U.S. Department of Labor

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

BRB No. 21-0079 BLA

HAROLD D. COLLETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUE DIAMOND COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH/AIG	)	DATE ISSUED: 3/24/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Harold D. Collett, Stinnett, Kentucky.

Andrew L. Kenney and Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

BOGGS, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Denying Benefits (2019-BLA-05364) rendered on a miner's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on June 27, 2017.[2]

The ALJ found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. He further found Claimant established thirty-nine years of underground coal mine employment but failed to establish total disability and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4), or establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[4] He therefore denied benefits.

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

[2] The Claimant filed a previous claim on February 6, 2015, which the district director denied because the evidence did not establish total disability. Director's Exhibit 2 at 11-12.

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

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's prior claim for failure to establish total disability, he must submit new evidence establishing total disability to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier (Employer) respond in support of the denial.[5] The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed without the assistance of counsel, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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 Assoc., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis before finding whether or not Claimant has invoked the presumption. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ considered nine interpretations of four chest x-rays. Decision and Order at 4-5, 11. He found that all the interpreting physicians are dually-qualified B readers and Board-certified radiologists. *Id.* He also found the x-rays dated May 30, 2017, August 2, 2017 and April 17, 2018 are negative for complicated pneumoconiosis.[7] Dr. Ramakrishnan

[5] We affirm, as unchallenged, the ALJ's finding of thirty-nine years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 16.

[7] Drs. DePonte and Adcock read the May 30, 2017 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 19; Employer's Exhibit 1. Drs. DePonte, Miller, and Adcock read the August 2, 2017 x-ray as negative for complicated pneumoconiosis. Director's Exhibits 12 at 23, 20, 22. Drs. DePonte and Adcock read the April 17, 2018 x-

read the May 23, 2019 x-ray as positive for complicated pneumoconiosis, while Dr. Adcock read it as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 5. The ALJ permissibly found the preponderance of the x-rays are negative or in equipoise as to complicated pneumoconiosis. Decision and Order at 11-12; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59-60 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant did not establish complicated pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.304(a); Decision and Order at 11-12.

The record contains no biopsy or CT scan evidence. Decision and Order at 11; *see* 20 C.F.R. §718.304(b), (c). The ALJ also correctly found that neither Dr. Ajjarapu's opinion, nor Claimant's treatment records, address whether Claimant has complicated pneumoconiosis. Decision and Order at 12; Director's Exhibits 12, 24; Claimant's Exhibits 6, 7, 8. Dr. Dahhan specifically opined Claimant does not suffer from complicated pneumoconiosis. Director's Exhibit 21 at 3; Employer's Exhibits 2, 3 at 6-7. We therefore affirm, as supported by substantial evidence, the ALJ's finding that Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c) or in consideration of the evidence as a whole. Thus, we affirm the ALJ's finding that Claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). *Gray*, 176 F.3d at 389-90; *Melnick*, 16 BLR at 1-33.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[8] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant evidence supporting total

ray as negative for complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 4. There are no positive readings of these films.

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

disability against all contrary relevant evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Pulmonary Function Studies

There are six pulmonary function studies.[9] The May 30, 2017 test conducted at St. Charles Respiratory Care Center produced qualifying pre-bronchodilator results. Director's Exhibit 19 at 2. Dr. Ajjarapu's August 2, 2017 test produced non-qualifying pre-bronchodilator and post-bronchodilator results. Director's Exhibit 12 at 13. Dr. Dahhan's December 8, 2017 test produced non-qualifying results.[10] Director's Exhibit 21 at 10. The April 17, 2018 test conducted at St. Charles Respiratory Care Center produced qualifying pre-bronchodilator results. Claimant's Exhibit 6 at 14. The May 23, 2019 test conducted at St. Charles Respiratory Care Center produced qualifying pre-bronchodilator

[9] The ALJ noted the tests report differing heights for Claimant and determined the Miner's height based upon an average height of the reported heights (63.833 inches). As there is no value for a height of 63.833 inches in the charts at 20 C.F.R. Part 718, Appendix B, the ALJ used the "closest table value of 63.8 inches" to determine whether the pulmonary function studies produced qualifying results. Decision and Order at 5 n.14. When a miner's height falls between two heights listed in the table, an ALJ should use the greater closest height to evaluate whether the results are qualifying. *See Toler v. E. Associated Coal Corp*., 43 F.3d 109, 116 n.6 (4th Cir. 1995) (Office of Workers' Compensation Programs directs use of the closest greater height when a miner's actual height falls between heights listed in the table). Any error is harmless, however, because use of the greater closest height does not result in any changes as to which studies are qualifying and non-qualifying. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] Dr. Dahhan opined the December 8, 2017 pulmonary function study he conducted was invalid due to poor cooperation. Director's Exhibit 21 at 3. The ALJ found Dr. Dahhan's comments do not detract from the probative weight of the study given the values were non-qualifying. Decision and Order at 14, n.36, *citing Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-479 (1983). Our dissenting colleague maintains the ALJ erred in relying on the December 8, 2017 test in assessing Claimant's respiratory disability. We need not reach this issue as we consider ALJ's error, if any, harmless because he adequately explained his overall finding that pulmonary function study evidence is insufficient to establish that Claimant has a permanent and totally disabling respiratory or pulmonary impairment. *See Larioni*, 6 BLR at 1-1278.

results.[11] Claimant's Exhibit 5 at 1. Dr. Dahhan's October 13, 2019 test produced non-qualifying pre-bronchodilator results. Employer's Exhibit 2 at 7 (unpaginated).

The ALJ noted correctly that the studies demonstrated "frequent fluctuations" in Claimant's respiratory abilities over a short span of time. Decision and Order at 15. We see no error in the ALJ's overall conclusion that while the studies show Claimant may suffer from a "transient impairment," they do not conclusively establish he is totally disabled by a respiratory or pulmonary impairment.[12] *Id.*; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); s*ee also Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion).

It is the province of the ALJ to evaluate the medical evidence, draw inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ, even if they would be different. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the ALJ acted within his discretion in weighing the pulmonary function studies and gave a permissible rationale for his conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), we affirm it as supported by substantial evidence.

Blood Gas Studies

The ALJ considered the results of three arterial blood gas studies. Decision and Order at 6, 15. Dr. Ajjarapu's August 2, 2017 study produced qualifying values at rest but non-qualifying values with exercise. Director's Exhibit 12 at 9. Dr. Dahhan's December

[11] Dr. Dahhan invalidated the May 30, 2017, April 17, 2018, and May 23, 2019 qualifying studies for poor effort. Employer's Exhibits 2 at 3 (unpaginated), 3 at 8. The ALJ permissibly found Dr. Dahhan did not adequately explain how the tracings supported his conclusions and that his opinion was contradicted by the technicians who administered the studies and noted that Claimant gave good effort and cooperation. Decision and Order at 14.

[12] Although our dissenting colleague relies on *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) for the proposition that the ALJ erred in finding a transient impairment, this case arises in the jurisdiction of the Sixth Circuit and *Greer* is therefore not binding precedent.

8, 2017 and October 14, 2019 studies were non-qualifying at rest and with exercise. Director's Exhibit 21 at 20; Employer's Exhibit 2 at 13-14 (unpaginated). The ALJ noted the preponderance of the resting blood gas studies were non-qualifying. He also permissibly gave greater weight to the non-qualifying exercise studies because he considered them to be more probative of Claimant's ability to perform "manual labor."[13] Decision and Order at 15; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984). Because the ALJ acted within his discretion in weighing the blood gas study evidence, we affirm his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinion Evidence

The ALJ considered Dr. Ajjarapu's opinion that Claimant is totally disabled and Dr. Dahhan's contrary opinion.[14] Decision and Order at 16-17; Director's Exhibits 12, 21, 24; Employer's Exhibits 2, 3. Dr. Ajjarapu conducted the Department of Labor (DOL) complete pulmonary evaluation of Claimant on August 2, 2017. Director's Exhibit 12. She noted Claimant's respiratory symptoms of cough and shortness of breath on exertion. *Id.* at 6. She opined Claimant's pulmonary function studies were within normal limits but that his resting blood gas study showed severe hypoxemia and met the regulatory standards for total disability. *Id.* at 7. Dr. Ajjarapu opined Claimant does not have the pulmonary capacity to do his previous work in the mines. *Id.*

In a supplemental report, Dr. Ajjarapu reviewed Dr. Dahhan's examination report. She indicated the pulmonary function test from her examination showed very mild impairment, while Dr. Dahhan's results were lower and showed "considerable" decline over four months but do not meet DOL disability criteria. Director's Exhibit 24 at 2. She stated that the blood gas values from Dr. Dahhan's testing showed "consistently lower values indicating [Claimant's] true pulmonary pathology." *Id.* Dr. Ajjarapu also noted that during the exercise blood gas testing she conducted, Claimant's heart rate increased

[13] The ALJ found Claimant's work as a belt foreman required work that "rose to the level of heavy exertion." Decision and Order at 13.

[14] In his December 8, 2017 and October 14, 2019 reports and subsequent deposition, Dr. Dahhan opined that there was no evidence of pulmonary disability and that Claimant retained the respiratory capacity to return to his previous coal mining work. Director's Exhibit 21 at 4; Employer's Exhibits 2 at 3-4 (unpaginated), 3 at 10. While the ALJ found Dr. Dahhan's opinion entitled to little weight, he correctly noted it does not aid Claimant in establishing total disability. Decision and Order at 16.

over four minutes of minimum exercise, indicating he would not be able to perform his last coal mine job that required him to walk for an eight-hour shift and lift heavy objects.[15] *Id.* at 1-2.

The ALJ noted that while Dr. Ajjarapu described Claimant's pulmonary function study values as declining, later pulmonary function studies showing a rise in Claimant's values undercut her opinion.[16] Decision and Order at 16. He further noted that while Dr. Ajjarapu described Claimant's blood gas studies as "consistently" lower after her examination, her opinion is not supported by the December 2017 and October 2019 test results, which both show higher oxygenation results than she obtained. *Id.* He also permissibly found Dr. Ajjarapu's opinion unpersuasive because she did not adequately explain why Claimant's exercise heartbeat during her examination indicates he is totally disabled by a *respiratory or pulmonary* impairment. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483 (6th Cir. 2003) (conclusory statements do not reflect reasoned medical judgment); *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360 (6th Cir. 1985) ("Determinations of whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact."); *see also Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); Decision and Order at 16. As the ALJ permissibly found Dr. Ajjarapu's opinion not well reasoned, we affirm his finding that Claimant failed to establish total disability at 20 C.F.R §718.204(b)(2)(iv).[17]

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because it is supported by substantial evidence, we affirm the ALJ's finding that the evidence as a whole

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[15] Dr. Ajjarapu observed Claimant's heart rate rose from 50 beats per minute at rest to 90 beats per minute over four minutes of minimal exercise. Director's Exhibit 24 at 1. She noted that Dr. Dahhan recorded a decrease from 94 beats per minute at rest to 88 beats per minute with maximum exercise and questioned whether he actually recorded Claimant's heart rate at his maximum exercise capacity. *Id.*

[16] There is a rise in the PO2 values at rest and with exercise in the subsequent studies. Director's Exhibits 12, 21; Employer's Exhibit 2.

[17] The ALJ did not make a specific finding regarding whether Claimant could establish total disability under 20 C.F.R. §718.204(b)(2)(iii). However, any such error is harmless as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *See Larioni*, 6 BLR at 1-1278.

did not establish total disability at 20 C.F.R. §718.204(b)(2). *See Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 198; *Rafferty*, 9 BLR at 1-232; Decision and Order at 17. As Claimant failed to establish he has a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's finding he did not invoke the Section 411(c)(4) presumption. Further, because Claimant did not establish total disability, a requisite element of entitlement, benefits are precluded. *See Anderson*, 12 BLR at 1-112; 20 C.F.R. §718.204(b)(2).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's denial of benefits. In finding Claimant is not totally disabled, the ALJ failed to properly apply the regulations and controlling law.

The record contains six pulmonary function studies, three with qualifying values and three with non-qualifying values.[18] Decision and Order at 5-6; Director's Exhibits 12

[18] The May 30, 2017 test conducted at St. Charles Respiratory Care Center produced qualifying pre-bronchodilator results. Director's Exhibit 19 at 2. Dr. Ajjarapu's August 2, 2017 test produced non-qualifying pre-bronchodilator and post-bronchodilator results. Director's Exhibit 12 at 13. Dr. Dahhan's December 8, 2017 test produced non-qualifying results. Director's Exhibit 21 at 10. The April 17, 2018 test conducted at St. Charles Respiratory Care Center produced qualifying pre-bronchodilator results. Claimant's Exhibit 6 at 14. The May 23, 2019 test conducted at St. Charles Respiratory Care Center produced qualifying pre-bronchodilator results. Claimant's Exhibit 5 at 1. Finally, Dr.

at 13, 19 at 2, 21 at 10; Claimant's Exhibits 5 at 1, 6 at 14; Employer's Exhibit 2 at 7 (unpaginated). The ALJ found the non-qualifying December 8, 2017 study invalid based on Dr. Dahhan's statement in his examination report that the study "showed poor cooperation resulting in an invalid test."[19] Director's Exhibit 21 at 3. Despite finding the study invalid, the ALJ nevertheless gave the study "probative weight," reasoning that "more patient effort would [have] only result[ed] in higher test values." Decision and Order at 14, n.36, *citing Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-479 (1983). Thus, he weighed Dr. Dahhan's invalid study along with the five valid studies. Concluding that the six pulmonary function studies showed a "transient impairment" and were in equipoise because three produced qualifying values while three did not, he determined Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 15.

The Board cannot affirm the ALJ's finding that the pulmonary function studies do not establish total disability, as he impermissibly relied on Dr. Dahhan's invalid study as probative evidence that Claimant is not disabled and improperly concluded that a "transient" impairment cannot be totally disabling.

First, the ALJ's crediting of Dr. Dahhan's invalid study is contrary to the regulations. Section 718.103 clearly states "no results of a pulmonary function study shall constitute evidence of the *presence or absence* of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with" the regulatory quality standards.[20] 20 C.F.R. §718.103(c) (emphasis added); 20 C.F.R. Part 718, Appendix B. Thus, the plain language of the regulation prohibits the ALJ from weighing an invalid pulmonary function study at 20 C.F.R. §718.204(b)(2)(i). Having found Dr. Dahhan's December 8, 2017 test

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Dahhan's October 13, 2019 test produced non-qualifying pre-bronchodilator results. Employer's Exhibit 2 at 7 (unpaginated).

[19] Dr. Dahhan also invalidated the May 30, 2017, April 17, 2018, and May 23, 2019 qualifying studies for poor effort, but the ALJ discredited his opinion for lack of sufficient explanation. Decision and Order at 14.

[20] Among the quality standards implicated by Claimant's poor cooperation are those requiring the administering physician, in this case Dr. Dahhan, to document the miner's "ability to understand instructions . . . and degree of cooperation" in performing the test, *see* 20 C.F.R. §718.103(b)(5), as well those setting forth the specific instructions a miner must follow for purposes of judging whether he achieved the necessary "maximum inspiration" and "maximum expiration" for valid test results, *see* 20 C.F.R. Part 718, Appendix B, para. (2)(ii).

invalid, the ALJ erred in crediting it as probative evidence that Claimant does not have a pulmonary impairment. *See* Decision and Order at 14-15. Therefore, his conclusion that the pulmonary function studies are in equipoise is unsupported by the evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion).

Second, the ALJ's reliance on *Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-479 (1983), is misplaced. As the ALJ noted, *Crapp* held that a pulmonary function study deemed invalid due to poor cooperation may constitute probative evidence that a miner is not disabled because, had the miner cooperated more fully, "the test results could only have been even higher." Decision and Order at 15, *citing* 6 BLR 1-476. Even assuming that holding has any scientific or medical basis – the Board did not identify any evidence or studies supporting its conclusion – it predates enactment of the current regulation by almost two decades. At the time, the regulation prohibited invalid testing from being credited as evidence of an "impairment." 20 C.F.R. §718.103(c) (1980).[21] Today, the regulation clearly prohibits such testing from being credited as proof of the "presence or absence" of an impairment, 20 C.F.R. §718.103(c), rendering *Crapp's* holding outdated and irrelevant.

Third, as a factual matter, the ALJ's assumption that Claimant's testing values would have been higher had he more fully cooperated – rendering the invalid December 8, 2017 test "probative" evidence that he is not disabled – lacks any support in the record. *See Martin*, 400 F.3d at 305; *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (the interpretation of medical evidence is for medical experts). No physician opined that Claimant's testing values would have been higher had he demonstrated better cooperation; no physician opined the study had probative value despite being invalid; and no physician relied on it as evidence that Claimant is not disabled. Significantly, Dr. Dahhan, who administered the test and found it invalid, did not rely on it as evidence that Claimant is not totally disabled. Rather, he opined that "*previous* pulmonary function studies *with*

[21] The prior regulation at issue in *Crapp* stated, "[n]o results of pulmonary function tests shall constitute evidence of a respiratory or pulmonary impairment unless such tests are conducted and reported in substantial compliance with this section and Appendix B." 20 C.F.R. §718.103(c) (1980).

valid tests indicated no evidence of pulmonary disability."[22] Director's Exhibit 21 at 3; *see also* Employer's Exhibits 2 at 3 (unpaginated); 3 at 8.

Finally, the ALJ's finding that mere fluctuations in Claimant's pulmonary function study results showed he has only a "transient," non-disabling impairment is both unsupported and contrary to law. No physician opined Claimant has a transient impairment or that such an impairment could not be disabling. *See Martin*, 400 F.3d at 305. And, the ALJ failed to explain his conclusion that Claimant is not disabled, i.e., capable of performing his usual coal mine work, despite an impairment that regularly rises to disabling levels (in this case, on three of the five valid pulmonary function tests). *See* 20 C.F.R. §718.204(b)(2); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal bases for her decision); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

At its core, the ALJ's decision – both in giving Dr. Dahhan's invalid test equal weight to the valid tests simply because it is non-qualifying, and in finding Claimant's impairment "transient" and non-disabling because some of the tests show greater pulmonary capacity than others – reflects an analysis the United States Court of Appeals for the Fourth Circuit has deemed "overstated, simplistic, and unfair to claimants." *See Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991). As the Court explained, the "fallacy" of crediting higher test results as inherently more reliable than lower ones is that "on any given day, it *is* possible to do better, and indeed to exert more effort, than one's typical condition would permit." *Id.*

Because the ALJ erred in crediting Dr. Dahhan's invalid pulmonary function study, and did not rationally explain his weighing of the remaining studies, the Board must vacate his determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Wojtowicz*, 12 BLR at 1-165. Moreover, because he relied on that erroneous finding to discredit Dr. Ajjarapu's diagnosis of total disability, the Board also must vacate his finding that Claimant did not establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv). *Id.*; Decision and Order at 16 (discrediting Dr. Ajjarapu's total disability diagnosis as "not fully supported by the objective testing").

[22] As noted, the ALJ rejected Dr. Dahhan's view that several of the qualifying studies were not valid, *see* fn. 18, and thus rationally discredited his opinion that Claimant is not disabled. Decision and Order at 16.

Thus, I would vacate the ALJ's overall determination that Claimant is not totally disabled and that Claimant did not invoke the Section 411(c)(4) presumption.

I, therefore, dissent.

GREG J. BUZZARD
Administrative Appeals Judge