U.S. Department of Labor

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

BRB No. 21-0141 BLA

BETTY THOMAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 3/30/2022
WALTER ENERGY, INCORPORATED	)	
	)	
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 Awarding Benefits of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and Paisley Newsome (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

John C. Webb and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judges, ROLFE and GRESH, Administrative Appeals Judges.

ROLFE AND GRESH, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order Awarding Benefits (2017-BLA-05600) rendered on a claim filed on April 14,

2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least fifteen years of underground coal mine employment and found she has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[3] 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

A miner is totally disabled if her pulmonary or respiratory impairment, standing alone, prevents her from performing her 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.[4] 20 C.F.R.

[1] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if she 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.

[2] We affirm, as unchallenged an appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 9.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as Claimant performed her coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R.

§718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant evidence supporting total disability against all contrary relevant 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). Employer challenges the ALJ's findings that Claimant established total disability based on the pulmonary function studies and in consideration of the evidence as a whole.[5]

Pulmonary Function Studies

Although the ALJ considered nine pulmonary function studies, there are only eight studies in the record.[6] Decision and Order 5-6.[7]

Dr. Barney's September 12, 2014 study produced non-qualifying pre-bronchodilator and post-bronchodilator results. Director's Exhibit 10 (unpaginated) at 33. Dr. Lipscomb's November 5, 2015 study produced qualifying pre-bronchodilator and post-bronchodilator results. Director's Exhibit 16 (unpaginated) at 21. A January 20, 2016 study produced non-qualifying pre-bronchodilator results. Claimant's Exhibit 5 at 24. Dr.

Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The ALJ found Claimant did not establish total disability based on the blood gas study evidence and there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 6, 11.

[6] In his chart of the evidence, the ALJ identified a January 20, 2015 study at Claimant's Exhibit 5 and a November 11, 2015 study at Director's Exhibit 16. Decision and Order at 5-6. The FEV1, FVC, and MVV values were identical: 1.34, 1.74, and 77, respectively. *Id.* However, the only study at Claimant's Exhibit 5 with those values is dated January 20, 2016, and has a *calibration date* of November 11, 2015. Claimant's Exhibit 5 at 24; Director's Exhibit 16 (unpaginated) at 23. We are unable to find any study dated January 20, 2015 or November 11, 2015 in the record before us. Therefore, apparently the ALJ incorrectly listed in his chart that there are two studies with non-qualifying results when there is only one, which should be dated January 20, 2016.

[7] Because the studies reported varying heights for Claimant ranging from 60 to 61.5 inches, the ALJ calculated an average height of 60.8 inches. He then used the closest greater table height at Appendix B of 20 C.F.R. Part 718 of 61 inches for determining the qualifying or non-qualifying nature of the studies. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 9-10.

Lipscomb's July 1, 2016 study produced non-qualifying pre-bronchodilator results.[8] Director's Exhibit 16 at 20. Dr. Lipscomb's March 8, 2017 study produced qualifying pre-bronchodilator and post-bronchodilator results. Claimant's Exhibit 5 at 5. Dr. Connolly's July 5, 2017 study produced qualifying pre-bronchodilator and post-bronchodilator results. Claimant's Exhibit 3. Dr. Goldstein's August 24, 2017 study produced qualifying pre-bronchodilator and post-bronchodilator results. Claimant's Exhibit 2. Dr. Lipscomb's September 12, 2017 study produced non-qualifying pre-bronchodilator and qualifying post-bronchodilator results. Employer's Exhibit 5.[9]

Employer argued below only that some of the studies were invalid and that the results overall were consistent with uncontrolled asthma, but not disability. Employer's Post Hearing Brief at 10-11. In response to Employer's arguments, the ALJ noted Dr. Fino opined the November 5, 2015 study was "technically invalid" and that all of the studies obtained in 2017 were invalid because they showed submaximal effort. Decision and Order at 10; Employer's Exhibit 4. But the ALJ found Dr. Fino did not adequately explain his opinion, gave it no weight, and concluded all the studies were valid. Decision and Order at 10. Employer does not challenge that finding, and we therefore affirm it. *See Skrack*, 6 BLR at 1-711. Based on the clear majority of the qualifying study results, the ALJ concluded "that absent contrary probative evidence, Claimant has established total

[8] We note the ALJ misstated the qualifying FVC and MVV values for a 61-inch-tall female from the ages 64 to 67 years old. Decision and Order at 5-6, 10; 20 C.F.R. Part 718, Appendix B. For a 64-year-old, the ALJ listed the qualifying FVC as 1.55 and the qualifying MVV as 50; but they are in fact 1.53 and 49. For a 65-year-old, the ALJ listed the FVC as 1.53, although it is 1.52. For a 66-year-old, the ALJ listed the FVC as 1.52 and the MVV as 49; but they are 1.51 and 48. For a 67-year-old, the ALJ listed the FVC as 1.51, but it is 1.49. These errors impact only the July 1, 2016 pulmonary function study, which Claimant performed when she was 65 years old, producing an FVC value of 1.53. Decision and Order at 5-6; Director's Exhibit 16 at 20. As the qualifying FVC value is 1.52, the FEV1/FVC ratio is 78.6 percent, and no MVV value was reported, the study is non-qualifying. *See* 20 C.F.R. Part 718, Appendix B; Director's Exhibit 16 at 20. Thus, the ALJ erred in concluding that the July 1, 2016 study was qualifying. However, this error is harmless as substantial evidence supports his overall finding that Claimant established total disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] The ALJ incorrectly noted the September 12, 2017 pulmonary function as appearing in Claimant's Exhibit 3 when it appears in Employer's Exhibit 5. Decision and Order 5-6.

disability by the preponderance of the pulmonary function study evidence." Decision and Order at 11; *see* 20 C.F.R. §718.204(b)(2)(i).

Employer contends the ALJ's analysis is "not supported by any discussion regarding the weights he assigned to any of the studies" or any explanation why he found Claimant totally disabled, despite the latest pre-bronchodilator study being non-qualifying. Employer's Brief at 4. Thus, Employer asserts the ALJ's consideration of the pulmonary function evidence does not comply with the Administrative Procedure Act (APA).[10] *Id.* at 4-5, *citing* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We disagree.

The ALJ properly conducted both a qualitative and quantitative review of the evidence: he determined the studies were all valid and then reasonably concluded that a preponderance of them establish disability since the majority -- including the overwhelming number of the most recent tests -- are qualifying. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 10-11. The ALJ considered all relevant evidence, and substantial evidence supports his conclusion. Nothing more is required. *See* 30 U.S.C. §932(a); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Wojtowicz*, 12 BLR at 1-165.

At best, the pre-bronchodilator values are in equipoise, with four qualifying and four non-qualifying results; there are five qualifying post-bronchodilator results compared to only one non-qualifying post-bronchodilator result. *Id.* at 5-6, 10-11. Considering the total number of results, there are nine qualifying and five non-qualifying. *Id.* Considering the most recent tests taken in a seven-month period in 2017, which all postdate the next most recent test by at least eight months and as much as fourteen months, there are seven qualifying results and only one non-qualifying result. *Id.* Considering the most recent tests taken within a three-month period between July 2017 and September 2017, there are five qualifying results and only one non-qualifying result. *Id.*

Finding all of the tests qualitatively valid, the ALJ was well within his authority in finding the weight or simple majority of them -- both overall and most recent -- were qualifying quantitatively. *See Sunny Ridge Min. Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). His analysis is direct and leaves no unresolved conflict in this evidence. *Id.* Because it is supported by

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

substantial evidence, we therefore affirm Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Looney*, 678 F.3d at 316-17 (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); Decision and Order at 10-11.

Our colleague's insistence that we should remand this case for the ALJ to explain why the single non-qualifying pre-bronchodilator test in September 2017 does not outweigh the rest of the qualifying pulmonary function testing or why Claimant met her burden when there are an equal number of qualifying and nonqualifying pre-bronchodilator results and a preponderance of qualifying post-bronchodilator results thus is puzzling.

First, as Claimant points out in her brief, Employer did not argue to the ALJ that a single test should prevail or outweigh the rest of the qualifying pulmonary function testing, as it does now. *See* Employer's Post Hearing Brief; Claimant's Brief at 4-5 (noting that the only arguments raised below were "questions about the validity of the tests" that the ALJ "addressed"). As the ALJ's qualitative and quantitative reasoning was valid, he was under no further obligation to address and refute an argument not presented to him, and neither Employer nor our colleague has attempted to establish why he was required to address this one in particular -- or, indeed, how he could even anticipate the argument in order to refute it. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (parties forfeit arguments before the Board not first raised to the ALJ).

Second, even if we were to consider the argument for the first time on appeal, using recency to evaluate results is only logical when a miner's condition deteriorates, because that is consistent with the progressive nature of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the "progressive nature of pneumoconiosis"). On the other hand, when a result allegedly shows a miner's condition has improved, "either the earlier or the later result *must* be wrong," "it is just as likely that the later evidence is faulty as the earlier", and the ALJ then has to reconcile the results "without reference to their chronological relationship." *Id.* at 52. Thus, contrary to what Employer and our colleague assert here, crediting a non-qualifying test result based on its mere recency thus simply is not logical. And mere recency is the only reason Employer asserts for crediting the September 2017 pre-bronchodilator test over all the rest. *Id.*; *see also Keathley*, 773 F.3d at 740; *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993); *Woodward*, 991 F.2d at 320.

Third, even if *that* were not the case, neither Employer nor our colleague has attempted to logically explain why the single non-qualifying September 2017 test is

entitled to more weight than the other essentially contemporaneous tests taken in 2017, particularly where three of the four 2017 pre-bronchodilator tests were qualifying and all four 2017 post-bronchodilator tests were qualifying. *See Keathley*, 773 F.3d at 740 (affirming total disability where four tests conducted within seven months were "sufficiently contemporaneous" and the preponderance of most recent tests qualified for total disability); *Thorn*, 3 F.3d at 719 (imputing selective reliability to highest test results among valid pulmonary function tests is speculative); *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (two months between tests is "insignificant when evaluating a slowly-progressing condition like pneumoconiosis."). Indeed, even if the ALJ in his discretion were to further provide more weight to the pre-bronchodilator tests -- as our colleague posits, he *might* do on remand -- the most recent pre-bronchodilator tests still overwhelmingly support disability, whether the six-month range is considered for all the 2017 tests, or the final three-month period is considered. *Id.*[11]

Finally, our colleague's suggestion that the ALJ miscounted the tests in a way that affects his rationale is misleading: the ALJ miscounted a single non-qualifying test twice and interpreted a nonqualifying test as qualifying. *See* n.6, n.8. The errors are harmless as they do not affect his determination that the preponderance of the evidence (a majority of the tests) still support disability. *See Larioni*, 6 BLR at 1-1278. Our colleague now

[11] While the Department of Labor (DOL) has generally cautioned against exclusively relying on post-bronchodilator results in assessing disability, it is because the question in the disability inquiry is whether the miner can do her usual work, not whether she can do it with the aid of medication. 20 C.F.R. §718.204(b)(1). For that reason, the DOL changed the regulation to require that if a bronchodilator is administered, "tests must be done both before and after its use." 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980). Here, five out of six post-bronchodilator results were qualifying, so the concern that they may misdiagnose Claimant as being able to perform her work when she is dependent on medication to do so is not an issue. In this instance, the post-bronchodilator results instead categorically add some weight to the qualifying results and the trend of a progressing disability. *Had Employer raised the preamble argument below*, the ALJ in his discretion thus would have had to unreasonably assign no weight at all to the six post-bronchodilator results rather than simply assigning greater weight to the pre-bronchodilator results, and further ignored the trend established by the clear majority of the most recent pre-bronchodilator results and all of the post-bronchodilator results, for Claimant not to meet her burden. It is not the case that the ALJ would have to treat the pre- and post-bronchodilator tests equally to establish disability as our colleague suggests, it is that he would have to ignore the post-bronchodilator tests completely to deny disability, which is not reasonable in these circumstances.

suggests on appeal that the ALJ *could have* found the pre-bronchodilator tests in equipoise with the post-bronchodilator tests had he counted the tests accurately. But Employer did not argue below that the Miner did not meet hers burden because of the equal amount of pre and post-bronchodilator tests. It argued only that if the valid tests were counted, there was a majority of non-qualifying tests and that the tests reflected uncontrolled asthma, not disability. Employer's Post Hearing Brief at 9-10. Having rejected the argument that any of the tests were invalid and crediting the overwhelming number of qualifying results under the regulations, the ALJ was under no obligation to discuss a theory Employer did not raise below and suggested only by our colleague on appeal.

Ultimately, our colleague's suggestion that we are creating a rationale for the ALJ has it backwards. Rather than injecting one, we instead accept the ALJ's qualitative review that all of the pulmonary function tests are valid, which no party challenges, and his quantitative review that the majority of the valid tests support disability, as logic and the law require. *See Keathley*, 773 F.3d at 740; *Woodward*, 991 F.2d at 321. It is our colleague's suggestion that we must remand this case for the ALJ to further refute a fundamentally flawed argument not presented to him originally and to further instruct him to interpret the pre-bronchodilator results in a light Employer has never suggested that misinterprets the Board's scope of review. 33 U.S.C. §921(b)(3); as incorporated by 30 U.S.C. §932(a); *O'Keeffe,* 380 U.S. at 359.[12]

[12] It is indisputable that the ALJ addressed the arguments presented to him below, considered all of the relevant evidence and, by accepting that the majority of the valid results were qualifying, provided substantial evidence for his decision. Nothing more is required under the case law or regulations. *See Keathley*, 773 F.3d at 740; 20 C.F.R. §718.204(b)(2). Contrary to our colleague's assertions, we thus have not suggested other ways he might have resolved the evidence, but only affirmed the direct manner in which he did. *Id.* Moreover, rather than creating further straw man arguments, we have addressed the problems we see with the new arguments Employer and our colleague have now asserted that were not raised below. In that regard, our colleague's suggestion that using the progressive nature of pneumoconiosis to reconcile evidentiary conflicts can only be used in evaluating x-ray evidence ignores the law -- because *Adkins* explicitly discussed the concept when evaluating pulmonary function tests as well as x-rays -- and simple logic -- because the regulations establish both legal and clinical pneumoconiosis can be progressively disabling. *See Adkins*, 958 F.2d at 51 (discussing the later is better rule in the context of pulmonary function tests); 20 C.F.R. § 718.201(c) (recognizing that by agency definition, pneumoconiosis "is a latent and progressing disease").

Medical Opinions and Weighing Evidence as Whole

The ALJ discredited all of the medical opinions and found Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Considering the evidence as a whole, the ALJ found "no physician has offered an opinion that, from a respiratory standpoint, Claimant is unable to return to her most recent coal mine job" and thus "there is also no contrary probative evidence to rebut the presumption of total disability raised by her qualifying pulmonary function studies." Decision and Order at 11-12. Therefore, the ALJ concluded Claimant established total disability and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2).

Employer argues the ALJ erroneously gave Claimant a presumption of total disability based on the qualifying pulmonary function studies. Employer's Brief at 5-6. We disagree. The ALJ's reference to a "presumption" is harmless error as he correctly found there is no contrary probative evidence to outweigh the qualifying pulmonary function studies. *See Larioni*, 6 BLR at 1-1278. Having discredited all of the medical opinions, including those of Employer's experts who concluded Claimant is not totally disabled,[13] the only remaining evidence, other than the qualifying pulmonary functions studies, is the non-qualifying blood gas studies. Blood gas studies, however, measure a different form of impairment and do not constitute contrary probative evidence that outweigh qualifying pulmonary function studies. *See Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Consequently, we affirm the ALJ's determination that Claimant established total disability on the evidence as a whole. 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm his determination that Claimant invoked the Section 411(c)(4) presumption.[14] 20 C.F.R. §§718.204(b)(2), 718.305; Decision and Order at 12.

[13] The ALJ discredited both Dr. Goldstein's and Fino's opinions because they did not adequately address the qualifying pulmonary function studies. Decision and Order at 11. Because Employer fails to identify any specific error in the ALJ's credibility determinations with regard to its experts, we affirm them. *See Skrack*, 6 BLR at 1-711.

[14] We affirm, as unchallenged, the ALJ's finding that the Employer did not rebut the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711; Decision and Order at 12-16.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the award of benefits because I agree with Employer that the ALJ erred in finding Claimant established total disability based on the pulmonary function studies and in failing to weigh the evidence as a whole. 20 C.F.R. §718.204(b)(2). Consequently, I would remand this case for the required analyses and determinations.

The ALJ considered what he thought were nine pulmonary function studies which yielded five qualifying pre-bronchodilator results and four non-qualifying pre-bronchodilator results.[15] Decision and Order at 5-6. After concluding all the studies were

[15] The inquiry at 20 C.F.R. §718.204(b)(2)(i) endorsed by the Department of Labor is whether the Miner is totally disabled based on the pre-bronchodilator values; the Department has cautioned against reliance on post-bronchodilator results in determining total disability. 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."). The effect of the majority's approach in affirming the ALJ's total disability finding is to make the post-bronchodilator tests determinative, which is counter to DOL's position.

The majority adds a gloss, not included in the preamble to the DOL rulemaking, suggesting that DOL took its position because the question as to disability is not whether

valid, he summarily stated, "I find that absent contrary probative evidence, Claimant has established total disability by the preponderance of the pulmonary function study evidence."[16] Decision and Order at 11; *see* 20 C.F.R. §718.204(b)(2)(i). The Administrative Procedure Act (APA) requires every adjudicatory decision to include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Here the ALJ made findings and conclusions but did not supply the required explanation. Employer correctly contends the ALJ's total disability determination is "not supported by any discussion regarding the weights he assigned to any of the studies," including the most recent non-qualifying pre-bronchodilator test. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165; Employer's Brief at 4-5. The ALJ's failure to provide an explanation for his conclusion is of particular importance because he erroneously counted nine tests when there were only eight, and considered a non-qualifying test result to be qualifying.[17] The consequence of this error was that he considered five qualifying pre-bronchodilator tests and four non-qualifying pre-bronchodilator tests when in reality there were four qualifying pre-bronchodilator tests and an *equal* number of non-qualifying pre-bronchodilator tests *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994) (evidence in equipoise does not carry burden of proof).

Although the majority dismisses these errors as harmless and rationalizes that the ALJ's overall finding of total disability is supported by substantial evidence, they do so by drawing their *own* inferences as to how the pulmonary function study evidence should be weighed. But that is not within our purview and fails to take into account the discretion

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the miner can perform her usual coal mine employment when he takes bronchodilator medication. However, the majority fails to extend its logic fully to the particulars of the case before us, i.e. the question here also is not whether the miner is *unable* to perform her usual coal mine employment when she takes bronchodilator medication. As the majority concedes, the question is whether the miner is unable to perform her usual coal mine employment, and the Department's stated position is simply that disability should be assessed without use of a bronchodilator.

[16] The majority accurately notes that the ALJ relied on nine pulmonary function studies in finding Claimant was totally disabled despite there only being eight studies of record and incorrectly concluded that the July 1, 2016 study was qualifying.

[17] As my colleagues note, the ALJ erroneously added a test and considered the July 1, 2016 test to be qualifying when it was not.

exercised by the ALJ.[18] *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

It is the ALJ's duty to weigh the evidence, resolving conflicts in the evidence, and determining credibility. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d

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[18] For example, if the ALJ focuses on the pre-bronchodilator tests (in accordance with the Department's caution against using post-bronchodilator results to determine disability) and assigns the same weight to each test, his conclusion would be in error -- because in actuality there were an equal number of qualifying and non-qualifying pre-bronchodilator tests. The result of correctly weighing the pre-bronchodilator tests (an even number of qualifying and non-qualifying tests), would mitigate against finding total respiratory or pulmonary disability because Claimant has the burden of proof on the issue. To the contrary, if the ALJ uses the majority's initial weighing, and gives all the post-bronchodilator tests equal weight with all the pre-bronchodilator tests (assuming, despite the Department's statements to the contrary, there is an appropriate explanation for so doing)) the results favor finding total respiratory or pulmonary disability established. Moreover, these are not the only possible ways in which the pulmonary function evidence could be weighed. Indeed, the majority goes on to suggest additional variations which are also within the purview of the ALJ, not the Board, but do not exhaust the possible approaches. (One being, as Employer suggested below, that the variability of the test results evidences a transient impairment that is not totally disabling and has actually improved to the point of normality.) Finally, the majority sets up a straw-man single latest test for the purpose of knocking it down. Although even that argument rests on defective logic since it relies on holdings relating to x-ray evidence as to the existence of pneumoconiosis--where a later negative x-ray cannot be right based on recency *alone* where there is an earlier positive x-ray because pneumoconiosis accurately shown on x-ray cannot disappear unless it is physically excised. To the contrary, pulmonary or respiratory condition can change, e.g. because the previously qualifying testing didn't actually reflect a totally disabling pneumoconiosis or other chronic condition (but instead something transient) or because the previous testing reflected coal dust aggravating an underlying condition which has itself improved.) We should not be creating an explanation for the ALJ's determination when the ALJ himself must do so. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (When the ALJ fails to make necessary factual findings, the proper course for the Board is to remand the case to the ALJ rather than attempt to fill the gaps in the ALJ's opinion). The majority's approach exceeds the Board's scope of review and substitutes speculation for his required explanation. *Id*. Only with the ALJ's actual explanation before us can we properly judge whether the ALJ acted within his discretion and reached an affirmable result. Without that explanation we cannot determine and the parties (and public) cannot see whether fair and proper adjudication occurred. The ALJ's failure to explain was unknowable until his decision was issued. Employer has

977, 992 (11th Cir. 2004); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 1367 (11th Cir. 1997). Further, the APA requires the ALJ to provide an explanation for his findings and conclusions. 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165. Because the ALJ's summary analysis of the pulmonary function study evidence does not satisfy the APA, and, without the explanation the APA requires, we cannot determine whether he properly reached his conclusion, I would vacate his finding at 20 C.F.R. §718.204(b)(2)(i). *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 5-6.

The record also contains four medical opinions. To the extent the ALJ's findings regarding the pulmonary function study evidence may have influenced his weighing of the medical opinion evidence, I would vacate his determination at 20 C.F.R. §718.204(b)(2)(iv).

The ALJ's errors in this case are not harmless because Claimant has the burden to affirmatively prove he is totally disabled. *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). The ALJ misstated the evidence and offered no explanation of how he weighed the pulmonary function studies, thereby affecting the remainder of his analysis of whether Claimant establish total disability at 20 C.F.R. §718.204(b). Thus, I would vacate the award of benefits and remand the case for the ALJ to correctly characterize the evidence, explain the weight he accords the pulmonary function studies and the medical opinions, and properly weigh the evidence as a whole as to whether Claimant is totally disabled. *See* 20 C.F.R. §718.204(b)(2); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR

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properly raised the issue to us. Accordingly, we should remand the case for the required explanation.

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).

Further, I would instruct the ALJ on remand to explain the bases for all of his credibility determinations, setting forth in detail how he resolves the conflicts in the evidence, as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

For these reasons I respectfully dissent.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge