U.S. Department of Labor

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

BRB No. 21-0586 BLA

DONALD R. THORNTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ENERGY PLUS, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/16/2023
	)	
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 Denying Benefits on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Cameron Blair (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

ROLFE and JONES, Administrative Appeals Judges:

Claimant appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Denying Benefits on Remand (2018-BLA-05470) rendered on a subsequent claim filed on July 18, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case is before the Benefits Review Board for the second time.

In her initial Decision and Order Denying Benefits, the ALJ credited Claimant with 15.44 years of underground coal mine employment and found the new evidence establishes the existence of clinical and legal pneumoconiosis. 20 C.F.R. §718.202(a). She therefore found Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[2] She further found, however, that Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus she found Claimant failed to invoke the presumption of total disability due to pneumoconiosis at Section

[1] On March 21, 2011, the district director denied Claimant's prior claim, filed on July 29, 2010, because he failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until filing the current claim. Director's Exhibit 3.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds "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. §725.209(c)(3). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *Id.*

411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Based on Claimant's failure to establish an essential element of entitlement,[4] she denied benefits.

Pursuant to an appeal by the Director, Office of Workers' Compensation Programs (Director), the Board affirmed the ALJ's findings Claimant established 15.44 years of underground coal mine employment, pneumoconiosis arising out of coal mine employment, and a change in an applicable condition of entitlement, and that he did not establish complicated pneumoconiosis. The Board vacated, however, the ALJ's finding that the arterial blood gas studies and medical opinions do not establish total disability. 20 C.F.R. §718.204(b)(2)(ii), (iv). The Board held she did not adequately explain, as the Administrative Procedure Act (APA) requires,[5] her conclusion the blood gas studies do not support a finding of total disability. Because her evaluation of the medical opinion evidence relied on her conclusion the blood gas studies do not support a finding of total disability, the Board also vacated her finding the medical opinion evidence does not establish total disability and her finding that Claimant failed to invoke the Section 411(c)(4) presumption. Thus, the Board remanded the case for further consideration. *Thornton v. Energy Plus, Inc.*, BRB No. 19-0503 BLA, slip op. at 5-6 (Sept. 9, 2020) (unpub.).

On remand, the ALJ again found the blood gas study and medical opinion evidence do not establish total disability and denied benefits. 20 C.F.R. §718.204(b)(2)(ii), (iv).

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability and thus did not invoke the Section 411(c)(4) presumption. Employer and its Carrier (Employer) did not file a response. The Director responds in support of Claimant's argument that the ALJ erred in weighing the evidence on the issue of total disability.

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

[4] Because Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304, the ALJ also found he 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).

[5] The APA requires 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).

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 362 (1965).

To invoke the Section 411(c)(4) presumption, a 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. 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). Claimant challenges the ALJ's finding he failed to establish total disability based on the blood gas studies and medical opinions.[7]

Arterial Blood Gas Studies

The ALJ considered four blood gas studies dated November 3, 2016,[8] September 22, 2017, September 6, 2018, and September 17, 2018. Director's Exhibits 15, 22; Claimant's Exhibits 1, 2. The November 3, 2016 and September 6, 2018 studies produced

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6; Hearing Transcript at 18.

[7] In her initial decision, the ALJ found the new pulmonary function studies do not establish total disability, as none of the studies produced qualifying values. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 17; Director's Exhibits 15, 22; Claimant's Exhibits 1, 2. Because she found no evidence of cor pulmonale with right-sided congestive heart failure, she also found total disability was not established under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 18.

[8] The ALJ rejected Employer's argument and found the November 3, 2016 study valid. Decision and Order on Remand at 5-6.

non-qualifying[9] values at rest and qualifying values with exercise. Director's Exhibit 15; Claimant's Exhibit 2. The September 22, 2017 study produced non-qualifying values both at rest and with exercise. Director's Exhibit 22. Finally, the September 17, 2018 study produced non-qualifying values at rest, and no exercise study was performed. Claimant's Exhibit 1.

The ALJ found the most recent blood gas studies are greater indicators of Claimant's current condition. Decision and Order on Remand at 4-5. Applying that rationale, she disregarded the November 3, 2016 blood gas study "as more remote" in time from the other studies. *Id*. She found the September 22, 2017, September 6, 2018, and September 17, 2018 blood gas studies are "more contemporaneous" with one another and are entitled to greater probative weight because they are more recent. *Id*. Because these "contemporaneous" studies include three non-qualifying resting studies, one non-qualifying exercise study, and one qualifying exercise study, she found the preponderance of the blood gas study evidence does not establish total disability "even assuming exercise [blood gas] studies may be more probative of [Claimant's] ability to perform" his usual coal mine employment. *Id*. at 4-5.

We agree with Claimant that the ALJ did not satisfy the explanatory requirements of the APA as she again failed to adequately explain how she resolved the conflict in the blood gas study evidence. Claimant's Brief at 8-14. An ALJ must consider all of the relevant evidence and apply the same level of scrutiny in determining the credibility of the blood gas study evidence. 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc).

Claimant performed the November 3, 2016 study 323 days before the September 22, 2017 study. As discussed above, the ALJ found these studies too "remote" in time from one another. Decision and Order on Remand at 4-5. Claimant, in turn, performed the September 22, 2017 study 349 days before the September 6, 2018 study. The ALJ found these studies "contemporaneous" with one another. *Id*. More time, however, separates the September 22, 2017 and September 6, 2018 studies than separates the November 3, 2016 and September 22, 2017 studies. The ALJ did not explain why the November 3, 2016 study is "remote" in time from the other studies, but the September 22, 2017 study is "more contemporaneous" with the 2018 studies. *See Sea "B" Mining Co. v.*

[9] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

Addison, 831 F.3d 244, 256-57 (4th Cir. 2016); *Hughes*, 21 BLR at 1-139-40; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

> This error is not harmless. Had the ALJ credited the exercise studies over the resting studies[10] and then assigned greater weight to the more recent testing of record, she could have found the September 6, 2018 qualifying exercise study entitled to more probative weight because it is the most recent blood gas study that contains results taken during exercise.

Regardless, the ALJ erred in evaluating the blood gas studies on recency alone. Decision and Order on Remand at 4 ("As previously noted, the more recent evidence should be afforded greater weight as more indicative of Claimant's condition at the time of the hearing in December 2018"). Instead, a long line of circuit court cases requires that ALJs must evaluate disability evidence both qualitatively and quantitively, without resorting to mechanically crediting later evidence and, when a miner's condition improves, without reference to its chronological order.[11] *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (given the progressive nature of pneumoconiosis, an ALJ must resolve conflicting evidence when the miner's condition improves "without reference to their chronological relationship"); *see also, Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th

[10] It is unclear if the ALJ has credited the exercise studies over the resting studies. She stated "even assuming exercise [blood gas] studies may be more probative of [Claimant's] ability to perform" his usual coal mine employment, the preponderance of the arterial blood gas studies does not establish total disability. Decision and Order on Remand at 4-5. Thus, while she acknowledged exercise studies may be more probative of Claimant's ability to perform his usual coal mine employment, which she found required heavy labor, the ALJ erroneously reverted to relying on the numerical superiority of the non-qualifying blood gas studies without explanation. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[11] The only case the ALJ cites for the proposition that evidence can be evaluated based on its proximity to the hearing, *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(en banc), predates these controlling cases. It merely concludes in a single sentence that in the circumstances of that case it was appropriate to credit a more recent x-ray establishing pneumoconiosis. *Clark*, 12 BLR at 1-152. Nowhere does *Clark* establish the sweeping proposition that all evidence can be favored given its proximity to the hearing, which on its face would violate this subsequent controlling precedent. *See, e.g., Adkins*, 958 F.2d 51-52 ("Later is better is not a reasoned explanation.").

Cir. 1993) ("A bare appeal to recency" in evaluating medical opinions "is an abdication of rational decision-making."); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (same); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJs must do a qualitative analysis of conflicting disability evidence).[12]

The ALJ further failed to follow our instructions in weighing Dr. Raj's September 17, 2018 blood gas study. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 267 (4th Cir. 2002); *Thornton*, BRB No. 19-0503 BLA, slip op. at 5-6. She observed Dr. Raj did not conduct

[12] Notably, our colleague's attempt to distinguish this binding circuit precedent, n.15, is utterly unavailing for several reasons. *First*, counter to our colleague's presentation of the facts, the ALJ explicitly held she was crediting the blood gas studies on the basis of recency alone. *See, e.g.*, Decision and Order on Remand at 4 (discussing how she resolved the conflict in the ABG studies pursuant to the Board's remand, "Here is [the] explanation: . . . the more recent evidence should be afforded greater weight as more indicative of Claimant's condition at the time of the hearing in December 2018."). *Second*, as a matter of law, these cases by their plain terms and logic apply to a claimant's condition, and not only to whether x-rays show the presence of clinical pneumoconiosis, as our colleague baldly asserts. The *Adkins* court, for example, held it was expressly making clear what it declined to do in earlier cases -- including cases dealing with pulmonary functions tests -- mandating that "later is better" does not work in evaluating *any* "evidence" when the miner's condition improves. 958 F.2d at 51. It made no attempt to limit that holding to x-rays and expressly held that when, as here, a miner's condition gets better the theory "cannot have any logical force." *Id.* As our colleague reluctantly admits, the *Thorn* court applied the concept to medical opinions -- after noting that in *Adkins* "we struck down, as arbitrary and irrational, the practice of blindly ascribing more weight to the most recent *evidence*." 3 F.3d at 718 (emphasis added). *Woodward* repeatedly refers to "test and exams," rather than just x-rays, and explicitly concludes later is better only works where "the evidence on its face shows the miner's condition has worsened." 991 F.2d at 319. And our colleague's take that *Keathley* did not require ALJs to perform qualitative reviews of evidence is just plain wrong: the court expressly concluded that *Woodward* "contemplated the consideration of quantitative differences in evidence *so long as qualitative differences were also considered.*" 773 F.3d at 740 (emphasis added). *Finally*, the majority of our colleague's critique in n.15 -- which argues it is inappropriate to credit more recent evidence when a miner's condition *deteriorates* because a miner's results can fluctuate on respiratory tests -- simply doesn't apply here: *the ALJ credited more recent blood gas studies showing an improvement, not the other way around*. So while our colleague's critique plainly flies in the face of the unambiguous central holding of these cases regarding the progressive nature of pneumoconiosis, it is also wholly irrelevant in this instance.

an exercise study because of Claimant's "resting hypoxemia and exertional chest pain." Decision and Order on Remand at 5; Claimant's Exhibit 1. She then found his decision to not conduct an exercise study has no effect on her weighing of the blood gas study evidence because the regulations do not require an exercise study be administered where it is medically contraindicated. Decision on Remand at 5. She failed, however, to address whether Dr. Raj's reasons for not conducting an exercise blood gas study, that Claimant had resting hypoxemia and exertional chest pain, supports a finding that he has a totally disabling respiratory or pulmonary impairment. *See Wojtowicz*, 12 BLR at 1-165; Claimant's Exhibit 1.

We therefore vacate the ALJ's finding Claimant did not stablish total disability at 20 C.F.R. §718.204(b)(2)(ii), and remand for her to reconsider the blood gas studies in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Medical Opinions

The ALJ next considered the opinions of Drs. Habre, Raj, and Green that Claimant is totally disabled and Dr. Zaldivar's opinion that he is not. Director's Exhibits 15, 22; Claimant's Exhibits 1, 2. She found the opinions of Drs. Habre, Raj, and Green are not well-documented, and Dr. Zaldivar's opinion is not credible because he had an inaccurate understanding of Claimant's exertional requirements. Decision and Order on Remand 6. Thus she found there are no credible medical opinions on the issue of total disability. *Id.*

Claimant and the Director argue the ALJ erred in discrediting the opinions of Drs. Habre, Raj, and Green. Claimant's Brief at 8-9, 15-17; Director's Reply at 1-3. We agree.

Dr. Habre recognized that Claimant worked "as a roof bolter, foreman, scoop operator, and buggy operator" in underground mines. Director's Exhibit 15 at 3. After summarizing Claimant's x-rays, pulmonary function studies, and arterial blood gas studies, he concluded Claimant has a "disabling lung disease with abnormal gas transfer. [He] does not have pulmonary capacity to perform his last coal mine job. He will not be able to perform strenuous activity and he met the disability criteria." *Id*. at 4-5.

Dr. Raj stated Claimant worked underground "as a foreman [and] equipment operator" and he "lifted 50-100 pounds at any given time. . . . [He] had heavy level of exertion in this job." Claimant's Exhibit 1 at 1. He noted Claimant's x-ray shows progressive massive fibrosis, resting and exercise blood gas testing is consistent with "severe hypoxemia," and pulmonary function testing reveals a "moderate obstructive defect." *Id*. at 3-4. He concluded Claimant has a pulmonary impairment and his "physical capacity is greatly diminished due to total disability resulting from [the] pulmonary impairment." *Id*. He explained Claimant "gets short of breath walking about 50 feet of distance uphill. With such a reduced physical capacity resulting from pulmonary

impairment, [Claimant] cannot meet the exertional requirement of his last coal mine employment job." *Id*.

Dr. Green also recognized Claimant worked underground operating equipment and working as foreman, and stated Claimant lifted "50 to 100 pounds at any given time." Claimant's Exhibit 2 at 1. After summarizing Claimant's objective testing, he opined Claimant is totally disabled as follows:

> [Claimant] is totally disabled from a pulmonary capacity standpoint. He does demonstrate significant hypoxemia with exercise. He is totally disabled from a pulmonary capacity standpoint on the basis of the pH of 7.40, pCO2 33 and a pO2 of 58 during exercise. This gentleman could not perform the duties of his previous coal mine employment. It would be harmful for this gentlemen to return to the underground environment with continued exposure to respirable coal and rock dust and continued performance of heavy labor given his significant exercise induced hypoxemia. This gentleman actually shows significant hypoxemia at rest. He does however demonstrate qualifying hypoxemia with exercise. It would be harmful for him to return to his previous coal mine employment with the degree of hypoxemia that has been demonstrated at rest and with exercise.

Id. at 4. In a separate paragraph, he also opined Claimant "is totally disabled from the pulmonary capacity standpoint on the basis of the radiographic findings of large A opacity consistent with progressive massive fibrosis." *Id*.

The ALJ found Drs. Raj and Green "predicated their opinions on total disability, in part, on chest x-ray evidence of large opacity findings (i.e., complicated pneumoconiosis), and Dr. Habre predicated his opinion on total disability in part on chest x-ray evidence of simple pneumoconiosis." Decision and Order on Remand at 6. She concluded all three opinions are not "well-supported to the extent [they are] based on such chest x-ray evidence" as she had found the "chest x-ray evidence of record was in equipoise on the issue of both complicated and simple pneumoconiosis."[13] *Id*.

We agree with Claimant and the Director that the ALJ erred in weighing these opinions. Contrary to the ALJ's analysis, Dr. Habre merely summarized the chest x-ray evidence of clinical pneumoconiosis and Dr. Raj the x-ray evidence of progressive massive fibrosis, but neither doctor opined Claimant is totally disabled based on the results of the x-rays. Director's Exhibit 15; Claimant's Exhibit 1. Both doctors explained why Claimant

[13] We note the ALJ specifically found the November 3, 2016 x-ray which Dr. Habre reviewed is positive for clinical pneumoconiosis. Decision and Order at 24.

could not perform his usual coal mine employment based on the results of arterial blood gas testing that demonstrates hypoxemia. *Id.* Thus substantial evidence does not support the ALJ's basis for discredited their opinions. *Addison*, 831 F.3d at 256-57; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

Further, Dr. Green opined Claimant is totally disabled by progressive massive fibrosis on x-ray, but he rendered a separate basis for diagnosing total disability – the results of arterial blood gas testing evidencing hypoxemia. Claimant's Exhibit 2. The ALJ erred in failing to address this aspect of his opinion. *See* 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *Addison*, 831 F.3d at 252-53; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand).

Thus we vacate her finding Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of the medical opinion evidence.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. She must initially reconsider the blood gas studies and provide an adequate rationale for how she resolves the conflict in the relevant evidence. She must also explain the weight she accords the conflicting medical opinions of Drs. Green, Habre, Raj, and Zaldivar on total disability based on her consideration of the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgements, and the sophistication of and bases for their conclusions. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. If the ALJ finds either the blood gas studies or medical opinions support a finding of total disability, she must weigh all of the relevant evidence together to determine whether Claimant is totally disabled and can invoke the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). The ALJ must explain the bases for her credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must reconsider whether Employer can rebut it.[14] 20 C.F.R. §718.305(d)(1); *Minich v. Keystone Coal*

[14] If Claimant invokes the Section 411(c)(4) presumption, the burden shifts to Employer to establish he has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in

Mining Corp., 25 BLR 1-149, 1-150 (2015). Alternatively, if the ALJ finds Claimant is not totally disabled, he will have failed to establish an essential element of entitlement and the ALJ may reinstate the denial of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I write in concurrence with my colleagues for purposes of clarification. I agree with my colleagues that remand is required for adequate explanation of the ALJ's determinations regarding the arterial blood gas studies and consideration of all relevant evidence relating to the medical opinions. However, although she has a duty of explanation under the Administrative Procedure Act, and an obligation to consider all relevant evidence, the ALJ also has considerable discretion in making findings, weighing the evidence, and reaching determinations. She is not required to weigh exercise studies more heavily than resting studies. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (it is within the ALJ's discretion to find a particular study more probative than another study). Moreover, she may consider the number of qualifying versus non-qualifying studies in conjunction with other relevant considerations in her weighing of the evidence. *See Sea*

[20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). Because we have affirmed the ALJ's finding that Claimant has pneumoconiosis, the only avenue for Employer would be to establish "no part of [his] 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).

"B" Mining Co. v. Addison, 831 F.3d 244, 252-54 (4th Cir. 2016) (an ALJ must weigh the quality, not just the quantity, of the evidence); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (an ALJ may consider "quantitative differences in the evidence so long as qualitative differences [are] also considered"). Further, in defining the term "remote" she may consider the extent to which a study performed in the past may reflect Claimant's condition, in the sense of that condition being total and permanent. *See Gray v. Director, OWCP*, 943 F.2d 513, 521 (4th Cir. 1991); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988).[15] Finally, I note that the Board's previous opinion

[15] The majority overstates the holdings in the cases it cites, to the extent it contends consideration of chronology is precluded with respect to all evidence when it does not point toward establishing the existence of pneumoconiosis. The ALJ must consider all relevant evidence; however, the ALJ has discretion in determining the weight to give that evidence, provided the ALJ does so appropriately and with adequate explanation. *Adkins* pertained to x-rays. *See Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992). In the case of x-rays, an earlier positive interpretation is incompatible with a later negative interpretation because once a miner has the disease it does not disappear, absent surgical removal. *See Adkins*, 958 F.2d at 51-52. Both the earlier positive reading and the later negative one cannot be correct. *Id.* To the contrary, valid respiratory or pulmonary testing results which are qualifying at an earlier time and non-qualifying at a later time can be compatible because the miner's respiratory or pulmonary condition can indeed change. Given that coal dust can be aggravating another respiratory or pulmonary impairment to produce a qualifying test result, when the non-coal dust-related impairment is reduced or eliminated, it is possible for the result to be non-qualifying and for the miner to be not totally disabled. Further, it is possible for the earlier result to have been wholly non-coal-dust related and thus not present subsequently. Both the earlier testing result and the later testing result can be correct. *Thorn* extended *Adkins* to medical opinions and precluded use of recency as a *sole criterion* for preference in that regard, expressly stating that a medical opinion considering later developed evidence may rationally be given precedence in appropriate circumstances. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993). Moreover, these cases cite the true doubt rule as a rationale for their holdings. Since the true doubt rule was eliminated by the Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994), an approach founded on giving greater weight to later evidence only when it favors Claimant is suspect. Further, the Sixth Circuit's *Keathley* case did not say that qualitative differences must always be considered; rather, it said, "It is unnecessary to decide whether [*Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), which related to x-rays and precluded a mere headcount of x-ray interpretations,] should be extended to pulmonary function tests, because even if *Woodward* applies, the ALJ satisfied *Woodward's* standard." *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (emphasis supplied).

did not specifically single out for further explanation or consideration the comments of Dr. Raj regarding the reasons he did not offer an exercise test, and that those reasons – chest pain and hypoxemia – would not by themselves qualify as evidence establishing total respiratory or pulmonary disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34 (4th Cir. 1998); *Wright v. Director, OWCP*, 8 BLR 1-245, 1-247 (1985); *Heaton v. Director, OWCP*, 6 BLR 1-1222, 1-1224 (1984); *Bushilla v. North American Coal Corp*., 6 BLR 1-365, 1-367 (1983).

JUDITH S. BOGGS
Administrative Appeals Judge