U.S. Department of Labor

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

BRB No. 22-0381 BLA

CHARLIE G. MEADE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED: 11/20/2023
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus and Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer.

Sarah M. Hurley (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: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

JONES, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand (2018-BLA-05437) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on February 27, 2017, and is before the Benefits Review Board for the second time.

In her initial Decision and Order Granting Benefits, the ALJ found Employer is the properly designated responsible operator. She credited Claimant with 11.91 years of coal mine employment; thus, she found Claimant could not invoke 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] Considering entitlement under 20 C.F.R. Part 718, she concluded that Claimant established all elements of entitlement and therefore awarded benefits.

Pursuant to Employer's appeal, the Board vacated the ALJ's finding that Employer is the responsible operator and remanded the case for reconsideration of the issue.[2] *Meade v. Eastover Mining Co.*, BRB No. 20-0153 BLA, slip op. at 4 (Apr. 28, 2021) (unpub.). Consequently, the Board instructed the ALJ to determine whether Employer was properly designated as the responsible operator pursuant to 20 C.F.R. §725.495 and explain her reasoning. *Id.*

On remand, the ALJ found Employer met its burden to prove it was improperly designated as the responsible operator. She determined Bodie Mining Company, Inc. (Bodie Mining) was Claimant's last coal mine employer for at least one year and is financially capable of assuming liability. Thus, finding Employer is not the properly designated responsible operator, the ALJ determined liability should transfer to the Black Lung Disability Trust Fund (Trust Fund).

On appeal, the Director argues the ALJ erred in finding Employer was incorrectly named as the responsible operator and thus in transferring liability to the Trust Fund.

[1] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] The Board declined to address Employer's arguments on the merits of entitlement as premature. *Meade v. Eastover Mining Co.*, BRB No. 20-0153 BLA, slip op. at 4 (Apr. 28, 2021) (unpub.).

Employer responds,[3] arguing the ALJ properly dismissed it as the responsible operator. Claimant has not filed a response.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965).

Responsible Operator[6]

The responsible operator is the potentially liable operator that most recently employed the miner.[7] 20 C.F.R. §725.495(a)(1). The district director is initially charged

[3] The Board dismissed Employer's cross-appeal as untimely. *See Meade v. Eastover Mining Co.*, BRB No. 22-0318 BLA/A (Sept. 19, 2022) (Order). Employer filed subsequent correspondence alleging it timely filed its cross-appeal but acknowledging that a cross-appeal on the merits of entitlement was "protective" and may be premature. Sept. 20, 2022 Corresp.; Oct. 5, 2022 Corresp. The Board advised that a cross-appeal was not necessary under the circumstances and Employer's arguments on the merits of entitlement raised in its prior appeal would be addressed if the ALJ's findings regarding the responsible operator were vacated or reversed. Sept. 7, 2023 Corresp.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant had 11.91 years of coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 5.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11; Director's Exhibit 8.

[6] All panel members join this portion of the decision.

[7] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2).

If the district director fails to identify the proper responsible operator prior to the claim's transfer to the Office of Administrative Law Judges, the improperly designated operator must be dismissed, and the Trust Fund must assume liability for benefits. 20 C.F.R. §725.407(d); *see Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 65 Fed. Reg. 79,920, 79,985 (Dec. 20, 2000) (regulations place "the risk that the district director has not named the proper operator on the [Trust Fund]").

The parties do not dispute that Employer is a potentially liable operator. 20 C.F.R. §§725.494(a)-(e), 725.495(c)(2); Decision and Order on Remand at 2 n.2. Thus, Employer can avoid liability only by establishing another financially capable operator more recently employed Claimant for at least one year. 20 C.F.R. §725.495(c); Decision and Order on Remand at 3.

In determining Claimant's length of employment with Bodie Mining, the ALJ considered Claimant's answers to Employer's interrogatories, Claimant's testimony, Claimant's Social Security Administration (SSA) earnings record, and information Claimant provided on the CM-911a and CM-913 forms in his application for benefits. Decision and Order on Remand at 4-5; Director's Exhibits 2, 4, 8, 32; Hearing Transcript at 10, 16. Noting that Claimant's SSA earnings record shows earnings in 1990, while Claimant's testimony and claim application indicated he ceased working in 1989 due to an injury, she found the evidence "conflicting" and insufficient to establish the exact beginning and ending dates of Claimant's employment with Bodie Mining. Decision and Order on Remand at 4. She therefore calculated the length of Claimant's employment with Bodie Mining using the formula at 20 C.F.R. §725.101(a)(32)(iii) and Claimant's SSA earnings record.[8] Decision and Order on Remand at 4. Based on her calculations, she

[8] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal

found Bodie Mining employed Claimant for 1.9 years.[9] *Id.* at 5. Also finding Bodie Mining capable of assuming liability,[10] the ALJ found it should have been named responsible operator, dismissed Employer as the responsible operator, and transferred liability to the Trust Fund. *Id.* at 5-6.

The Director argues the ALJ did not sufficiently consider the relevant evidence when finding the evidence does not establish the beginning and ending dates of Claimant's employment with Bodie Mining prior to applying the regulatory formula.[11] Specifically, he argues that Claimant consistently indicated his employment with Bodie Mining was for eleven months – from July 1988 until June 1989 – and his testimony is corroborated by documentary evidence that the ALJ failed to consider. Director's Brief at 8-9; Director's Exhibits 3, 7, 8. Thus, the Director requests remand.

Employer responds that the ALJ adequately addressed the conflicting evidence to find Claimant worked at Bodie Mining for at least one year and her findings are supported

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> mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*.

[9] The ALJ found Claimant worked for 2.03 years from 1988 through 1990 based on his SSA earnings record. Decision and Order on Remand at 5. However, she subtracted the 0.13 year calculated for 1990 based on Claimant's statement that he stopped working in 1989. *Id.*

[10] The ALJ found the Director failed to provide a statement in the record that Bodie Mining was uninsured at the time of Claimant's employment. Decision and Order on Remand at 3. In the absence of such a statement, it is presumed the most recent employer is financially capable of assuming liability. 20 C.F.R. §725.495(d); Decision and Order on Remand at 3. Thus, the ALJ found Bodie Mining capable of assuming liability. Decision and Order on Remand at 4. The Director does not challenge this finding; therefore, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[11] The Director does not challenge the ALJ's finding that use of the formula at 20 C.F.R. §725.101(a)(32)(iii) results in more than one year of coal mine employment with Bodie Mining; therefore, we affirm it. *See Skrack*, 6 BLR at 1-711.

by substantial evidence and comply with the regulations.[12] Employer's Response at 10-11. We agree that remand to address the responsible operator issue is again required.

The Administrative Procedure Act (APA) requires the ALJ to consider all relevant evidence in the record, and to set forth her "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 Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). As the Director argues, the ALJ failed to consider the letter to the United Mine Workers of America from Bodie Mining's accountant,[13] which if credited,[14] would establish the beginning and ending dates of Claimant's employment. *See Osborne*, 25 BLR at 1-204-05 (recognizing the preference for the use of direct evidence to compute the length of coal mine employment); Director's Exhibit 7.

Moreover, we are unable to decipher the ALJ's determinations regarding the evidence she did consider or whether she found it credible. As the Director argues, it seems

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[12] We reject Employer's argument that the Director forfeited his argument regarding Claimant's employment with Bodie Mining for failing to timely raise it. Employer's Response at 8-9. The Director argued in the prior appeal that Claimant testified to working eleven months with Bodie Mining. *See* Director's Response at 5; Decision and Order on Remand at 3 n.4; *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 574 (6th Cir. 2000) ("With respect to the Director's absence below, its absence before the Board does not preclude the Director from participating on appeal."). Further, contrary to the Employer's argument, the district director was not required to list more than one basis for disqualifying Bodie Mining as the responsible operator in the Proposed Decision and Order. Employer's Response at 8-9; *see* 20 C.F.R. §725.495(b)-(c).

[13] The September 24, 1991 letter from Mr. Hicok, Bodie Mining's certified public accountant, to the United Mine Workers of America concluded Claimant's employment with Bodie Mining began on July 13, 1988, and ended on June 22, 1989. Director's Brief at 8-9.

[14] Employer argues that Claimant's payroll records with Bodie Mining included with the September 24, 1991 letter do not support Mr. Hicok's conclusions regarding Claimant's beginning and ending dates of employment. Employer's Response at 6, 11 n.8. The ALJ, however, did not address this evidence and the Board is not permitted to make factual findings in the first instance. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). It is the ALJ's responsibility to do so.

the ALJ found Claimant's testimony and statements that he did not work in 1990 to be credible, as she excluded the calculation obtained for that year from Claimant's SSA earnings record from her overall calculation, but she did not address what weight, if any, she provided his testimony that he worked only eleven months for Bodie Mining.[15] Director's Brief at 9-10; Decision and Order on Remand at 4-5. Because the ALJ did not adequately explain how she evaluated and weighed the evidence, remand is also required for her to provide the bases for her determinations. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012) (it is the ALJ's duty, not the responsibility of the courts, to make findings of fact and to resolve conflicts in the evidence).

We therefore vacate the ALJ's responsible operator determination and dismissal of Employer. Decision and Order on Remand at 5-6. In the event the ALJ again finds Employer the properly named responsible operator, we next address Employer's arguments on the merits of entitlement pursuant to 20 C.F.R. Part 718.

Entitlement Under 20 C.F.R. Part 718[16]

Without the benefit of the Section 411(c)(3) or (c)(4) presumptions,[17] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these

[15] Employer alleges inconsistencies between Claimant's statements regarding the end of his employment with Bodie Mining, noting Claimant testified that he was injured in 1988, while elsewhere he indicated this occurred in 1989. Employer's Response at 10; Hearing Transcript at 10, 13, 20; Director's Exhibits 2-4, 32. We note the ALJ addressed this apparent discrepancy in her initial decision, indicating the evidence supports a finding that Claimant stopped working due to an injury in 1989 and he "misspoke" at the hearing. Decision and Order Granting Benefits at 3 n.3. However, in her decision on remand, she seems to find Claimant's testimony and application consistent. Decision and Order on Remand at 4.

[16] Chief Administrative Appeals Judge Daniel T. Gresh joins this portion of the decision.

[17] There is no evidence of large opacities or complicated pneumoconiosis. Decision and Order Granting Benefits at 5, 10. Thus, Claimant is unable to 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); *see* 20 C.F.R. §718.304.

elements precludes an award 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he suffers from a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[18] 20 C.F.R. §718.201(a)(2), (b). A miner need not establish that coal mine dust exposure is the sole cause of his respiratory impairment. *Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013).

The ALJ considered the medical opinions of Drs. Forehand, Rosenberg, and Vuskovich. Decision and Order Granting Benefits at 9-11. Dr. Forehand diagnosed legal pneumoconiosis in the form of a mixed restrictive-obstructive lung disease, due to the combined effects of cigarette smoke[19] and coal mine dust. Director's Exhibit 17. Dr. Rosenberg indicated some restriction and gas exchange abnormalities may be present but determined they are due to Claimant's morbid obesity and unrelated to coal mine dust exposure. Employer's Exhibits 6 at 4; 8 at 3. Dr. Vuskovich determined that Claimant does not have any impairment related to coal mine dust exposure. Employer's Exhibit 7 at 16; 9 at 7. The ALJ found Dr. Forehand's opinion well-reasoned and accorded it "significant" probative weight. Decision and Order Granting Benefits at 11. She accorded Drs. Rosenberg's and Vuskovich's opinions less weight for failing to find total disability, contrary to her finding. *Id*. Thus, the ALJ found Claimant established legal pneumoconiosis. *Id*.

Employer argues the ALJ's crediting of Dr. Forehand's opinion fails to comply with the APA as she did not explain how his opinion was well-reasoned or consider the relevant evidence in evaluating his opinion, particularly the evidence which detracted from it. Employer's Brief at 10, 12-16, 19. We agree.

The ALJ summarily found Dr. Forehand's opinion well-reasoned, without explanation; thus, her findings are insufficient to satisfy the APA. *See Addison*, 831 F.3d

[18] The ALJ found Claimant does not suffer from clinical pneumoconiosis. Decision and Order at 10.

[19] The ALJ found a smoking history of one-third to one-fourth of a pack of cigarettes per day, for two to eight years. Decision and Order Granting Benefits at 3. The parties do not challenge this finding; thus, it is affirmed. *See Skrack*, 6 BLR at 1-711.

at 252-53 (the ALJ must conduct an appropriate analysis of the evidence to support her conclusions and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (the ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 10.

Further, as Employer notes, the ALJ appears to confuse issues when evaluating Drs. Rosenberg's and Vuskovich's opinions on the issue of legal pneumoconiosis. Employer's Brief at 17-18; Decision and Order Granting Benefits at 11. The question to be addressed regarding legal pneumoconiosis is not the extent of the Claimant's impairment, but rather whether he has a disease or impairment "significantly related to, or substantially aggravated by," coal mine dust exposure. 20 C.F.R. §718.201(a)(2), (b). Thus, we also vacate the ALJ's credibility determinations regarding Drs. Rosenberg's and Vuskovich's opinions.[20]

In view of the foregoing errors, we vacate the ALJ's weighing of the evidence regarding legal pneumoconiosis and remand the case for further consideration. 20 C.F.R. §718.202(a)(4); Decision and Order Granting Benefits at 11.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work[21] and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on

[20] As Dr. Vuskovich's opinion regarding legal pneumoconiosis is reliant in part on his conclusion that there are no valid pulmonary function studies, the ALJ's errors in assessing the pulmonary function study evidence, addressed below, also potentially affect her findings on legal pneumoconiosis.

[21] We reject Employer's argument that the ALJ failed to consider Claimant's conflicting statements regarding the exertional requirements of his usual coal mine employment, as it did not raise this contention below. 20 C.F.R. §802.301(a); *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); Employer's Brief at 18. Further, even if we were to consider Employer's argument, it has not explained how the alleged discrepancies undermine the ALJ's finding. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 18. Thus, we affirm the ALJ's finding that Claimant's usual coal mine work as a mine operator required "significant exertional requirements." Decision and Order Granting Benefits at 4.

qualifying[22] pulmonary function studies or arterial blood gas tests, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp*., 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant's total disability was supported by the pulmonary function evidence and Dr. Forehand's opinion.[23] Decision and Order Granting Benefits at 9-10.

Pulmonary Function Studies

The ALJ considered five pulmonary functions studies dated December 12, 2016, March 27, 2017, February 15, 2018, July 26, 2018, and September 12, 2018. 20 C.F.R. §718.204(b)(2)(i); Decision and Order Granting Benefits at 6. She found all the studies produced qualifying results. Decision and Order Granting Benefits at 6, 9; Director's Exhibits 17, 20; Claimant's Exhibit 4; Employer's Exhibits 3, 4. Thus, the ALJ concluded that Claimant's pulmonary function studies support a finding of total disability. Decision and Order Granting Benefits at 9.

Employer argues the ALJ failed to resolve the dispute in the evidence regarding the validity of the pulmonary function study evidence and erroneously discredited Dr. Vuskovich's opinion on the issue because he did not observe the testing first-hand.

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

[23] The ALJ found the arterial blood gas studies do not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order Granting Benefits at 9. Employer argues the ALJ's analysis of the arterial blood gas studies is "muddled" as the ALJ's table in her decision summarizing the blood gas studies includes a "valid" column but not a "qualify" column. Employer's Brief at 18. It is evident that the ALJ's "valid" column for the blood gas studies is a typographical error, as there is no evidence the studies were invalid and she expressly finds that none of the arterial blood gas studies are qualifying. Decision and Order Granting Benefits at 6, 9. Thus, we affirm, as supported by substantial evidence, that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *Lane v. Union Carbide Corp*., 105 F.2d 166, 174 (4th Cir 1997); Decision and Order Granting Benefits at 9.

Employer's Brief at 16-17 (citing *Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880 (7th Cir. 1992)). We agree.

When considering pulmonary function study evidence, an ALJ must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987). The ALJ, as the fact-finder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). "In the absence of evidence to the contrary, compliance with the [regulatory quality standards] shall be presumed." 20 C.F.R. §718.103(c). Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). However, the quality standards do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation.[24] 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment); Decision and Order at 44. An ALJ must still determine, however, if treatment record pulmonary function studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

The ALJ acknowledged that Dr. Vuskovich's opinion found the pulmonary function study evidence invalid. Decision and Order Granting Benefits at 8-9; Employer's Exhibit 7, 9. She also noted that the technician who performed the March 27, 2017 study for Dr. Forehand's examination indicated "good effort." Decision and Order Granting Benefits at 8, 9. The ALJ dismissed Dr. Vuskovich's opinion, citing *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985) for the proposition that more weight may be given to the first-hand observations of technicians who administer studies over physicians who only review the tracings. Decision and Order Granting Benefits at 9. As Employer asserts, the ALJ erred in considering the pulmonary function study evidence.

Initially, *Revnack* is a case arising under 20 C.F.R. Part 727 and does not address the weight an administering technician's comments are entitled to compared to the opinion of a reviewing physician. 7 BLR at 1-773. Further, Dr. Vuskovich specifically provided his rationale for invalidating the studies, explaining that Claimant did not put forth sufficient effort during the pulmonary function studies to generate valid results and thus

[24] It is unclear if all of the pulmonary function studies of record were obtained in anticipation of litigation.

artificially lowered the results.[25] Employer's Exhibits 7 at 6-14; 9 at 3-5. A reviewing physician may challenge the validity of a pulmonary function study based on his or her examination of the tracings. *See* 65 Fed. Reg. at 79,927 ("A party may challenge another party's [pulmonary function] study by submitting expert opinion evidence demonstrating the study is unreliable or invalid."); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *see also Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885 (7th Cir. 1992) (a technician's notations of good effort and cooperation do not amount to substantial evidence that a study is valid in the face of competent opinions showing the contrary).

The ALJ failed to meaningfully consider Dr. Vuskovich's opinion or explain why it is not credible or persuasive. *Brinkley*, 972 F.2d at 885. Moreover, as Employer argues, Dr. Rosenberg also opined that the studies were invalid due to inconsistent or submaximal effort. Employer's Brief at 7-8, 16-17; Employer's Exhibits 6, 8. While the ALJ noted Dr. Rosenberg's opinion, she did not address his explanation regarding the validity of the studies. Decision and Order Granting Benefits at 9.

Because the ALJ did not provide a valid rationale for discrediting Drs. Vuskovich's opinion that the pulmonary function studies are invalid and did not address Dr. Rosenberg's opinion regarding the same studies, we must vacate her findings regarding the pulmonary function study evidence. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *Addison*, 831 F.3d at 252-53; Decision and Order Granting Benefits at 9. We do not pass judgment on whether the opinions are credible or if the studies are valid or reliable; rather, the ALJ must consider the opinions and render her own credibility findings. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) ("it is the province of the ALJ to evaluate the physicians' opinions").

Further, because the medical opinion evidence is reliant in part on the pulmonary function studies, we also vacate the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order Granting Benefits at 9-10.

Therefore, we vacate the ALJ's finding that Claimant established total disability. 20 C.F.R. §718.204(b); Decision and Order Granting Benefits at 10. As we have vacated the ALJ's finding that Claimant is totally disabled and established legal pneumoconiosis,

[25] While generally noting the physicians found the pulmonary function studies invalid, the ALJ only specifically addresses the validity evidence regarding Dr. Forehand's March 27, 2017 study. Decision and Order Granting Benefits at 8, 9; Employer's Exhibits 7, 9.

we must also vacate her finding that he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c)(1); Decision and Order Granting Benefits at 11.

Remand Instructions

On remand, the ALJ must reconsider the responsible operator issue, considering all of the relevant evidence in the record to determine if the beginning and ending dates of Claimant's coal mine employment with Bodie Mining can be established. 20 C.F.R. §725.101(a)(32)(ii); *see Osborne*, 25 BLR at 1-204-05. She must explain all of her material findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR 1-998.

If she again finds no credible evidence to establish the beginning and ending dates of employment with Bodie Mining, she may reinstate her finding that Claimant worked for Bodie Mining for more than one year and dismiss Employer as the responsible operator. As the Director has not challenged entitlement to benefits, the ALJ's award of benefits also may then be reinstated, with liability transferred to the Trust Fund. 20 C.F.R. §725.407(d); *see Kourianos*, 917 F.3d at 1215.

If the ALJ finds Employer is the properly named responsible operator, then she must reconsider her findings on the merits of entitlement. She must first reconsider whether the medical opinion evidence establishes legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b).

Next, the ALJ must reconsider whether the pulmonary function study evidence establishes a total respiratory or pulmonary disability. 20 C.F.R. §718.204(c). In weighing the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), the ALJ must first resolve the conflicting evidence regarding the validity of the studies, including the validity opinions of Drs. Vuskovich and Rosenberg.[26] *See Addison*, 831 F.3d at 252-53; *McCune*, 6 BLR at 1-998. If a study does not precisely conform to the quality standards, she must determine if it is in substantial compliance. 20 C.F.R. §718.101(b). The ALJ must then weigh the studies together to determine if they support total disability, undertaking a qualitative and quantitative analysis of the evidence and providing an adequate rationale

[26] In assessing the evidence, the ALJ should first consider if the pulmonary function studies were obtained in anticipation of litigation. The quality standards do not apply to studies obtained for treatment purposes, and the ALJ must consider whether any such studies are sufficiently reliable to support total disability. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

for how she resolves conflicts in the evidence. 20 C.F.R. §718.204(b)(2)(i); *Wojtowicz*, 12 BLR at 1-165.

The ALJ must also reevaluate the medical opinions of Drs. Forehand, Rosenberg, and Vuskovich on the issue of total disability, taking into consideration her findings regarding the objective studies and comparing the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); 20 C.F.R. §718.204(b)(2)(iv). If she finds total disability based on either the pulmonary function study or medical opinion evidence, then she must weigh all of the relevant evidence together to determine whether Claimant has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

Finally, if the ALJ finds both legal pneumoconiosis and total disability established, she must determine if the evidence is sufficient to establish that legal pneumoconiosis is a substantially contributing cause of Claimant's disabling impairment. 20 C.F.R. §718.204(c).

When weighing the medical opinion evidence, the ALJ must evaluate the credibility of the medical opinions in light of the physicians' qualifications, the explanations for their findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Hicks*, 138 F.3d at 532-34; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). She must explain all her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If the ALJ finds Claimant establishes the existence of legal pneumoconiosis, total disability, and disability causation, she may reinstate the award of benefits. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. However, if Claimant fails to establish any of these elements of entitlement, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the ALJ's Decision and Order on Remand and her Decision and Order Granting Benefits are affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this decision.[27]

SO ORDERED.

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Chief Administrative Appeals Judge, concurring:

I concur with vacating: 1) the ALJ's responsible operator determination and dismissal of Employer; 2) the ALJ's weighing of the evidence regarding legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4); 3) the ALJ's finding that the pulmonary function study and medical opinion evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv); 4) the ALJ's finding that Claimant established total disability pursuant to 20 C.F.R. §718.204(b); 5) and her finding that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1), and therefore concur with again remanding the case for reconsideration of those issues.

[27] In *Milburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998), after the Board had twice remanded the case to an ALJ, the Fourth Circuit required remand to a new ALJ because it in part had concerns that after fifteen years of litigation, the presiding ALJ was prejudiced by prior decisions in the case:

> Finding the ALJ made several errors of law including failing to consider all of the relevant evidence and to adequately explain his rationale for crediting certain evidence, we conclude that review of this claim requires a fresh look at the evidence, unprejudiced by the various outcomes of the ALJ and the Board's orders below.

Hicks, 138 F.3d at 537. The circumstances in this case do not yet require such a "fresh look," particularly given this is the first time the ALJ is considering the medical merits of the case on remand. Administrative Appeals Judge Judith S. Boggs joins this portion of the decision.

However, I write separately to express my view that, in this case arising within the jurisdiction of the Fourth Circuit, due to the Board's previous remand of this case and the ALJ's repetition of errors, "review of this claim requires a fresh look at the evidence . . . ." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537 (4th Cir. 1998) ("Finding the ALJ made several errors of law including failing to consider all of the relevant evidence and to adequately explain his rationale for crediting certain evidence, we conclude that review of this claim requires a fresh look at the evidence."); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). In the Fourth Circuit, such circumstances require a "fresh look," not influenced by the prior outcomes in the case, without any further showing of bias or other requirement.

Thus, I would direct he case be reassigned to a different ALJ on remand. I otherwise concur in the majority opinion in all other respects.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur, in all respects, in remanding this case on the responsible operator issue to ALJ Applewhite. For the reasons the Board did not previously address other issues, I would not do so now, and would address those issues should Employer subsequently appeal.

JUDITH S. BOGGS
Administrative Appeals Judge