have the disease. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); *Ogle*, 737 F.3d at 1074; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 27-28. We therefore affirm the ALJ's finding that Employer failed to establish that no part of the Miner's pulmonary disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we affirm the award of benefits.

Attorneys' Fee Award

For work performed before the ALJ, Claimant's counsel, Austin P. Vowels (counsel), requested $28,643.71 in fees and expenses as follows: 1) $9,075.00 for 33.0 hours of attorney services provided by Austin P. Vowels at a rate of $275.00 per hour; 2) $385 for 1.4 hours of attorney services provided by David Curlin at a rate of $275.00 per hour; 3) $460.00 for 2.3 hours of attorney services provided by Duncan Taylor at a rate of $200.00 per hour; 4) $2,222.50 for 12.7 hours of law clerk services provided by Neal Baker at a rate of $175.00 per hour; 5) $11,130.00 for 74.2 hours of paralegal services provided by Desire Smith at a rate of $150.00 per hour; 6) $2,525.50 for 20.2 hours of legal assistant services provided by Sarah Agnew at a rate of $125.00 per hour; and 7) $2,846.21 in expenses. Employer objected to the hourly rates for Paralegal Smith and Law Clerk Baker, and to certain time entries as excessive or duplicative.

After considering counsel's motions and Employer's objections, the ALJ found the hourly rates requested for Attorney Taylor, Law Clerk Baker, Paralegal Smith, and Legal Assistant Agnew excessive. He determined Attorney Taylor is entitled to an hourly rate of $150.00, Law Clerk Baker and Paralegal Smith are entitled to an hourly rate of $125.00, and Legal Assistant Agnew is entitled to an hourly rate of $100.00. The ALJ also

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failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 27; Employer's Brief at 14-23.

disallowed 12.3 hours performed by Paralegal Smith because the services were clerical or duplicative, or the time requested was excessive.

On appeal, counsel alleges the ALJ erred in reducing the hourly rate requested for Attorney Taylor, Paralegal Smith, and Legal Assistant Agnew and in reducing the amount of time billed.[14] Neither Employer nor the Director filed a response brief.

When an attorney prevails on behalf of a client, the Act provides the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to the claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The amount of an attorney fee award by an ALJ is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003); *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 661 (6th Cir. 2008); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989) (citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980)); *see also Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998) (en banc).

In determining the amount of attorney's fees to award under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *Bentley*, 522 F.3d at 663; *E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010).

Hourly Rates

A reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). In order to identify the prevailing market rate, the fee applicant must produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services . . . of comparable skill, experience, and reputation." *Id*. at 896 n.11; *see Gosnell*, 724 F.3d at 571. Further, any fee:

[14] We affirm, as unchallenged on appeal, the ALJ's determination that Law Clerk Baker is entitled to an hourly rate of $125.00. *Skrack*, 6 BLR at 1-711; Attorneys' Fee Order at 4.

> shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested.

20 C.F.R. §725.366(b).

Attorney Taylor

Counsel informed the ALJ that he customarily bills for Attorney Taylor's work at a rate of $150.00 to $200.00 an hour, and stated he was requesting the $200.00 hourly rate in this case "due to the complex nature and specialized legal and medical knowledge required to pursue federal black lung claims." Claimant's Fee Petition at 10. In support of this request, counsel cited two cases in which an attorney with less experience was granted an hourly rate of $175.00.[15] *Id.* The ALJ found that counsel did not establish a market rate for Attorney Taylor's services of more than $150.00 an hour. Attorneys' Fee Order at 4.

Counsel contends the ALJ's award of attorney's fees at an hourly rate of $150.00 for Attorney Taylor is arbitrary and inadequately explained. Claimant's Fee Brief at 4-8. We disagree.

Contrary to counsel's argument, it is counsel's burden to show his requested fee is reasonable and based on the prevailing market rate. *Blum*, 465 U.S. at 896 n.11; *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 470 (7th Cir. 2001); *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007). While prior fee awards can provide guidance in determining a prevailing market rate, the hourly rate awarded in other cases is not binding in subsequent unrelated cases because individual circumstances determine rates. *See Bentley*, 522 F.3d at 664; *see generally Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217 (1986).

The ALJ permissibly found that because a description of the individual attorneys' experience is not included in the awards cited by counsel, they are of limited value in drawing comparisons to the hourly rate Attorney Taylor requested. *See Maddox v.*

[15] In *Vincent v. Schoate Mining Co.*, OALJ No. 2016-BLA-05600 (Nov. 20, 2017) (Order) (unpub.), counsel was granted a rate of $175.00 an hour for a law clerk in an unopposed fee petition. In *Mortis v. Kenamerican Res.*, OALJ No. 2017-BLA-05459 (Aug. 15, 2018) (Order) (unpub.), an attorney was granted a rate of $175.00 an hour where the requested rate was not opposed.

Lodestar Energy, Inc., No 18-3514, 2019 WL 386958 at *2 (6th Cir. Jan. 30, 2019) (unpub.); *Abbott*, 13 BLR at 1-16; Attorneys' Fee Order at 4. Moreover, as the ALJ noted, counsel provided no information regarding Attorney Taylor's professional experience beyond stating that he has been licensed to practice law since October of 2018. Attorneys' Fee Order at 4; Claimant's Fee Petition at 10. Further, counsel stated in his Motion that he customarily bills between $150.00 and $200.00 per hour for Attorney Taylor's work, and the ALJ awarded Taylor an hourly rate within that range. Claimant's Fee Request at 10. Besides asserting that the attorneys who were granted a rate of $175.00 an hour in the cited cases had less experience than Attorney Taylor, counsel did not explain why his specific experience and quality of representation warrants compensation at the higher end of his own customary billing rate. *Id.* Consequently, counsel has failed to meet his burden to prove the ALJ abused his discretion, and we therefore affirm the ALJ's designation of $150.00 as the appropriate hourly rate for Attorney Taylor. 20 C.F.R. §725.366(b); *Bentley*, 522 at 661; *Jones*, 21 BLR at 1-108-10.

Paralegal Smith

Counsel informed the ALJ that he customarily bills for Paralegal Smith's work at a rate of $100.00 to $150.00 an hour and requested $150.00 an hour in this case "due to the complex nature and specialized legal and medical knowledge required to pursue federal black lung claims." Claimant's Fee Petition at 12. In support of this, counsel cited to Paralegal Smith's experience as well as one case in which she was awarded a rate of $150.00 an hour in an unopposed fee petition. *Id.* Counsel further cited four fee petitions in which unnamed paralegals were awarded rates of $150.00 an hour in black lung claims and two longshore claims where paralegals were awarded $150.00 and $200.00 an hour. *Id*. at 12-13. Finally, counsel cited the National Association of Legal Assistants (NALA) National Utilization and Compensation Survey Reports from 2018 and 2020 as proof that a $150.00 hourly rate is within the market rate for her work. *Id*. at 13-14. The ALJ found that Paralegal Smith's work was entitled to greater than the $100.00 an hour rate that counsel sometimes charges for her work, but she was not entitled to the same rate as Attorney Taylor nor was the evidence persuasive that a rate of $150.00 an hour is the market rate for her work. Attorneys' Fee Order at 5. Thus, he granted counsel a rate of $125.00 an hour for Paralegal Smith's work. *Id*.

Counsel contends that the ALJ's award of an hourly rate of $150.00 for Smith's work as a paralegal is arbitrary and not adequately explained. Claimant's Fee Brief at 8-11. We disagree.

The ALJ permissibly declined to give controlling weight to the single prior unopposed fee award counsel cited in establishing Paralegal Smith's hourly rate.[16] *See Bentley*, 522 F.3d at 664 (prior fee awards may provide some inferential evidence of the market rate but "do not set the prevailing market rate—only the market can do that"); *Maddox*, 2019 WL 386958 at *3; Attorneys' Fee Order at 4-5. Additionally, the ALJ permissibly determined the prior fee awards that approved $150.00 for other paralegals do not establish a market rate for Smith's work because the paralegals' qualifications are not included in those cases. *See Maggard v. Int'l Coal Grp., Knott Cnty., LLC*, 24 BLR 1-172, 1-175 (2010); Attorneys' Fee Order at 5. The ALJ also permissibly found the NALA National Utilization and Compensation Survey Reports from 2018 and 2020 on which counsel relied are unpersuasive in establishing a market rate because the survey results are "too broad in range, are not limited to paralegal services in federal black lung litigation or reasonably similar litigation, or to the geographic area of [counsel's] practice."[17] *See Chubb*, 312 F.3d 894 (rate must be market-based); *Bentley*, 522 F.3d at 664 (noting surveys provide inferential evidence but do not set the rate); *Maggard*, 24 BLR at 1-175; Attorneys' Fee Order at 5. Given counsel conceded he customarily charges between $100.00 and $150.00 for Paralegal Smith's services, and the ALJ permissibly awarded an hourly rate of $150.00 for a licensed attorney, counsel has not explained how the ALJ abused his discretion in finding Paralegal Smith's work justified an hourly rate of $125.00. *See Bentley*, 522 F.3d at 664 (customary billing rate relevant to lodestar calculation).

Legal Assistant Agnew

Similarly, we reject counsel's argument that the ALJ arbitrarily reduced Legal Assistant Agnew's hourly rate. Claimant's Attorney's Fee Brief at 11-12. Counsel stated he customarily charges between $75.00 and $150.00 for Legal Assistant Agnew's services and requested a rate of $125.00 in this case. Claimant's Fee Petition at 14-15. Counsel cited two fee petitions in which Legal Assistant Agnew's rate was granted at $100.00 an hour. *Id.* The ALJ awarded $100.00 an hour as counsel "monetarily values [] Agnew's

[16] Counsel states he cited to three fee awards which specifically identify Paralegal Smith and six identifying a paralegal. Claimant's Attorney Fee Brief at 10. However, review of counsel's fee petition shows the ALJ was correct in finding counsel cited to only one fee award identifying Paralegal Smith, in addition to the six fee awards to unnamed or other paralegals. Claimant's Fee Petition at 12-13.

[17] The survey lists rates charged by attorneys for the service of paralegals in seven broad regions (Southeast, Southwest, Far West, Plain States, Rocky Mountains, Great Lakes, New England/Mid East). The survey does not account for the size of the firms, nature of the litigation, or experience of the paralegals together with the geographic region.

services less than [] Smith's." Attorneys' Fee Order at 5-6. Counsel has failed to show how the ALJ's reduction of Legal Assistant Agnew's rate to $100.00 an hour was an abuse of discretion when this rate is within Agnew's customary rate and is consistent with the cited fee awards, and counsel's fee petition indicates Paralegal Agnew's hourly rate is $25.00 less than Paralegal Smith's. *See Bentley*, 522 at 661; *Maddox*, 2019 WL 386958 at *3; 20 C.F.R. §725.36(b) (any fee approved shall take into account "any other information which may be relevant to the amount of fee requested").

Allowable Hours

Claimant's counsel next argues the ALJ erred in disallowing the time entries for services Paralegal Smith provided. Claimant's Attorney Fee Brief at 12-20. The ALJ disallowed 2.8 hours of work performed on November 18, 2020, and November 23, 2020, for summarizing Dr. Farney's 66-page deposition.[18] Attorneys' Fee Order at 7. He further disallowed 1.8 hours of work performed on November 23, 2020, and November 30, 2020, for summarizing Dr. Chavda's 118-page deposition.[19] *Id.* Additionally, he disallowed 5 hours of work performed in December 2020 for preparing the closing brief and performing ancillary tasks related to preparation of the brief. *Id.* He ultimately approved 61.9 hours of Paralegal Smith's time as compensable. *Id*. at 8.

Services that counsel billed are compensable if the amount of time is not excessive and, at the time the work was performed, counsel could reasonably regard it as necessary to establish Claimant's entitlement. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 316 (1984).

The ALJ partially disallowed the time entries because he found merit in Employer's objection that they were excessive. Attorneys' Fee Order at 7. Specifically, Employer noted counsel asserted Paralegal Smith's skill justified a high hourly rate, and noted counsel requested compensation for the 4.4 hours Paralegal Smith spent reviewing and summarizing fifty-two Director's Exhibits on December 19, 2019, including over five hundred pages of treatment records. Employer's Objection to Fee Petition at 3. Employer contended counsel's requested time entries in November and December 2020 are inconsistent with the "great deal of expertise and skill" shown by Paralegal Smith in reviewing the record in December 2019. *Id.*

The ALJ reviewed counsel's requests and carefully considered whether the time entries were reasonable. Counsel has failed to show how the ALJ abused his discretion in

[18] Counsel requested 5.3 hours of time for this task.

[19] Counsel requested 6.3 hours of time for this task.

reducing the time required for these tasks when Paralegal Smith required more time to summarize the two depositions than review and summarize all of the Director's Exhibits, and when she had already requested and was awarded two hours for preparing for Dr. Chavda's deposition; therefore, the ALJ permissibly found the time entries for summarizing Drs. Farney's and Chavda's depositions are excessive.[20] *See Bentley*, 522 F.3d at 666-67; *Lanning*, 7 BLR at 1-317 (ALJ has broad discretion to determine reasonableness of time entries); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (ALJ's duty to explain is satisfied as long as a reviewing court can discern what the ALJ did and why he did it); Attorneys' Fee Order at 7.

Further, counsel challenges the ALJ's determination to disallow five hours entered for Paralegal Smith's work related to preparing the closing brief in December 2020.[21] Claimant's Attorney Fee Brief at 17-20. The ALJ noted Employer's objection that the amount of time requested was excessive because it contained "the same information already exchanged on pre-hearing forms and was not new work product." Attorneys' Fee Order at 7. He found counsel's block billing for "ancillary tasks" made it difficult to assess the reasonableness of time spent on each task and noted counsel's admission that the work "could perhaps be done more efficiently."[22] *Id*. Thus, counsel has not established that the

[20] Counsel argues that because the ALJ did not disallow any time from the 2.6 hours Paralegal Smith spent reviewing and summarizing Dr. Castle's 46-page deposition at a rate of 3.4 minutes per page, the ALJ's decision to reduce time entries for reviewing and summarizing Drs. Chavda's and Farney's depositions at similar minute-per-page rates was arbitrary. Since the ALJ is not required to determine allowable hours based on minutes spent per page alone, he did not abuse his discretion by finding the time entries for reviewing Drs. Farney's and Chavda's depositions were excessive, despite approving the time entry for reviewing Dr. Castle's deposition. *See B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 666-67 (6th Cir. 2008). Moreover, as Employer did not object to the time allowed for reviewing Dr. Castle's deposition, the ALJ had no reason to give particular scrutiny to the time spent.

[21] Counsel requested 29.4 hours of time for preparing the closing brief.

[22] Counsel argues the ALJ erred in failing to identify the "ancillary tasks" and why they are non-compensable. Claimant's Attorney Fee Brief at 19. Contrary to counsel's argument, the ALJ never determined the ancillary tasks are unnecessary to establish entitlement, but rather, permissibly disallowed some of the total time spent on the closing brief as excessive. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984) (ALJ must determine whether time spent on a task is excessive after determining whether the task is compensable); Attorneys' Fee Order at 7.

ALJ abused his discretion in finding the time entries for Paralegal Smith's work on Claimant's closing brief excessive. *See Bentley*, 522 F.3d at 666-667; *Lanning*, 7 BLR at 1-317; Attorneys' Fee Order at 7.

ALJs are afforded "broad deference" in determining whether the number of billable hours is reasonable in relation to the work performed because "they are in a much better position than the appellate court to make these determinations." *Bentley*, 522 F.3d at 666-67. Because counsel has not demonstrated the ALJ abused his discretion, we affirm the ALJ's finding that 61.9 hours of Paralegal Smith's time is compensable, while 12.3 hours is not. 20 C.F.R. §725.366; *see Bentley*, 522 F.3d at 667; *Lanning*, 7 BLR at 1-317. As counsel raises no further challenges to the ALJ's attorney fee award, we affirm the award of $21,150.00 in attorneys' fees in this claim.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Attorneys' Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' determination that the ALJ properly credited Dr. Chavda's opinion to find Claimant established the Miner was totally disabled.

Employer does not contend that Claimant must prove the Miner's impairment was chronic rather than acute. It contends the ALJ, when assessing total disability, erred in failing to recognize that there is a distinction between the effect of an acute versus a chronic illness, and that evidence that is the effect of an acute illness is not proper and reliable evidence for purposes of establishing entitlement under the Act. Employer's Brief at 5-7. Its contention has merit.

The Act provides entitlement for miners who are totally disabled due to pneumoconiosis which, by definition, is a chronic respiratory or pulmonary disease. 30 U.S.C. §902(b); *see* 20 C.F.R §718.201(a). Accordingly, the regulations for determining disability exclude from consideration objective testing conducted under circumstances that make the testing likely to be unreliable for detecting the respiratory or pulmonary effect of

a chronic condition. *See* 20 C.F.R Part 718, App. B(2)(i) ("[Pulmonary function] [t]ests shall not be performed during or soon after an acute respiratory illness."); 20 C.F.R Part 718, App. C ("[Blood gas] [t]ests must not be performed during or soon after an acute respiratory or cardiac illness."); 20 C.F.R §718.105(d)(A) (A qualifying blood gas study administered during a hospitalization that ended in the miner's death cannot be considered evidence the miner was totally disabled unless it is "accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition.").

In this case, the Miner presented to Herrin Hospital on December 17, 2016, with reports of progressive shortness of breath for the last three to four weeks. Claimant's Exhibit 3 at 2. He was found to be in severe respiratory distress with hypoxia and was admitted and placed on high flow supplemental oxygen and testing showed bilateral infiltrates in the lungs. *Id*. at 2-5. He was discharged on December 30, 2016, so that he could be transferred to Kindred Hospital. *Id*. After being admitted to Kindred Hospital, he was placed on a BiPAP machine after his breathing deteriorated. Director's Exhibit 15 at 63-67. His breathing continued to deteriorate, and he was intubated on January 2, 2017. *Id*. at 67. On January 4, 2017, he was taken off the ventilator and passed away. *Id*. at 72.

While Dr. Chavda opined the Miner had a disabling impairment as early as May 30, 2013, Claimant's Exhibit 6 at 10-11, he further opined that the Miner was totally disabled at the time of his death because "[h]e was in respiratory failure. If you're on a ventilator, you cannot go back to work." Employer's Exhibit 5 at 108. Employer's physicians, however, opined that evidence from the Miner's hospitalizations would be unreliable as evidence of total disability because acute conditions were causing him to be ill at those times. Employer's Exhibits 4, 7. The ALJ summarily concluded that the treatment records support a finding of total disability, that Dr. Chavda "provided a well-reasoned and well-documented opinion that [the] Miner was totally disabled at the time of his death based on the final hospital records," and that the opinions of Drs. Castle and Farney failed to adequately address the import of these records.[23] Decision and Order at 18. Yet that is the

[23] The ALJ rested his findings of disability entirely on evidence tied to the Miner's hospitalizations which ended in death, and which Employer's experts opine was related to acute illness so that it was unreliable as to disability under the Act, to wit:

Medical Opinion Evidence of Dr. Chavda

The ALJ's analysis with respect to crediting Dr. Chavda's opinion as to disability focused entirely on the miner's final hospitalizations that ended in death:

> In order to invoke the 15-year presumption, Claimant must establish Miner was totally disabled by a pulmonary or respiratory impairment at the time of his death. I find Dr. Chavda's statement that Miner was disabled from a respiratory standpoint at the time of his death to be supported by the hospital and treatment records from December 2016 and January 2017. Miner was admitted to a hospital for respiratory failure attributed to pulmonary fibrosis, pulmonary embolism, and pneumonia. Despite a history of coronary artery disease, Miner's cardiac tests were normal. Miner's condition continued to deteriorate and required he be placed on high-flow oxygen, intermittent BiPAP, and eventually led to intubation and mechanical ventilation.
>
> I recognize that Dr. Chavda never specifically discussed the exertional requirements of Miner's coal mine job or expressly stated that Miner's terminal condition would prevent him from performing his last coal mine job. However, administrative law judges are permitted to draw reasonable inferences from the evidence in the record. . . .
>
> . . . .
>
> *Here, Dr. Chavda stated that Miner's condition requiring him to be paced* [sic] *on a ventilator would preclude him from doing any physical activity. I found that Miner's last job was not sedentary and required some level of exertion from walking and pulling. In comparing Dr. Chavda's assessment of Miner's physical abilities to my finding of the exertional requirements of his last coal mine employment, I find it reasonable to infer that Miner would be unable to perform the exertional requirements of his last coal mine job and that he was totally disabled from a respiratory or pulmonary condition at the time of his death.* Overall, I find Dr. Chavda's disability opinion to be well-documented and well-supported and I accord it probative weight.

Decision and Order at 16-17 (emphasis added).

Discrediting of the opinions of Drs. Castle and Farney:

> Both Dr. Castle and Dr. Farney stated that Miner was not disabled during his life based on the objective testing in the record. A preponderance of the PFTs and ABGs in the record that pre-date December 2016 were not qualifying, which supports these opinions. Even so, the issue here is whether Miner was

evidence the ALJ cited to find Dr. Chavda's total disability opinion reasoned—he identified the Miner's hospital treatment for respiratory failure and his being placed on a ventilator as the reasons for accepting Dr. Chavda's opinion. Decision and Order at 17-18. Dr. Chavda's medical opinion, as based on the records from the Miner's final hospitalization, also constituted the basis for the ALJ's determination of disability after weighing all the evidence.[24] But if objective tests obtained under circumstances involving

> disabled at the time of his death, not at some prior point. Both Dr. Castle's and Dr. Farney's medical opinions focused on the cause of Miner's respiratory failure that led to his final hospitalization, without significantly addressing what effects that hospitalization had on Miner's ability to work. Dr. Castle noted Miner's respiratory condition in December 2016 was getting worse but stated it was due to an acute illness and concluded there was no evidence of a total and permanent chronic pulmonary impairment. The language of the regulation merely requires a miner to be disabled at the time of death and does not require the disability to stem from a chronic condition. Given the lack of meaningful discussion on Miner's disability at the time of his death, I find that Dr. Castle's and Dr. Farney's disability opinions are not well reasoned and I accord them less weight.

Decision and Order at 18.

The Miner's treatment records

The ALJ found the treatment records from the Miner's final hospitalization support a finding of total disability (because he was placed on high-flow oxygen, BiPAP and eventual intubation); however, earlier treatment records do not:

> With regard to Miner's treatment records, as discussed above, Miner's treatment records from his final hospitalization . . . support a finding that Miner was totally disabled at the time of his death.
>
> The record contains additional medical record dating back to 2011. . . . I find that nothing in these additional hospital and treatment records supports a finding of total disability, but they also do not preclude a finding that Miner was totally disabled at the time of his death.

Decision and Order at 18.

[24] The ALJ's determination rested on the final hospital records:

acute illness require inquiry to ensure they reflect disability that could be related to pneumoconiosis, then surely prescription of treatment in those circumstances merits the same inquiry.[25] Here, the ALJ summarily rejected the testimony of Employer's doctors and failed to consider that the Miner's hospitalization treatments were not for a chronic illness. Moreover, the ALJ did not conduct any review to determine whether the treatments themselves were otherwise reliable evidence for these purposes, i.e., they were medically necessary and reflected the reasoned exercise of medical judgment by the physicians who ordered them. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.204(b)(2)(iv) (total disability can be established by a physician "exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques"); 20 C.F.R. §718.107 (A party submitting a test or procedure to establish total disability "bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing" entitlement.); *see* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000) (Despite the inapplicability of the quality standards to treatment records,

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> Weighing all the evidence together, I find that it establishes that Miner was totally disabled at the time of his death. . . . The PFTs and ABG studies of record are insufficient to make a finding of total disability. Even so, I find that the medical opinion evidence is sufficient to show that Miner was totally disabled. Dr. Chavda provided a well-reasoned and well-documented opinion that Miner was totally disabled at the time of his death based on the final hospital records, while Dr. Castle and Dr. Farney failed to substantively discuss how Miner's respiratory failure and final hospitalization in December 2016 effected [sic] his ability to perform his last coal mine employment. Overall, I find that the well-reasoned medical opinion evidence establishes that Miner was totally disabled from a pulmonary or respiratory impairment at the time of his death.

Decision and Order at 18.

[25] Indeed, in this case the ALJ found the qualifying December blood gas studies could not be relied upon (because they were produced during hospitalization which ended in the Miner's death and were not accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition), and moreover, that the April 27, 2012 blood gas study could not be used to establish total disability because it was performed during or soon after an acute respiratory or cardiac illness. Decision and Order at 14-15; 20 C.F.R. §718.105(d); Appendix C of Part 718.

the ALJ "still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.").

The ALJ must base his findings regarding total disability on reliable evidence. He failed to consider Employer's objection that the evidence is unreliable for purposes of establishing total disability under the Act and explain his findings accordingly. On this issue, the question is not what the ALJ could have found and concluded, but what he actually did find and conclude. The majority has rewritten the ALJ's decision and affirmed its rewritten version. It is not within our authority to do so. Rather, we must review and render our determination based on what the ALJ actually said and did. *See A & E Coal Co. v. Adams,* 694 F.3d 798, 802 (6th Cir. 2012) (The APA "imposes on the ALJ a duty accurately and specifically to reference the evidence supporting his decision."); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) ("[A] reviewing court must be able to discern what the ALJ did and why he did it."). When the ALJ's decision is reviewed on that basis, we are compelled to find that the ALJ erred.

Employer also challenges the ALJ's acceptance of Dr. Chavda's opinion as documented and reasoned. Employer's Brief at 7-12. Since the ALJ did not analyze Dr. Chavda's opinion when finding it reasoned and documented, beyond citing Dr. Chavda's reference to the Miner being placed on a ventilator, Employer's argument has merit.[26] The ALJ thereby violated the Administrative Procedure Act's requirement to explain his findings and conclusions, and the bases for them. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[27]

Therefore, I would vacate the ALJ's findings and determinations relating to disability and remand the case for the ALJ to properly consider and explain his crediting of the medical opinion evidence, and if he uses medical evidence obtained during the Miner's final hospitalization ending in death to find total disability, to explain how it is reliable evidence to find total disability under the Act. *See Adams*, 694 F.3d at 802;

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[26] A physician's opinion regarding total disability must be "based on medically acceptable clinical and laboratory diagnostic techniques . . . ." 20 C.F.R. §718.204(b)(2)(iv).

[27] The Administrative Procedure Act requires that every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Contrary to my colleagues' contention, the ALJ did not consider Dr. Chavda's opinion in its entirety and provide an adequate explanation for finding it well-reasoned and documented.

Wojtowicz v. Duquesne Light Co., 12 BLR 1-162, 1-165 (1989). Because the ALJ's findings and determination as to total disability affected other findings and determinations, including his ultimate determination of entitlement to benefits, I would vacate those as well. Thus, I would decline to address, as premature, Claimant's challenges to the ALJ's fee award.

JUDITH S. BOGGS
Administrative Appeals Judge