U.S. Department of Labor

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

BRB No. 22-0146 BLA

GEORGE D. LAWS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC c/o PEABODY ENERGY CORPORATION	)	
	)	
and	)	DATE ISSUED: 9/27/2023
	)	
PEABODY ENERGY CORPORATION c/o UNDERWRITERS SAFETY & CLAIMS,	)	
	)	
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for Claimant.

Tighe A. Estes and Quiyarra McCahey (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (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) Larry S. Merck's Decision and Order Denying Benefits (2019-BLA-06367) rendered on a miner's claim filed on January 3, 2017, pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2) and thus he could not invoke the rebuttable presumption of total disability at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] or establish entitlement under 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.[3]

On appeal, Claimant argues the ALJ erred in finding he is not totally disabled. Employer and its Carrier (Employer) respond, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging the Benefits Review Board to vacate the ALJ's decision and remand the claim.

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

[1] Claimant filed an initial claim for benefits on May 13, 2013, which he withdrew. Director's Exhibit 51. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

[3] The ALJ did not make a finding as to the length of Claimant's coal mine employment.

with applicable law.[4] 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).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[5] 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 argues the ALJ erred in finding he did not establish total disability based on the pulmonary function studies, medical opinions, and the evidence as a whole.[6]

Pulmonary Function Tests – 20 C.F.R. §718.204(b)(2)(i)

The ALJ considered three pulmonary function tests, conducted on May 23, 2013, February 10, 2017, and December 4, 2020. Decision and Order at 8-9; Director's Exhibits 12, 51; Employer's Exhibit 9. He accurately observed Claimant was sixty-seven years old during the 2013 study, seventy-one years old during the 2017 study, and seventy-five years old during the 2020 study. Decision and Order at 8. The ALJ noted studies performed on a miner over the age of seventy-one must be treated as qualifying if they would be

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 29.

[5] 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).

[6] We affirm, as unchallenged on appeal, the ALJ's findings that the blood gas studies do not support total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 8-10.

qualifying for a seventy-one-year-old, the maximum age set forth in the regulations' chart of qualifying values. Decision and Order at 9 (citing *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008)). However, the party opposing entitlement may offer evidence that the studies do not indicate disability for a miner over seventy-one. *Id*.

The ALJ found each of the studies were non-qualifying using the table values set forth at 20 C.F.R Part 718, Appendix B. Decision and Order at 10 & n.35. He further credited Dr. Rosenberg's opinion that the December 4, 2020 study is non-qualifying when applying the "Knudson predictive equation" to account for Claimant's age of seventy-five. Decision and Order at 10; Employer's Exhibit 10 at 2. Thus, the ALJ concluded the pulmonary function study evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 10.

Claimant contends the ALJ erred in finding the pulmonary function study evidence non-qualifying since each study produced qualifying FEV1 values pursuant to Appendix B. Claimant's Brief at 10. He additionally argues the ALJ erred in relying on Dr. Rosenberg's age adjustments, rather than the Appendix B table values, in assessing whether the 2020 study is qualifying. Claimant's Brief at 12.

Contrary to Claimant's contention, although each of his studies yielded qualifying FEV1 values as provided in the tables in Appendix B, qualifying FEV1 values, alone, do not render a pulmonary function study qualifying overall. Claimant's Brief at 10. Rather, the regulations provide that, in addition to a qualifying FEV1 value, Claimant must establish either a qualifying FVC or MVV value or an FEV1/FVC ratio equal to or less than fifty-five percent. 20 C.F.R. §718.204(b)(2)(i)(A)-(C). Because Claimant does not allege that any of his pulmonary function tests yielded a qualifying FVC value, MVV value, or FEV1/FVC ratio, we affirm the ALJ's determination that all the studies are non-qualifying.[7] *See* 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10. Further, as the

[7] The ALJ averaged Claimant's heights as noted in the record to find he is 76.76 inches tall and used the closest greater table height at Appendix B of 20 C.F.R. Part 718, 76.8 inches, in determining whether each study is qualifying. *See Carpenter v. GMS Mine and Repair Maintenance, Inc.*, BLR , BRB No. 22-0100 BLA (Sept. 6, 2023); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8 n.28. Given Claimant was sixty-seven years of age during the May 23, 2013 study, he needed to obtain test values equal to or less than the following qualifying values: an FEV1 of 2.48 and an FVC of 3.16, an MVV of 98, or an FEV1/FVC ratio of 55%. 20 C.F.R. Part 718, App. B. As no MVV result was reported and his FVC of 3.94 and FEV1/FVC ratio of 56.7% are non-qualifying, the study is non-qualifying despite its FEV1 of 2.24. 20 C.F.R. Part 718, App. B; Director's Exhibit 51. Given Claimant's age of seventy-one and seventy-five years during the

December 4, 2020 study did not produce qualifying results under Appendix B, we need not address Claimant's argument that the ALJ erred in finding the study non-qualifying based on Dr. Rosenberg's age adjustment. 20 C.F.R. Part 718, App. B; *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, we affirm the ALJ's finding at 20 C.F.R. §718.204(b)(2).

Medical Opinions – 20 C.F.R. §718.204(b)(2)(iv)

In considering the medical opinion evidence, the ALJ initially found Claimant's last coal mine job as a continuous miner operator required medium exertion but occasionally required heavy exertion.[8] Decision and Order at 7. He then weighed the medical opinions of Drs. Istanbouly, Cohen, and Rosenberg.

Dr. Istanbouly performed the Department of Labor complete pulmonary examination on March 28, 2017. Director's Exhibit 12. He opined Claimant's pulmonary function study showed a severe obstruction, his blood gas test showed increased pCO2 in response to exercise consistent with pulmonary disease, and his cardiopulmonary exercise test showed "remarkably reduced" maximum oxygen consumption (VO2 max) and total metabolic equivalents (METs) that reflect "physical limitation" consistent with a "class IV total impairment due to respiratory disease per the A[merican] M[edical] A[ssociation] 6th Edition Guide[s to the Evaluation of Permanent Impairment]." Director's Exhibits 18 at

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February 10, 2017 and December 4, 2020 studies, he needed to obtain test values equal to or less than the following qualifying values: an FEV1 of 2.41 and an FVC of 3.09, an MVV of 97, or an FEV1/FVC ratio of 55%. 20 C.F.R. Part 718, App. B. As no MVV result was reported on his February 10, 2017 study and his pre-bronchodilator FVC of 3.49, post-bronchodilator FVC of 3.59, and pre-and post-bronchodilator FEV/FVC ratios of 57% and 56% are non-qualifying, the study is non-qualifying despite its pre- and post-bronchodilator FEV1s of 1.99 and 2.01. 20 C.F.R. Part 718, App. B; Director's Exhibit 12. Similarly, regarding Claimant's December 4, 2020 study, as his pre- and post-bronchodilator FVCs of 3.94 and 4.03, his MVV of 97, and his pre- and post-bronchodilator FEV1/FVC ratios of 60.5% and 59.6% are non-qualifying, the study is non-qualifying despite its pre- and post-bronchodilator FEV1s of 2.39 and 2.39. 20 C.F.R. Part 718, App. B; Employer's Exhibit 9.

[8] The ALJ found Claimant's usual coal mine employment involved work as a continuous miner operator, which required standing for eight hours a shift, lifting twenty-five pounds eight times a day, and dragging fifteen feet of cable weighing over 200 pounds. Decision and Order at 7-8; Director's Exhibit 5; Hearing Transcript at 24-25.

1-2, 23 at 1. Based on the objective testing, he concluded Claimant has a totally disabling respiratory impairment and is "unable to go back to work in the coal mine under any job title." Director's Exhibits 12 at 14, 18 at 1-2, 23 at 1. He further explained his total disability diagnosis is "mainly based on the severe and irreversible obstructive lung disease." Director's Exhibit 23 at 1.

Dr. Cohen issued a consultative report on April 14, 2021. Claimant's Exhibit 5. He opined Claimant's moderately severe obstructive impairment is totally disabling as it would preclude his operating a continuous miner and dragging 200 pounds of cable. Claimant's Exhibit 5 at 2, 6.

Dr. Rosenberg prepared consultative reports based on his review of the evidence. Employer's Exhibits 9, 10. He opined Claimant's December 4, 2020 pulmonary function study, when corrected for race, reflects only a mild obstruction, not the moderate to severe obstruction the other physicians found disabling, and that Claimant's estimated ventilation of 96 liters/minute indicates he retains the respiratory capacity to operate a continuous miner and drag 200 pounds of cable. Employer's Exhibit 9. Thus, Dr. Rosenberg concluded that Claimant is not totally disabled. *Id*.

The ALJ found Drs. Cohen and Rosenberg accurately understood the exertional requirements of Claimant's last coal mine job as a continuous miner operator.[9] Decision and Order at 12-13. He rejected the opinions of Drs. Istanbouly and Cohen as not well-reasoned, however, because he found they failed to reconcile their diagnoses of severe respiratory impairment with Claimant's nonqualifying pulmonary function and blood gas studies. Decision and Order at 10-13. By contrast, although he found Dr. Rosenberg's opinion that Claimant's pulmonary function studies would show only a mild obstruction when adjusted for race to be undocumented, he nonetheless credited Dr. Rosenberg's ultimate conclusion as supported by the non-qualifying objective test results. *Id.* at 13-14. Thus, the ALJ found Claimant did not establish disability based on the medical opinion evidence. *Id.* at 14; 20 C.F.R. §718.204(b)(iv).

We vacate the ALJ's conclusion the ALJ failed to adequately explain his credibility determinations and conducted only a limited analysis of the relevant evidence. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Director's Brief at 4-6.

[9] Although Dr. Istanbouly indicated Claimant's Description of Coal Mine Employment form was available for consideration as to his pulmonary evaluation of Claimant, the ALJ did not make a finding as to whether Dr. Istanbouly understood the exertional requirements of Claimant's usual coal mine work. Director's Exhibit 12.

Counter to the ALJ's findings, Dr. Istanbouly relied on both arterial blood gas and pulmonary function tests to diagnose Claimant as disabled. Regarding the arterial blood gas tests, the physician explained "post exercise ABGs did confirm increased PCO2 from 41.2 to 45.8, which is abnormal and consistent with underlying pulmonary disease." Director's Exhibit 18 at 1. Dr. Istanbouly further clarified that "VO2 max and METs are remarkably reduced consistent with class IV total impairment due to respiratory disease per AMA 6th Edition Guidelines" and that the pulmonary function testing revealed a "significant abnormality." *Id.* at 1-2. Dr. Istanbouly thus explained the tests, though nonqualifying, still revealed a disabling impairment, and he further bolstered his conclusion by explaining it is significant enough to be disabling under the AMA guidelines. *Id*. The ALJ's findings that Dr. Istanbouly did not reconcile his opinion with the objective tests or provide any "context" for his opinion thus are demonstrably incorrect as a factual matter. Decision and Order at 11. And as a legal matter, his resulting decision to discredit Dr. Istanbouly's opinion without discussing materially relevant aspects of it categorically is not -- and cannot be -- based on substantial evidence. *See* 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327 (7th Cir. 1992) (substantial evidence is relevant evidence that "a rational mind might accept as adequate to support a conclusion"); *McCune*, 6 BLR at 1-998; Decision and Order at 11.

Like Dr. Istanbouly, Dr. Cohen explained the objective tests revealed "a moderate obstructive impairment" sufficient to prevent Claimant from working as "a continuous miner operator." Claimant's Exhibit 5 at 5. The ALJ agreed Claimant's "last coal mine job required medium exertion but occasionally required work that rose to the level of heavy exertion," including dragging fifteen feet of cable weighing over two hundred pounds. Decision and Order at 7-8.

Notably, the regulations specifically provide for disability when "a physician exercising reasoned medical judgment, based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine employment or comparable gainful employment]." 20 C.F.R. §718.204(b)(2)(iv). As a matter of black letter law, a physician thus may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005). Indeed, a medical opinion may establish disability if it merely provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See 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 infer 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); *see also Cornett v. Benham DeCoal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (miner is totally disabled if he cannot perform the exertional requirements of his previous job).

Drs. Istanbouly and Cohen diagnosed severe and moderate obstructive impairments, based on objective tests that they believed prevent Claimant from performing his usual coal mine work. Other than finding their opinions did not conform with the nonqualifying results, the ALJ neither adequately explained what he found lacking in them nor did he independently compare the physicians' assessments with the physical requirements of Claimant's usual coal mine employment. The ALJ's consideration of their opinions -- as a matter of law -- thus is incomplete. *See Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52; *see also Cornett,* 227 F.3d at 578.[10]

We further agree with the Department of Labor that the ALJ's assessment of Dr. Rosenberg's opinion is similarly inadequate. Director's Brief at 4. Dr. Rosenberg predicated his diagnosis of a mild, non-disabling obstruction in part on predicted test values adjusted to account for Claimant's race. Employer's Exhibits 9, 10. While he explained that the results were nonqualifying under the Department's regulations without adjusting for race, Dr. Rosenberg nevertheless maintained it should still play a material role in determining Claimant's disability because, properly adjusted, Claimant had only a mild impairment -- not the moderate or severe impairment the other doctors diagnosed. As the Director states, "Dr. Rosenberg's opinion rests on two prongs: the nonqualifying

[10] In our view, our dissenting colleague attempts to fill these gaps with analysis absent from the ALJ's decision. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (When the ALJ fails to make necessary factual findings, the proper course for the Board is to remand the case to the ALJ rather than attempt to fill the gaps in the ALJ's opinion.); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (same). While our colleague believes the ALJ did enough to explain why exceeding the AMA guidelines for disability on its own is not enough to establish disability, she misses the larger context. No one contends the AMA guidelines control; both doctors readily admitted the objective tests were nonqualifying under the governing regulations. But the regulations provide several avenues for establishing disability that do not depend on qualifying objective tests, including a physician's opinion that a miner's respiratory condition prevents them from engaging in their usual coal mine work. In that regard, the ALJ's conclusory rationale that the doctors failed to adequately explain the diagnostic techniques underlying their opinions unquestionably omits relevant portions of their analysis and fails to adequately assess their conclusions given the physicians' accurate understanding of Claimant's coal mine work and what they believed to be his respiratory limitations.

pulmonary function test results, and Laws' race. In Dr. Rosenberg's view, Laws, because he is African American, has smaller lungs than a Caucasian, and thus the test results should be adjusted to compensate for the alleged size difference." Director's Brief at 4.

The table values at 20 C.F.R. Part 718, Appendix C, however, unambiguously apply to all miners regardless of race. Indeed, the Department specifically declined to promulgate separate qualifying table values given the lack of a scientific basis for it, concluding in the absence of any such data "it is appropriate to apply the same table to blacks and whites." 45 Fed. Reg. 13, 678, 13, 711 (Feb. 29, 1980).

The ALJ thus correctly found Dr. Rosenberg's view "unsupported." Decision and Order at 14. Yet, despite the fact it allowed Dr. Rosenberg to deny the moderate impairment the other physicians found disabling, the ALJ nevertheless baldly concluded "I do not find that this detracts from the weight to give his opinion." Decision and Order at 14. Instead, the ALJ held that "I find Dr. Rosenberg exercised reasoned medical judgment and that his opinion is based on medically acceptable clinical and laboratory diagnostic techniques and so is well-documented and well-reasoned . . . ." *Id.*

But as the Director points out, Dr. Rosenberg did not cite one whit of medical literature to support his view on race, and he did not deny that the objective tests were abnormal when not adjusted for it -- exactly as Drs. Istanbouly and Cohen maintained. In light of Dr. Rosenberg's failure to explain the reasoning or to document the medical basis for that portion of his opinion, we cannot affirm the ALJ's conclusion it is reasoned and documented. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (explaining a reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusions). Moreover, without a credible explanation for those failures, it is impossible to evaluate Dr. Rosenberg's overall credibility. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Howell v. Einbinder*, 350 F.2d 442, 444 (D.C. Cir. 1965) (Board is not required to accept an ALJ's ultimate finding or inference, if the decision discloses that it was reached in a manner that cannot be accepted as valid); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Finally, the ALJ did not explain why he credited Dr. Rosenberg's opinion that Claimant's "estimated" MVV establishes he retains the respiratory capacity to perform his usual coal mine work. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69 (7th Cir. 2001); Decision and Order at 13; Employer's Exhibit 9 at 1.

Based on all of these errors, we vacate the ALJ's credibility determinations and his conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence establishes a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). He must consider the physicians' opinions in conjunction with the exertional requirements of Claimant's usual coal mine employment and draw appropriate inferences. *See Poole*, 897 F.2d at 894; *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). If Claimant establishes total disability based on the medical opinion evidence, the ALJ must determine whether he is totally disabled taking into consideration the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232.

If Claimant establishes total disability, the ALJ must make a finding regarding his length of qualifying coal mine employment to determine whether he can invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[11] If Claimant successfully invokes the presumption, the ALJ must determine whether Employer is able to rebut it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. If Claimant does not establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See 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). In rendering all his determinations on remand, the ALJ must explain his findings as the Administrative Procedure Act requires.[12] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

[11] 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.

[12] 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).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand this case to the ALJ 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 and dissenting:

I respectfully dissent from the majority's decision to vacate the denial of benefits. The sole issue in this case is whether the ALJ erred in finding Claimant failed to establish total disability, and particularly whether the ALJ erred in discrediting the opinions of Drs. Istanbouly and Cohen and in giving probative weight to Dr. Rosenberg's opinion. For the reasons that follow, the ALJ's decision is consistent with law and supported by substantial evidence. *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965). It therefore must be affirmed.[13]

Contrary to the majority's opinion, the ALJ permissibly rejected Dr. Istanbouly's opinion that Claimant is totally disabled based on the VO2 max and METS measurements[14]

[13] I concur with my colleagues in affirming the ALJ's findings and determinations with respect to the pulmonary function testing.

[14] Dr. Istanbouly conducted the Department of Labor's complete pulmonary examination of Claimant on March 28, 2017. Director's Exhibit 12. The pulmonary function and blood gas studies were nonqualifying under the Department's standards; however, Dr. Istanbouly opined the testing showed a severe obstruction and Claimant is totally disabled as "supported by pft and exercise test results (severe reduction of VO2 max and total METS)." *Id*. at 14. In a supplemental report, Dr. Istanbouly stated, "VO2 max and total METS are remarkably reduced consistent with a class IV total impairment due to respiratory disease per the AMA 6th Edition Guidelines." Director's Exhibit 18 at 1-2.

because he did not explain what those tests demonstrate and did not address whether they are acceptable clinical and laboratory diagnostic techniques for assessing pulmonary or respiratory disability. *See* 20 C.F.R §718.107(b) (stating that the party "submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits"); Decision and Order at 11. The ALJ also permissibly found Dr. Istanbouly's opinion unpersuasive because he failed to provide any context for the level of pulmonary or respiratory disability associated with a class IV impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 6th Edition, and thus did not adequately explain why Claimant could not perform his usual coal mine work.[15] *Id*. He further permissibly found Dr. Istanbouly did not explain how the cardiopulmonary testing, which is nonqualifying, rendered Claimant unable to perform the duties of his last job. *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007) (It is the province of the ALJ to evaluate the medical evidence, draw inferences, and assess probative value.); *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, (7th Cir. 2002) (Whether a medical report is sufficiently reasoned is for the ALJ as the fact-finder to decide.); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990) (same); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc) (same); Decision and Order at 11.

Regarding Dr. Cohen's opinion, the ALJ accurately noted that he reviewed the medical record and diagnosed a moderately severe respiratory impairment and opined that Claimant is totally disabled and unable to perform his usual coal mine employment. Decision and Order at 13; Claimant's Exhibit 5. I see no error in the ALJ's permissible finding that Dr. Cohen's opinion is conclusory and lacks sufficient rationale for why Claimant's impairment would preclude him from working in his usual coal mine job as a continuous miner operator. *See Stalcup*, 477 F.3d at 484; *Consolidation Coal Co. v.*

VO2 max and METS are not mentioned at all in the Department's regulations for determining total disability.

[15] The Department's regulations set forth standards for determining respiratory disability. The regulations do not reference the AMA Guidelines and Dr. Istanbouly did not show how the standards in the Guidelines are equivalent to those of the Department or explain how the measurements in the Guidelines demonstrate total disability as it is defined in the Department's regulations.

Director, OWCP [*Stein*], 294 F.3d 885, 895 (7th Cir. 2002); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

Moreover, I disagree with my colleagues that the ALJ erred in giving probative weight to Dr. Rosenberg's opinion that Claimant is not totally disabled. The ALJ specifically rejected Dr. Rosenberg's assertion that Claimant's pulmonary function study results should be adjusted to account for race. Decision and Order at 13-14. However, the ALJ, within his discretion, concluded that Dr. Rosenberg's opinion overall is otherwise credible because Dr. Rosenberg also noted the pulmonary function studies are non-qualifying without a race adjustment and his opinion is better supported by the objective evidence. *See Stein*, 294 F.3d at 895; *Poole*, 897 F.2d at 895; *see generally Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004) (ALJ has discretion to determine the extent to which a physician's opinion is tainted by review of inadmissible evidence). Thus, I believe the ALJ fulfilled his duty to explain his crediting of Dr. Rosenberg's opinion as the Administrative Procedure Act requires.[16] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). However, any error by the ALJ in crediting Dr. Rosenberg is harmless since the ALJ gave valid reasons for discrediting Claimant's evidence and it is Claimant's burden to establish a totally disabling pulmonary or respiratory impairment. *See* 20 C.F.R. §718.204(a)-(b); *see also Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); Decision and Order at 12-13.

[16] The Administrative Procedure Act, 5 U.S.C. §500 et seq., as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "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).

Accordingly, I would affirm the ALJ's finding that the medical opinion evidence and evidence as a whole do not establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, and thus would affirm the ALJ's denial of benefits.

I therefore dissent.

JUDITH S. BOGGS
Administrative Appeals Judge