U.S. Department of Labor

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

BRB Nos. 21-0171 BLA
and 21-0172 BLA

TRACIE JEFFERSON (Executrix of the Estate of BRENDA S. JEFFERSON, Deceased Widow of and o/b/o WILLIE JEFFERSON)	)	
Claimant-Petitioner	)	
v.	)	
ZIEGLER COAL COMPANY	)	
and	)	DATE ISSUED: 9/28/2022
OLD REPUBLIC INSURANCE COMPANY	)	
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 on Remand and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

Claimant[1] appeals Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order on Remand and his Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration (Order on Motion for Reconsideration) (2011-BLA-05932 and 2013-BLA-06100) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a miner's subsequent claim filed on July 28, 2006, and a survivor's subsequent claim filed on August 20, 2010. Both claims are before the Benefits Review Board for the second time.[2]

In a November 30, 2011 Decision and Order Denying Benefits issued in the miner's claim, ALJ Joseph E. Kane credited the Miner with thirty-three years of coal mine employment, with at least twenty-seven years in underground mines, but found the new evidence did not establish the Miner was totally disabled. 20 C.F.R. §718.204(b)(2). He therefore found the Miner could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, he found the new evidence did not establish the Miner had pneumoconiosis. 20 C.F.R. §718.202(a). Thus he found the Miner failed to establish a change in an applicable condition of entitlement, 20 C.F.R. §725.309, and denied benefits.

As the Miner had died on March 15, 2008, while his claim was pending, the Miner's widow indicated she would be pursuing his claim on behalf of his estate. Miner's Claim (MC) Director's Exhibit 55. She timely requested modification of the denial of benefits on January 17, 2012. 20 C.F.R. §725.310; MC Director's Exhibit 84. In addition, she separately filed a subsequent survivor's claim on August 20, 2010. Survivor's Claim (SC) Director's Exhibit 5. However, she died on March 9, 2016, while both claims were

[1] The Miner and his widow are both deceased and their surviving daughter is pursuing both claims. Thus she is the Claimant in this case.

[2] We incorporate the procedural history of both claims as set forth in *Jefferson v. Zeigler Coal Co.*, BRB Nos. 17-0471 BLA, 17-0472 BLA, slip op. at 2 n.2 (Sept. 26, 2018) (unpub.).

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

pending. SC Director's Exhibit 29. Claimant, the surviving daughter of the Miner and his widow, indicated she would be pursuing both claims. June 8, 2016 Hearing Tr. at 24.

ALJ Calianos (the ALJ) adjudicated the request for modification in his May 11, 2017 Decision and Order Denying Benefits in Living Miner's and Survivor's Claims (Decision and Order on Modification). He credited the Miner with at least twenty-seven years of underground coal mine employment but found the evidence insufficient to establish the Miner had pneumoconiosis or was totally disabled. 20 C.F.R. §§718.202, 718.204(b)(2). Therefore he found Claimant could not invoke the Section 411(c)(4) presumption or establish a basis for modification in the miner's claim. 20 C.F.R. §725.310. As the Miner was not entitled to benefits at the time of his death, the ALJ found no basis to award derivative survivor's benefits under Section 422(*l*) of the Act,[4] 30 U.S.C. §932(*l*) (2018). He also denied benefits in the subsequent survivor's claim because Claimant could not establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

Pursuant to Claimant's appeal, the Board affirmed the ALJ's finding that the Miner had at least twenty-seven years of underground coal mine employment. *Jefferson v. Zeigler Coal Co.*, BRB Nos. 17-0471 BLA, 17-0472 BLA, slip op. at 3 n.5 (Sept. 26, 2018) (unpub.). The Board vacated, however, his finding that Claimant failed to establish the Miner was totally disabled based on the pulmonary function study and medical opinion evidence. *Id.* at 7-9; *see* 20 C.F.R. §718.204(b)(2)(i), (iv). Thus the Board vacated his finding that Claimant failed to invoke the Section 411(c)(4) presumption in the miner's claim or establish derivative entitlement in the survivor's claim under Section 422(*l*), and remanded both claims for further consideration. *Jefferson*, BRB Nos. 17-0471 BLA, 17-0472 BLA, slip op. at 10.

On remand, the ALJ again found the evidence insufficient to establish total disability and thus Claimant could not invoke the Section 411(c)(4) presumption or establish a basis for modification in the miner's claim. 20 C.F.R. §§718.204(b)(2), 725.310. He also reinstated his denial of survivor's benefits. Pursuant to Claimant's request for reconsideration, the ALJ agreed that he erred in finding the diffusion capacity evidence invalid, but nevertheless found the medical evidence did not establish total disability based on the diffusion capacity evidence. Thus he again denied benefits.

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[4] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010).

On appeal, Claimant argues the ALJ erred in finding she failed to establish the Miner was totally disabled. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Orders if they are 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).

In considering whether to grant modification of the prior denial of the Miner's subsequent claim, the ALJ was required to determine whether the denial contained a mistake in a determination of fact or whether the evidence submitted on modification, along with the evidence previously submitted in the subsequent claim, was sufficient to establish a change in an applicable condition of entitlement.[6] 20 C.F.R. §§725.309(c); 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). The ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (emphasis added).

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

A miner was totally disabled if he had a pulmonary or respiratory impairment which, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish the miner was totally disabled based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim (MC) Director's Exhibits 5, 7, 10.

[6] Where 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 he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner did not establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of the current claim. *Id.*

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).

On remand, the ALJ found the pulmonary function studies and medical opinions do not establish total disability.[7] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order on Remand at 6, 9-10, 23-24.

Pulmonary Function Studies

Claimant argues the ALJ erred in finding the pulmonary function study evidence does not establish the Miner was totally disabled. Claimant's Brief at 19-29. Her argument has merit.

In his May 11, 2017 Decision and Order on Modification, the ALJ considered three pulmonary function studies dated August 24, 2006, October 24, 2006, and February 15, 2007. Decision and Order on Modification at 16-17; MC Director's Exhibits 17, 49 at 73-77, 108-114. He found no mistake in ALJ Kane's finding that these studies do not establish total disability.[8] Decision and Order on Modification at 16-17. Specifically, he found the August 24, 2006 study produced qualifying[9] values for total disability, but agreed with ALJ Kane that it is invalid. *Id.* He further found the October 24, 2006 and February 15, 2007 studies non-qualifying. *Id.* As the record contains no valid, qualifying study, he found the pulmonary function testing does not establish total disability. *Id.*

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[7] The ALJ found the arterial blood gas study evidence does not establish total disability. Decision and Order at 23. Further, there is no evidence of cor pulmonale with right-sided congestive heart failure. As it is unchallenged on appeal, we affirm the ALJ's conclusion that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] The ALJ found no new pulmonary function studies were submitted on modification and thus Claimant cannot establish a change in condition based on this evidence. 20 C.F.R. §§718.204(b)(2)(i), 725.310; Decision and Order on Modification at 16.

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

The Board vacated the ALJ's finding that the August 24, 2006[10] study is invalid because he failed to explain the weight he accorded to Dr. Mettu's validation report, or why he credited the opinions of Drs. Repsher and Selby that the study is invalid over Dr. Chavda's opinion that it is valid. *Jefferson*, BRB Nos. 17-0471 BLA, 17-0472 BLA, slip op. at 7. Thus the Board held that his credibility findings did not satisfy the explanatory requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[11] The Board therefore remanded the case to resolve the conflict in the evidence regarding the validity of the August 24, 2006 study and determine whether it is sufficient to establish total disability. *Jefferson*, BRB Nos. 17-0471 BLA, 17-0472 BLA, slip op. at 11.

On remand, rather than revisiting whether the August 24, 2006 pulmonary function study is valid, the ALJ issued an alternative basis for concluding that there is no mistake in a determination of fact with respect to ALJ Kane's finding that the pulmonary function study evidence does not establish total disability.[12] Decision and Order on Remand at 6. Adopting ALJ Kane's findings, the ALJ stated:

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[10] Dr. Simpao conducted the August 24, 2006 pulmonary function study, and Drs. Mettu, Chavda, Repsher, and Selby reviewed the study and addressed its validity. Dr. Mettu reviewed the study for the Department of Labor and opined the "vents are acceptable." MC Director's Exhibit 17 at 10. Dr. Chavda stated he considered the Miner's effort on "blows" from "about eight flow volume loop" trials in addressing its validity. MC Employer's Exhibit 3 at 20-21. He noted the study "was done in [the Miner's] usual chronically ill health" and opined it is valid. MC Claimant's Exhibit 4 at 5; MC Employer's Exhibit 3 at 19. In contrast, Drs. Repsher and Selby opined the study is invalid because the Miner did not provide sufficient effort and cooperation. MC Director's Exhibits 49 at 50-53, 66 at 143, 151.

[11] 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).

[12] In discussing the pulmonary function study evidence, the ALJ did not specifically address whether the August 24, 2006 study is valid. Decision and Order on Remand at 6. However, he ultimately concluded that the record in the miner's claim includes no "valid and qualifying pulmonary function test, and no qualifying arterial blood gas test." *Id.* at 24. Thus the ALJ did not follow the Board's remand instructions.

> [ALJ] Kane adequately explained why he gave more weight to [the] two later, non-qualifying studies. Specifically, [he] found that, even though the physicians who administered the later studies ([Drs.] Repsher and Selby) considered them to be invalid due to lack of effort, these studies still reflected that the Miner had, at a minimum, the pulmonary capacity that the studies showed. [] And [ALJ] Kane cited to multiple published Board decisions in support of this principle. Even if [ALJ] Kane had determined that the study of August 2006 was due full weight and consideration, his conclusion – that the pulmonary function study evidence did not, of itself, establish total disability – would very likely have been the same, because there were two later, non-qualifying studies.

Id., *citing Crapp v. U.S. Steel Corp.*, 6 BLR 1-476 (1983); *Houchin v. Old Ben Coal Co.*, 6 BLR. 1-1141 (1984); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984).

We agree with Claimant's argument that the ALJ erred in finding the non-qualifying pulmonary function studies more probative than the qualifying study. Decision and Order on Remand at 6; Claimant's Brief at 19-28.

First, the ALJ failed to follow the Board's instructions on remand, as he did not address and render necessary factual findings as to whether each of the August 24, 2006, October 24, 2006, and February 15, 2007 pulmonary function studies is invalid. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal bases for his decision); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); *see also Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) ("Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error"); *Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988) ("a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it"). These factual findings are necessary for the ALJ to properly evaluate whether the pulmonary function study evidence establishes total disability.

In concluding that he is not required to render these necessary factual findings, the ALJ found the October 24, 2006 and February 15, 2007 non-qualifying studies outweigh the August 24, 2006 qualifying study regardless of whether the non-qualifying studies are invalid. Decision and Order on Remand at 6. This was error.

The regulation at 20 C.F.R. §718.103 states "no results of a pulmonary function study shall constitute evidence of the *presence or absence* of a respiratory or pulmonary

impairment unless it is conducted and reported in accordance with" the regulatory quality standards.[13] 20 C.F.R. §718.103(c) (emphasis added); 20 C.F.R. Part 718, Appendix B. Thus, the plain language of the regulation prohibits the ALJ from weighing an invalid pulmonary function study at 20 C.F.R. §718.204(b)(2)(i).

The ALJ's reliance on the Board's decisions in *Crapp*, *Houchin*, and *Runco* is misplaced. The regulation in effect at the time the Board issued those decisions prohibited crediting invalid testing as evidence of an "impairment." 20 C.F.R. §718.103(c) (1980). Specifically, the prior regulation at issue stated: "no results of pulmonary function tests shall constitute evidence of a respiratory or pulmonary impairment unless such tests are conducted and reported in substantial compliance with this section and Appendix B." 20 C.F.R. §718.103(c) (1980). But the current version of the regulation clearly prohibits such testing from being credited as proof of the "presence or absence" of an impairment, 20 C.F.R. §718.103(c), rendering the Board's prior holdings outdated and irrelevant. Further, in addressing comments "questioning the need for a statement regarding the cooperation of the patient from the supervising physician or technician conducting pulmonary function tests," the Department of Labor explained:

> [This information] serves to benefit the [miner] who gives maximum cooperation, but, because of the severity of his or her ailment, produces tracings which appear to be invalid. This can occur, for example, when an attempt at maximal expiration produces a fit of coughing; while the result of the pulmonary function test itself is invalid, the fact that an attempt at a forced expiratory maneuver produced uncontrolled coughing may be considered as evidence of a pulmonary impairment.

45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

Thus the ALJ should have rendered findings as to the validity of the October 24, 2006 and February 15, 2007 non-qualifying studies. His failure to do so is not harmless, as he credited those studies as constituting probative evidence that the Miner did not have a pulmonary impairment.[14] Decision and Order on Remand at 6.

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[13] Dr. Repsher conducted the October 24, 2006 pulmonary function study and opined it is invalid "due to very poor effort and cooperation." MC Director's Exhibit 49 at 50, 73-76. Dr. Selby conducted the February 15, 2007 pulmonary function study and opined it is invalid because the Miner did not provide sufficient effort and cooperation. MC Director's Exhibits 49 at 108-09, 66 at 132, 141-43.

[14] As a factual matter, the ALJ cited to no medical evidence that he credited for his assumption that the Miner's testing values would have been higher had he more fully cooperated and thereby rendering the possibly invalid October 24, 2006 and February 15,

In addition, to the extent the ALJ credited the non-qualifying studies because they were performed more recently, this was also error. The United States Court of Appeals for the Sixth Circuit has held it is irrational to credit evidence solely because of recency when the Miner's condition has improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the court reasoned that 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. *Woodward*, 991 F.2d at 319-20. Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id.* But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply": one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id.* An ALJ must therefore resolve conflicting tests when a miner's condition improves "without reference to their chronological relationship." *Id.*

Based on the foregoing errors, we vacate the ALJ's finding that the pulmonary function studies do not establish total disability as it is inconsistent with law and unsupported by the evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion); 20 C.F.R. §718.204(b)(2)(i). We further vacate the ALJ's findings that Claimant failed to establish total disability, 20 C.F.R. §718.204(b)(2), and invoke the Section 411(c) presumption, and his conclusion that Claimant did not establish entitlement to benefits. We therefore remand the case for further consideration.

On remand, the ALJ must first render findings as to whether each pulmonary function study is invalid. The framework the ALJ must apply is as follows.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[15] 20 C.F.R.

2007 studies as probative evidence that he is not disabled. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (the interpretation of medical evidence is for medical experts).

[15] An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an

§§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed.[16] 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (the party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B. If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b).

The quality standards, however, do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 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 conducted as part of a miner's treatment). An ALJ must nevertheless determine if a miner's treatment 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).

In addressing whether the August 24, 2006, October 24, 2006 and February 15, 2007 pulmonary function studies are invalid, the ALJ must address all evidence relevant to the validity of these studies, including medical opinions and deposition testimony, and resolve any conflict in the evidence. *Rowe*, 710 F.2d at 254-55. He should address the comparative

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ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

[16] The ALJ asserted "the Board mischaracterized ALJ Kane's finding" by stating he "'invalidated' the August [24] 2006 study." Decision and Order on Remand at 6 n.4. He explained ALJ Kane "gave it 'little weight' and 'discounted' it" because Dr. Simpao was inconsistent in opining whether Claimant gave adequate effort in performing the August 24, 2006 study. *Id.* We advise the ALJ that this finding itself is problematic because a pulmonary function study submitted in anticipation of litigation is presumed to comply with the quality standards, *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (the party challenging the validity of a study has the burden to establish the results are unreliable), and the quality standards are inapplicable to studies obtained for medical treatment. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010). Thus finding that Dr. Simpao was inconsistent, and thus not credible, as to whether the Miner gave adequate effort in performing the August 24, 2006 study not only indicates ALJ Kane found it invalid, but ALJ Kane's explanation for doing so is not a rational basis to assign the study diminished weight.

credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 254-55.

After addressing the validity of the pulmonary function studies, the ALJ must address whether the preponderance of this evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). The ALJ must explain the bases for his credibility findings in accordance with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

Medical Opinions

Claimant's argument that the ALJ erred in finding the medical opinion evidence insufficient to establish total disability also has merit. Claimant's Brief at 29-39.

Before weighing the medical opinions, the ALJ found the Miner's usual coal mine employment was working as a coal driller and that this job required a "moderate degree of physical labor." Decision and Order on Remand at 15-17. He further noted that the medical opinions before ALJ Kane included Dr. Simpao's opinion that the Miner was totally disabled, and the opinions of Drs. Repsher and Selby that he was not. *Id.* at 6-10. Further, the ALJ found Claimant submitted Dr. Chavda's opinion that the Miner was totally disabled in support of the modification request. *Id.* at 13-22.

The ALJ first weighed Dr. Simpao's opinion. He noted Dr. Simpao relied on the August 24, 2006 pulmonary function study to diagnose total disability, but reiterated that he "discounted" this qualifying study compared to the non-qualifying studies. Decision and Order on Remand at 6-7. Moreover, the ALJ found Dr. Simpao did not diagnose a totally disabling respiratory or pulmonary impairment, standing alone, but rather diagnosed total disability based on a combination of respiratory and non-respiratory conditions. *Id.* at 6-7, 9-10. Thus the ALJ rejected Dr. Simpao's opinion.[17] *Id.*

In considering Dr. Chavda's opinion, the ALJ was not persuaded by the doctor's opinion that the Miner was totally disabled from his usual coal mine employment working as a coal driller because he found the doctor did not have an adequate understanding of the exertional requirements of that job. Decision and Order on Remand at 13-15; *see* MC Employer's Exhibit 3 at 38-40. Although Dr. Chavda characterized this job as requiring

[17] The ALJ set forth his credibility findings with respect to Dr. Simpao by summarizing ALJ Kane's credibility findings and concluding that the doctor's opinion is entitled to "minimal weight" as "consistent with ALJ Kane's findings." Decision and Order on Remand at 23.

"hard manual labor," the ALJ found that assumption "at odds with the evidence" and his own finding that the job required a "moderate degree of physical labor." *Id.* at 15-22. Further, the ALJ noted Dr. Chavda diagnosed total disability based on his belief that the August 24, 2006 pulmonary function study is valid, contrary to the ALJ's finding that it is invalid.[18] *Id.* at 22.

With respect to the contrary opinions of Drs. Selby and Repsher, the ALJ found "Dr. Selby articulated an adequate understanding of the exertional demands of the Miner's coal mine work, and such understanding is consistent with the evidence of record . . . ." Decision and Order on Remand at 23. The ALJ also found Dr. Selby's opinion well-reasoned and documented. *Id.* Further, he found Dr. Repsher also understood the Miner worked as a "coal driller," but assigned his opinion diminished weight because there is no indication he "knew about the exertional demands of the Miner's job." *Id.*

Because the ALJ's error in weighing the pulmonary function study evidence affected his weighing of the medical opinion evidence, we must vacate his finding that the medical opinion evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

Further, we agree with Claimant that the ALJ erred in assessing the exertional requirements of the Miner's usual coal mine work. Claimant's Brief at 32-34. The ALJ summarized the evidence he considered on this issue as follows:

> The Miner told [Dr.] Simpao that he was a "coal driller": [he] worked at the face with a ceiling height of [forty-eight to sixty] inches; [he] had to lift, bend, and stoop continuously; and [he] worked in "awkward positions." [Dr.] Repsher's report reflects only that the Miner reported he was a "coal driller." [Dr.] Selby stated that the Miner was a "very poor historian" and reported that in his last coal mine job . . . he "ran a drill, worked on a loader, and did various odd jobs." The record also contains a Form CM-913 ("Description of Coal Mine Work and Other Employment") the Miner submitted in conjunction with the current claim[.] [H]e described his work as follows: "Drilled coal for blasting purposes." Regarding the exertional requirements of the work, he indicated only that his sitting, standing, crawling, lifting, and carrying demands were "various."

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[18] As noted above, the ALJ did not render a specific finding as to the validity of the August 24, 2006 pulmonary function study and instead relied on an alternative basis to resolve the conflict in the pulmonary function study evidence. Decision and Order on Remand at 6. Nonetheless, he discredited Dr. Chavda's opinion based on a belief that the August 24, 2006 study is invalid. *Id.*

Decision and Order on Remand at 15-16, *quoting* MC Director's Exhibits 6, 17, 19, 49 at 100.

The ALJ found the Miner's statements to Dr. Simpao establish his usual coal mine employment working as a coal driller required "a moderate degree of physical labor" because he was "required to work in coal with a ceiling height of under five feet" and "bend and stoop." Decision and Order on Remand at 16. Although the ALJ acknowledged the Miner "would have [had] to lift objects," he determined the record is silent as to "how much such objects weighed, and whether the Miner was also required to carry objects any appreciable distance." *Id.* He found "[m]ost importantly" that the Miner operated a drill from a sitting position and that "the most heavily taxing tasks, such as timbering, were performed in concert with other miners." *Id.*

The ALJ has not explained his basis for concluding that the job duties the Miner provided to Dr. Simpao equate to "a moderate degree of physical labor." Decision and Order on Remand at 16. Thus we conclude this finding does not satisfy the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165. As Claimant correctly argues, the record contains evidence relevant to the weight and frequency of the objects Claimant had to carry. Claimant's Brief at 32-34. Regarding the Miner's June 28, 2002 claim, the ALJ noted the Miner completed a CM-913 Description of Coal Mine Work form where he stated he "operated [a] coal drilling machine requiring the use of electrical controlled levers." Decision and Order on Remand at 16, *citing* MC Director's Exhibit 3 at 865. The ALJ also noted the Miner was required to lift "20 pounds, 100 times per day, but not every day; and carried 200 pounds 30 feet with assistance from others." *Id.* With respect to the Miner's May 5, 1989 claim, the ALJ noted the Miner completed a form CM-913 where he stated he "lifted 0.5 pounds, three times per day; and carried 50 pounds a distance of five feet, 150 times per day." Decision and Order on Remand at 16, *citing* MC Director's Exhibit 1 at 1526. Although the ALJ acknowledged this evidence, he failed to weigh it when rendering a finding as to the exertional requirements of the Miner's usual coal mine work. *Rowe*, 710 F.2d at 254-55; *McCune*, 6 BLR at 1-998; Decision and Order on Remand at 16. Based on the foregoing errors, we vacate the ALJ's exertional requirements finding and remand this case for further consideration of this issue.[19]

[19] It is the ALJ's duty to evaluate conflicting evidence, draw appropriate inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185. To assist in fulfilling this duty, the ALJ has the discretion to take judicial notice of the *Dictionary of Occupational Titles,* provided he follows the correct procedure in doing so. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989). The Board has recognized that the position descriptions in the

As Claimant also correctly argues, the ALJ erred in discrediting Dr. Simpao's opinion by finding the doctor did not diagnose a totally disabling respiratory or pulmonary impairment, standing alone. Claimant's Brief at 36-37. Dr. Simpao noted the Miner's August 24, 2006 pulmonary function study demonstrates both a moderate restrictive and obstructive airway disease, and he opined its FEV1 and MVV values "are below the disability standards set in the federal register." MC Director's Exhibit 17. Thus the ALJ failed to consider the entirety of Dr. Simpao's opinion when discrediting it. *Rowe*, 710 F.2d at 254-55.

We also agree with Claimant's argument that the ALJ erred in discrediting Dr. Chavda's opinion because he found the doctor assumed the Miner's usual coal mine work required "hard manual labor" rather than "a moderate degree of physical labor"[20] as the ALJ found. Decision and Order on Remand at 16; *see* Claimant's Brief at 35-36. A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a miner is unable to do his last coal mine job.[21] *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical

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Dictionary of Occupational Titles may be especially useful in a case where the miner is deceased. *See Onderko*, 14 BLR at 1-4.

[20] Although the ALJ found Dr. Chavda's "deposition testimony reflects that [he] drew conclusions regarding the inability of the Miner to perform hard manual labor," the ALJ found "the record does not indicate that [Dr. Chavda] had any specific knowledge regarding the nature or exertional requirements of the Miner's usual coal mine work. Rather, it appears that [Dr. Chavda] presumed that the Miner's work required hard manual labor, because that was how Claimant's counsel posed questions regarding the Miner's supposed pulmonary impairment." Decision and Order on Remand at 14.

[21] In contrast, an ALJ may discredit a doctor who concludes a miner is not totally disabled because the doctor neither has an adequate understanding of the exertional requirements of the miner's usual coal mine work nor sets forth sufficient information from which the ALJ could rationally conclude that the miner can perform such work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (a physician who asserts a miner is capable of performing assigned duties should state his or her knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991). Thus we affirm the ALJ's decision to reject Dr. Repsher's opinion because "the record is silent as to what, if anything, [Dr.] Repsher knew about the exertional demands of the Miner's job." Decision and Order on Remand at 23; *see Cornett*, 227 F.3d at 578; *Eagle*, 943 F.2d at 512-13; *Walker*, 927 F.2d at 184-85.

limitations described in a doctor's report are sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion."); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may find total disability by comparing physician's impairment rating and any physical limitations due to that impairment with the exertional requirements of the miner's usual coal mine work).

Dr. Chavda set forth his basis for opining the Miner had specific physical limitations based on his respiratory or pulmonary impairment. In his report, Dr. Chavda diagnosed a severe impairment and opined the Miner did not have the respiratory capacity to do his usual coal mine work as a driller, roof bolter, and rock duster. MC Claimant's Exhibit 4 at 2-3. He did not, however, indicate the level of the exertional requirements of the Miner's usual coal mine work. In response to questions at his deposition, Dr. Chavda acknowledged the Miner was unable to do "hard, manual labor." MC Employer's Exhibit 3 at 38, 40. Because we have vacated the ALJ's usual coal mine employment finding, we also vacate his discrediting of Dr. Chavda's opinion because the doctor characterized the Miner's usual coal mine employment as requiring "hard manual labor." Decision and Order on Remand at 16.

Claimant also asserts the ALJ erred in discrediting Dr. Chavda's opinion that the Miner was totally disabled based on his single breath carbon monoxide diffusion capacity (DLCO) values.[22] Claimant's Brief at 45-48. Dr. Chavda noted the Miner's DLCO values on the October 24, 2006 and February 15, 2007 pulmonary function studies were "very low" at fifty-seven percent and forty-seven percent of predicted, respectively. MC Claimant's Exhibit 4 at 4. He opined having a DLCO value at fifty-seven percent of predicted puts the Miner "very close" to the "highest class of disability" under the American Medical Association standards, and that the Miner would not be able to do hard manual labor because he would not be able to maintain his oxygen levels and would be

[22] Claimant further argues the ALJ erred in applying a more restrictive standard than the Social Security disability standards (SSDS) in finding the Miner was not totally disabled based on his single breath carbon monoxide diffusion capacity (DLCO) values. Claimant's Brief at 49-50. Claimant asserts "a person with a qualifying DLCO value would be found disable[d] under the [SSDS], but not found [d]isabled under Federal Black Lung Disability Standards." *Id.* at 50. Contrary to Claimant's argument, the ALJ correctly concluded Dr. Chavda did not render a disability opinion based on the SSDS and thus the ALJ was not bound by it in weighing the doctor's opinion. Order on Motion for Reconsideration at 5-7; MC Employer's Exhibit 3 at 36-37.

short of breath. MC Employer's Exhibit 3 at 36-38. Similarly, he opined the Miner would be unable to perform hard manual labor with a DLCO at forty-seven percent of predicted. *Id.* at 40.

The ALJ discredited Dr. Chavda's opinion that the DLCO results establish total disability because Drs. Repsher and Selby opined the DLCO/VA results indicate the Miner had normal diffusion capacity.[23] Order on Motion for Reconsideration at 5. He acknowledged, however, that "[t]he record does not contain any evidence discussing the difference between the DLCO absolute value and the DLCO value corrected for alveolar volume." *Id.* As the ALJ did not adequately explain why he found Drs. Repsher's and Selby's opinions based on a different test undermine Dr. Chavda's reliance on the Miner's DLCO values, we vacate his finding. *See Rowe*, 710 F.2d at 255; *Wojtowicz*, 12 BLR at 1-165; Decision and Order on Remand at 20; Order on Motion for Reconsideration at 5.

We therefore vacate the ALJ's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, we vacate the ALJ's finding that Claimant failed to establish total disability when weighing the evidence as a whole at 20 C.F.R. §718.204(b).

On remand, the ALJ must reconsider the medical opinions in light of our holdings as set forth above. *See Cornett* v. Benham Coal, Inc., 227 F.3d 569, 578 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). He must fully explain the reasons for his credibility determinations in light of the physicians'

[23] In his Decision and Order on Remand, the ALJ noted "the DLCO values were far lower than predicted" and "the DLCO/VA values . . . were higher than predicted." Decision and Order on Remand at 20. He also stated none of the medical experts explained "whether a DLCO/VA measurement that was higher than predicted negates or supersedes a DLCO value that is far lower than predicted." *Id.* Consequently, he did not make a finding regarding whether Drs. Repsher and Selby were correct in opining the Miner's DLCO values were normal. *Id.* In his Order on Motion for Reconsideration, however, the ALJ stated "[t]he burden is on Claimant to establish total disability, and Claimant's failure to present any evidence addressing [Dr. Selby's] and [Dr. Repsher's] comments that the diffusion capacity was normal after accounting for alveolar volume, diminishes the persuasive value of [Dr. Chavda's] statements regarding the low diffusion capacity." Order on Motion for Reconsideration at 5.

explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.[24] *See Rowe*, 710 F.2d at 255.

Lay Testimony and Treatment Records

Claimant also argues the ALJ erred in weighing the lay testimony and the Miner's treatment records showing that he was totally disabled in isolation from other evidence, rather than weighing all the evidence together. Claimant's Brief at 39-41.

The ALJ considered the Miner's September 16, 1998 and January 25, 2005 hearing testimony and Claimant's January 25, 2005 hearing testimony. He also considered the Miner's treatment records from Dr. Hargrove from 1999 to 2007, Ridgewood Terrace nursing home from August 2007 to March 2008, Baptist Health/Regional Medical Center from March 2005 to March 2009, and Dr. Taylor from April 2007. MC Director's Exhibit 59; MC Claimant's Exhibits 1-3. He found the lay testimony and treatment records do not, "of themselves," establish the Miner had a total respiratory disability. Decision and Order on Remand at 11.

The regulations provide that "[s]tatements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a determination as to whether the miner was totally disabled at the time of death." 20 C.F.R. §718.204(d)(4).

While the regulations prohibit a finding of total disability based solely on lay testimony from an individual who is eligible to receive benefits in the claim, they do not state that such evidence lacks relevance or cannot be considered at all in conjunction with the medical evidence of record. 20 C.F.R. §718.305(b)(4). Moreover, the pertinent statue provides:

> In determining the validity of claims under this part, *all relevant evidence shall be considered*, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and *any medical history*, evidence submitted by the claimant's physician, or *his wife's affidavits*, and *in the case*

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[24] Because we vacate the ALJ's finding that the DLCO evidence does not establish total disability and direct him to make findings on the credibility of the physicians' opinions based on whether they are well-reasoned and well-documented before weighing them together, we decline Claimant's request to take administrative notice of the "Graham et al, *Task Force Report: 2017 ERS/ATS standards for single-breath carbon monoxide uptake in the lung*" study. Claimant's Brief at 44-45.

of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

30 U.S.C. §923(b) (emphasis added); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; *McCune*, 6 BLR at 1-998 (fact finder's failure to discuss relevant evidence requires remand); *Mancia v. Director, OWCP*, 130 F.3d 579, 588 (3d Cir. 1998) (regulation requiring "competent medical evidence" to establish entitlement "does not allow the ALJ to ignore uncontradicted relevant lay testimony where it corroborates the medical testimony of a treating physician and is consistent with the medical records.").

Thus, we agree with Claimant that the ALJ erred in weighing the lay testimony evidence in isolation, rather than weighing it together with the other relevant evidence to determine whether the overall evidence supports a finding of total disability. *Id.* On remand, the ALJ is instructed to consider the lay testimony and weigh it together with the other evidence relevant to total disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Similarly, the ALJ failed to follow our instructions regarding the Miner's treatment record evidence. *Jefferson*, BRB No. 17-0471 BLA, 17-0472 BLA, slip op. at 9 n.13. Instead of determining whether the treatment record evidence in isolation establishes total disability, the ALJ is instructed to weigh it together with the rest of the relevant evidence and determine whether it supports a finding of total disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Because we vacate the ALJ's finding that Claimant failed to establish total disability, we also vacate his finding that Claimant failed to invoke the Section 411(c)(4) presumption. Further, we vacate the ALJ's finding that Claimant failed to establish a mistake in a determination of fact. 20 C.F.R. §725.310; Decision and Order on Remand at 5-10.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant has established the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §§718.305(b)(1)(iii), 718.204(b)(2).

First, he must address whether the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i). He should render a finding as to whether any studies were performed as part of the Miner's medical treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see Stowers*, 24 BLR at 1-92. For any such studies, he must evaluate whether they are sufficiently reliable to support a finding of total disability notwithstanding the inapplicability of the regulatory quality standards. 65 Fed.

Reg. at 79,928. For any pulmonary function studies performed in anticipation of litigation, the ALJ must assess whether they are in substantial compliance with the regulatory quality standards. *See Keener*, 23 BLR at 1-237. In doing so, the ALJ must be cognizant that compliance with the quality standards is presumed. 20 C.F.R. §718.103(c). Further, Employer has the burden to establish the results are unreliable, as it is the party challenging the validity of these studies. *See Vivian*, 7 BLR at 1-361.

The ALJ must also reconsider whether the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv). He should recognize that a physician may offer a reasoned medical opinion diagnosing total disability even if the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett*, 227 F.3d at 578 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Moreover, an ALJ may assign controlling weight to a treating physician's opinion based on the nature and duration of their relationship with the miner and the frequency and extent of their treatment, so long as the treating physician's opinion is reasoned and documented. 20 C.F.R. §718.104(d); *see Soubik v. Director, OWCP*, 366 F.3d 226, 235 (3d Cir. 2004).

In evaluating the pulmonary function study and medical opinion evidence on the issue of total disability, the ALJ must discuss all relevant evidence, critically analyze the medical opinions, and render necessary credibility findings. *See Rowe*, 710 F.2d at 255; *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Hicks*, 138 F.3d at 533; *McCune*, 6 BLR at 1-998. In rendering his credibility findings, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. He must also explain his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability, then she has invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1). The ALJ must then determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If Employer is unable to rebut the Section 411(c)(4) presumption pursuant to either 20 C.F.R. §718.305(d)(1)(i) or (ii), Claimant will have established entitlement to benefits, and a basis for modification pursuant to 20 C.F.R. §725.310. In that event, the ALJ must also determine whether granting Claimant's request for modification of the denial of benefits in the miner's claim would render justice under the Act.

Alternatively, if the ALJ finds Claimant cannot establish a totally disabling respiratory impairment, the ALJ may reinstate the denial of benefits as total disability is an essential element of entitlement under 20 C.F.R. Part 718. *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).

The Survivor's Claim

Because we vacate the ALJ's determination that Claimant did not establish entitlement to benefits in the miner's claim, we also vacate his finding that Claimant is not entitled to derivative benefits in the survivor's claim under Section 422(*l*).

Accordingly, the ALJ's Decision and Order on Remand and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration are affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge