U.S. Department of Labor

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

BRB Nos. 22-0177 BLA
and 22-0178 BLA

ELIZABETH W. MIRACLE (o/b/o and Widow of CORDELL MIRACLE, JR.)	)	
Claimant	)	
v.	)	
BURNSIDE EXCAVATING COMPANY	)	
and	)	DATE ISSUED: 9/28/2023
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits[1] of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

[1] Administrative Law Judge (ALJ) Theresa C. Timlin issued a document titled "Decision and Order Denying Benefits" on January 6, 2022. The Director, Office of Workers' Compensation Programs (Director), submitted a motion for reconsideration on February 4, 2022, noting the content of the ALJ's Decision and Order granted benefits and thus requesting the ALJ amend the title of her Decision and Order. Director's Motion for

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer.

Ann Marie Scarpino (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 ROLFE, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Granting Benefits (2017-BLA-05813; 2018-BLA-06250) 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 miner's subsequent claim filed on July 28, 2016,[2] and a survivor's claim filed on March 15, 2018. Director's Exhibits 5; 36; 41; 42 at 2.

The ALJ credited the Miner with 15.78 years of underground coal mine employment and found he had a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant[3] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[4] and

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Reconsideration to Correct Clerical Error (Feb. 4, 2022). By Order dated April 12, 2022, the ALJ granted the Director's motion and amended her January 6, 2022 Decision and Order to be retitled Decision and Order Granting Benefits. Order Granting Motion for Reconsideration and Amending Decision and Order at 1-2 (Apr. 12, 2022).

[2] The Miner filed three prior claims. Director's Exhibits 1-3. On July 30, 2003, the district director denied his previous claim, filed on January 3, 2002, for failure to establish any element of entitlement. Director's Exhibit 3.

[3] Claimant is the widow of the Miner, who died on February 20, 2018. Director's Exhibit 40. She is pursuing the Miner's claim on his behalf, along with her own survivor's claim.

[4] 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

established a change in an applicable condition of entitlement.[5] 20 C.F.R. §725.309(c). Further, she found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ also determined Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6]

On appeal, Employer asserts the ALJ lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2,[7] and because the removal provisions applicable to the ALJ render her appointment unconstitutional. On the merits, Employer argues the ALJ erred in

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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.

[5] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the ALJ 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); *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 district director denied the Miner's previous claim for failure to establish any element of entitlement, Claimant was required to submit new evidence establishing an element of entitlement to obtain review of this subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

[6] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be 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).

[7] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

finding Claimant invoked the Section 411(c)(4) presumption and that Employer did not rebut it. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging rejection of Employer's constitutional challenges. Employer replied to the Director's brief, reiterating its arguments.

The Benefit Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 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).

Appointments Clause and Removal Protections

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[9] Employer's Brief at 28-33. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[10] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id*. It also challenges the

[8] This case arises within 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); Director's Exhibit 6.

[9] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[10] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Timlin.

constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 33-38; Employer's Reply Brief at 2-4. It generally argues the removal protections for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521 (2018), are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's arguments in *Lucia*. Employer's Brief at 33-38; Employer's Reply Brief at 2-4. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and *Arthrex, Inc. v. Smith & Nephew, Inc.*, 594 U.S. , 141 S. Ct. 1970 (2021). For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , 22-0022 BLA, slip op. at 3-6 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Invocation of the Section 411(c)(4) Presumption: Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar" to underground mines. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of the Miner's coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011).

In evaluating the Miner's coal mine employment, the ALJ considered his August 1992 application for benefits and CM-911a form, November 1992 CM-913 form, February 1996 application for benefits, August 1997 hearing testimony, January 2002 application for benefits and CM-911a form, W-2 Wage and Tax statements, Social Security Administration (SSA) earnings record, the Miner's current application for benefits and CM-911a form, and Employer's September 2016 interrogatories. Director's Exhibits 1 at 101, 106, 115, 124-25; 2 at 19-22, 304-05; 3 at 123-30, 135, 137; 5; 6; 8; Employer's Exhibit 6; Decision and Order at 7-10. She determined the evidence did not establish the beginning and ending dates of the Miner's coal mine employment for any year except 1992.[11] Decision and Order at 10.

[11] The ALJ correctly observed the record demonstrates the Miner did not work in coal mine employment after July 1992. Decision and Order at 13 n.13 (citing Director's Exhibits 5, 6).

The ALJ accorded normal weight to the Miner's W-2 Wage and Tax statements and Social Security Earnings Record. *Id.* at 11 (citing Director's Exhibits 1 at 106, 115; 3 at 123-30). After reviewing the Miner's 1997 hearing testimony, 2002 CM-911 form, current CM-911a form, and responses to Employer's interrogatories, the ALJ determined that, although the Miner indicated in his prior claims his first coal mine employer was Kentucky-Virginia Stone (KVS), he "likely misremembered" when he actually began working in coal mines, as the record demonstrated he worked for Mustang Coal the year before he began working at KVS. Decision and Order at 11 (citing Director's Exhibits 3 at 123, 130, 137; 6; Employer's Exhibit 6). For the years prior to 1992, she compared the Miner's earnings to the average yearly earnings of coal miners as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual* to find 15.2 years of coal mine employment. Decision and Order at 12. Noting the Miner indicated he did not work in coal mine employment after July 1992, she credited him with an additional 0.58 of a year of coal mine employment in 1992. *Id.* at 13. In total, the ALJ credited the Miner with 15.78 years of coal mine employment. *Id.*

Employer initially contends the ALJ erred by relying on Exhibit 610 to calculate the Miner's length of coal mine employment prior to 1992. Employer's Brief at 12-13. Comparing the Miner's 1992 earnings with his stated retirement date from coal mining in July 1992, Employer argues the Miner was paid "well above industry averages" and that the ALJ should have adjusted her calculations for previous years accordingly.[12] *Id.* We disagree.

As the ALJ explained, ALJs may use "any reasonable method of computation" to determine the length of a miner's coal mine employment. Decision and Order at 6; *see Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). She further correctly noted ALJs may apply the formula at 20 C.F.R. §725.101(a)(32)(iii) and Exhibit 610 when the beginning and ending dates of a miner's employment are not ascertainable. Decision and Order at 7 (citing *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 403 (6th Cir. 2019)). We affirm, as unchallenged on appeal, the ALJ's finding that the beginning and ending dates of the Miner's coal mine employment in 1992 are ascertainable but that they are not ascertainable for the years prior to 1992. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-12. Consequently, the ALJ permissibly used Exhibit 610

[12] Employer asserts applying the ALJ's "treatment of [the Miner's] 1992 earnings" to prior years "would reduce the amount credited in 1975 by .28 years, in 1976 by .31, and in 1990 by approximately.27 years, for a .86-year reduction" from the 15.78 years calculated by the ALJ. Employer's Brief at 13 n.3. Employer does not explain the mathematical basis for its calculations or explain why the Miner's earnings in 1992 demonstrate he was paid greater than the average daily rate in prior years.

to calculate the length of the Miner's coal mine employment in the years prior to 1992 and used the actual dates of his employment for 1992. 20 C.F.R. §715.101(a)(32)(ii); *see Vickery*, 8 BLR at 1-432.

We agree with Employer, however, that the ALJ erred in determining the Miner's employment with KVS constituted coal mine employment because she did not consider relevant evidence in coming to that conclusion. Employer's Brief at 13-18.

As a threshold matter, it was within the ALJ's authority to consider whether the Miner's work at KVS constituted coal mine employment despite the fact he did not report KVS as coal mine employment in his current claim. Notwithstanding the Miner's failure, the ALJ retained the discretion to determine the Miner's statements on his 1992 Form CM-913 and January 3, 2002 Form 911a from his prior claims were credible and sufficient to establish that his employment with KVS constituted coal mine employment. Decision and Order at 11 (citing Director's Exhibits 1 at 101; 3 at 135). Noting the Miner's work for Mustang Coal in 1970,[13] the ALJ reasonably concluded the Miner "misremembered" when he actually began working in coal mines, thus undermining the Miner's statements in his current claim that his first coal mine employer was Hignite Coal Company in 1978 -- rather than with three other coal mine employers including partial years with KVS from 1970 until 1976.[14] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 11; Director's Exhibits 1 at 101, 124; 2 at 19-22.

But while the ALJ had the discretion to consider whether the Miner's work with KVS was coal mine employment, she did not address the Miner's statements to Drs. Paranthaman and Vaezy that his work for KVS was road construction or his statement to Dr. Rosenberg that he worked for the highways laying blacktop during this time. Employer's Brief at 14-15; Director's Exhibits 2 at 118, 247; Employer's Exhibit 5 at 6; *see McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). Because the ALJ failed to weigh all

[13] The ALJ stated the Miner worked at Mustang Coal in "1980." Decision and Order at 11. This reference appears to be a scrivener's error, as immediately before this statement the ALJ correctly indicated the Miner worked at Mustang Coal before he worked at KVS (where he began working in 1971). *Id.* She further accurately noted in her table of coal mine employers and earnings that the Miner worked for Mustang Coal in 1970. *Id.*

[14] Indeed, as the ALJ correctly observed, Employer acknowledged in its post-hearing brief that the Miner worked for Mustang Coal in 1970. Decision and Order at 11 n.12 (citing Employer's Post-Hearing Brief at 22).

the relevant evidence and explain her length of coal mine employment calculation, we must vacate her findings that Claimant established the Miner had 15.78 years of underground coal mine employment and invoked the Section 411(c)(4) presumption. Thus, we vacate the ALJ's award of benefits in the miner's claim. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune*, 6 BLR at 1-998. Although we vacate the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption and the award of benefits in the miner's claim, we will address Employer's remaining arguments, in the interest of judicial economy, that the ALJ erred in also finding total disability established when determining that Claimant invoked the Section 411(c)(4) presumption.

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

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found the pulmonary function studies and medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv).[15] Decision and Order at 14.

Pulmonary Function Studies

The ALJ considered two pulmonary function studies conducted on October 18, 2016, and August 18, 2017. Decision and Order at 16-18; Director's Exhibit 12; Employer's Exhibit 3. Drs. Rosenberg and Vuskovich opined that the "Knudson predicted value[s]" establish that the August 18, 2017 study is non-qualifying[16] when accounting for the Miner's age of eighty-four at the time of the study. Employer's Exhibits 5 at 7; 7 at 3; 11 at 4-5. They also opined the August 18, 2017 study is invalid. Employer's Exhibits 5 at 6; 7 at 3; 11 at 4-5. Dr. Vuskovich further noted varying heights were reported for the

[15] The ALJ determined that the arterial blood gas studies do not establish a totally disabling impairment and there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 24.

[16] 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).

Miner and opined that, after adjusting for the Miner's age using the Knudson values, the October 18, 2016 study would be non-qualifying if the Miner's height was seventy-one and one-quarter inches, as Dr. Baker reported for the Miner's height in his April 15, 2002 examination. Employer's Exhibit 7 at 4, 8 (referencing Director's Exhibit 3 at 99). The ALJ found these opinions unpersuasive. Decision and Order at 17-18. Thus, applying the values found in Appendix B of 20 C.F.R. Part 718 for a miner seventy-four inches tall and seventy-one years old, she determined the October 18, 2016 study produced qualifying values before and after the administration of a bronchodilator, and that the August 18, 2017 study produced qualifying values before the administration of a bronchodilator. Decision and Order at 17; Director's Exhibit 12. The ALJ therefore concluded the pulmonary function study evidence supports a finding of total disability. Decision and Order at 18.

Employer initially contends the ALJ erred by failing to resolve the discrepancy in the heights reported on the Miner's pulmonary function studies. Employer's Brief at 24-25. We agree.

The ALJ found the Miner was seventy-four inches tall, stating only that "the physicians of record listed [the] Miner's height at seventy-four inches." Decision and Order at 16. However, as Employer correctly observes, measurements of the Miner's height ranged from Dr. Vaezy's April 5, 1996 measurement of seventy-one inches to Drs. Forehand's and Rosenberg's measurements of seventy-four inches. Director's Exhibits 2 at 251; 12 at 10; Employer's Exhibit 3 at 2; *see also* Director's Exhibits 1 at 46, 49; 2 at 42, 120, 143, 164; 3 at 99; Employer's Exhibit 7 at 8 (noting discrepancy in reported heights). An ALJ must resolve discrepancies in height measurements on pulmonary function study reports and use one "actual height" when assessing the table values in Appendix B. *See 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). Because the ALJ failed to address conflicting evidence and resolve the discrepancy in the Miner's reported height, her analysis does not comport with the 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).[17] *See Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

[17] 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).

We further agree with Employer that the ALJ erred in finding the August 18, 2017 pulmonary function study produced valid results.[18] Employer's Brief at 20-23.

Dr. Rosenberg opined the Miner put forth only "fair" effort on the August 18, 2017 pulmonary function study and noted that "the two best [pre-bronchodilator] FVC and FEV_1 values varied by 200ccs." Employer's Exhibit 5 at 6. In contrast, the ALJ observed the technician conducting the August 18, 2017 pulmonary function study reported the Miner "gave good effort" and that the study "is acceptable and reproducible." Decision and Order at 18 (quoting Employer's Exhibit 3 at 2). She discredited Dr. Rosenberg's validity opinion because the physician did not explain his opinion that the Miner provided only fair effort considering the technician rated the Miner's efforts as good. *Id.*

Although Dr. Rosenberg did not specifically address the administering technician's statements, he did provide a rationale explaining his conclusion that the Miner did not put forth sufficient effort, as the ALJ acknowledged.[19] Decision and Order at 18; Employer's Exhibit 5 at 6. 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. 79,920, 79,927 (Dec. 20, 2000) ("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). Assuming, without supporting evidence, that a technician is equally qualified as a reviewing doctor to assess the validity of a pulmonary function study is error. *See 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, as it is "the interpretation of the tracings" that matters in determining the validity of a pulmonary function study. *Id.*

[18] We affirm, as unchallenged on appeal, the ALJ's finding that the October 18, 2016 pulmonary function study produced valid results. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

[19] The ALJ indicated Dr. Rosenberg's statement that there was a two-hundred cubic centimeter variance between the two highest FVC and FEV1 measurements "does not comport with the quality standards found in the regulations." Decision and Order at 18. However, one cubic centimeter is equivalent to one milliliter, and the statement that there was a two-hundred cubic centimeter variance is thus the same as stating there was a two-hundred milliliter variance. *See* National Institute of Science and Technology, SI Units – Volume, https://www.nist.gov/pml/owm/si-units-volume (last visited Sept. 7, 2023).

Dr. Vuskovich also opined the August 18, 2017 pulmonary function study is invalid. Employer's Exhibit 7 at 3. The ALJ found his validity opinion unreasoned because he "did not explain his reasoning." Decision and Order at 17. However, contrary to the ALJ's conclusion, Dr. Vuskovich explained the August 18, 2017 study is invalid because the Miner's "initial efforts were not maximum efforts[,] which artificially lowered his FEV1 results," and that his "respiratory rate and tidal volume were not sufficient to generate valid MVV results." Employer's Exhibit 7 at 3. He further opined that "flow volume loops and volume time tracings showed that within a reasonable degree of medical certainty [the Miner] did not put forth the effort required to generate valid FVC-FEV1 results" and that pulmonary function testing "is not a 'fair' effort test" but rather a "maximum effort test." Employer's Exhibit 11 at 4-5.

Because the ALJ did not provide a valid rationale for discrediting Drs. Rosenberg's and Vuskovich's validity opinions, we must vacate her findings with regard to the validity of the August 18, 2017 pulmonary function study. *See* 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 17-18. We are not passing judgment on whether this study is valid. Rather, the ALJ must consider the validity of this study and render her own credibility findings. *See Crisp*, 866 F.2d at 185 (it is the ALJ's responsibility to evaluate physicians' opinions); *see also Rowe*, 710 F.2d at 255 (Board must remand when the ALJ fails to make necessary factual findings).

We also agree, in part, with Employer's argument that the ALJ did not adequately explain her reasons for rejecting Drs. Rosenberg's and Vuskovich's reliance on the Knudson predicted values to determine whether the pulmonary function studies are qualifying. Employer's Brief at 19-21. Drs. Rosenberg and Vuskovich both noted the tables in Appendix B to 20 C.F.R. Part 718 consider miners only up to the age of seventy-one and opined that, after using the Knudson predicted values to extrapolate qualifying values to a person of the Miner's age, the August 18, 2017 pulmonary function study did not produce qualifying values. Employer's Exhibits 5 at 7; 7 at 3; 11 at 4-5. Dr. Vuskovich further opined the values produced in the October 18, 2016 study would not be considered qualifying if the Knudson predicted values were applied to a miner of the lower height reported during the Miner's previous examinations. Employer's Exhibit 7 at 4, 8. The ALJ rejected Dr. Vuskovich's opinion because he did not explain why the Knudson predicted values should be applied instead of the values contained in Appendix B to 20 C.F.R. Part 718 and because the "Board is clear that an [ALJ] should not extrapolate qualifying values for individuals over age seventy-one." Decision and Order at 17 (citing *Meade*, 24 BLR at 1-47).

As Employer asserts, the ALJ erred in applying *Meade* to conclude ALJs may never use extrapolated values to determine a miner's disability when he is over the age of seventy-one. Employer's Brief at 19-21. We explained in *Meade* that, absent contrary

evidence, the values for a seventy-one-year-old miner listed in Appendix B to 20 C.F.R. Part 718 should be used to determine if miners over the age of seventy-one qualify as totally disabled. 24 BLR at 1-47. When such evidence is provided, however, the ALJ must consider the credibility of the physician's use of the other predicted values. *See id.*

Further, the ALJ erred by failing to address Dr. Rosenberg's opinion with respect to the Knudson predicted values.[20] Dr. Rosenberg opined that, although the tables at 20 C.F.R. 718 Appendix B only provide values up to age seventy-one, age continues to affect the normal and qualifying values. Employer's Exhibit 5 at 7. He explained that he calculated new values considering an eighty-four-year-old miner based on the Knudson predicted values and attached table values to his report based on the Knudson equation to account for the Miner's advanced age. *Id.* at 7, 12-14. The credibility of physician opinions is the purview of the ALJ, and we take no position on the weight due Dr. Rosenberg's opinion. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. However, the ALJ erred by failing to consider the credibility of Dr. Rosenberg's opinion with regard to his use of the Knudson predicted values. *See Meade*, 24 BLR at 1-47; *McCune*, 6 BLR at 1-998. Thus, we vacate the ALJ's finding that the pulmonary function study evidence weighs in favor of a finding of total disability at 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ considered the medical opinion of Dr. Forehand that the Miner was totally disabled and the opinions of Drs. Rosenberg and Vuskovich that he was not. Decision and Order at 19-24; Director's Exhibit 12 at 15-16; Employer's Exhibits 5 at 5-7; 7 at 10-11; 11 at 8. The ALJ credited Dr. Forehand's opinion as supported by the pulmonary function evidence and discredited the opinions of Drs. Rosenberg and Vuskovich because they relied on their conclusions that the pulmonary function study evidence did not demonstrate total disability, contrary to her finding. Decision and Order at 23.

[20] We affirm, as unchallenged on appeal, the ALJ's discrediting of Dr. Vuskovich's opinion on the basis that he did not explain why the Knudson predicted values should be applied to miners over the age of seventy-one. *Skrack*, 6 BLR at 1-711; Decision and Order at 17. Although our colleague asserts that the ALJ could have relied on Dr. Rosenberg's rationale regarding the Knudson predicted values to credit Dr. Vuskovich's use of them as well and that the discrediting of Dr. Vuskovich's opinion was "subsumed" in Employer's contention that the ALJ erred in discrediting Dr. Vuskovich and Dr. Rosenberg for using the Knudson predicted values, Employer only -- and incorrectly -- stated in its brief on appeal that "[o]ther than misapprehending *Meade*, the ALJ offered no rationale to reject these opinions." Employer's Brief at 20; *see* Decision and Order at 17.

Because we have vacated the ALJ's weighing of the pulmonary function studies, which influenced her weighing of the medical opinions, we also vacate her finding that the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). We further vacate her finding that the evidence, considered as a whole, establishes total disability at 20 C.F.R. §718.204(b)(2). Consequently, we remand the case for further consideration.

Survivor's Claim: Derivative Entitlement

Because we have vacated the award of benefits in the miner's claim, we vacate the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 32.

Remand Instructions

On remand, the ALJ must reconsider the length of the Miner's coal mine employment and specifically address whether the Miner's employment with KVS constituted coal mine employment. In doing so, she must address all relevant evidence, including the Miner's statements to Drs. Paranthaman, Vaezy, and Rosenberg that his employment with KVS was in road construction, and explain all material findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

The ALJ must then reconsider whether Claimant has established total disability based on a preponderance of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i). She must resolve the discrepancy in the Miner's reported heights and, if the Miner's established height falls between two values listed in the tables in Appendix B to 20 C.F.R. Part 718, she must round up to the next nearest height. *See Carpenter v. GMS Mine & Repair Maint. Inc.*, BLR , BRB No. 22-0100 BLA, slip op. at 4-5 (Sept. 6, 2023); *Protopappas*, 6 BLR at 1-223. Further, she must consider Drs. Rosenberg's and Vuskovich's opinions that the August 18, 2017 pulmonary function study is invalid and assess the credibility of Dr. Rosenberg's opinion that the Knudson predicted values should be used when evaluating disability in miners over the age of seventy-one. *See Rowe*, 710 F.2d at 255; *Meade*, 24 BLR at 1-47. Moreover, she must reevaluate the medical opinions, taking into consideration her findings regarding the pulmonary function studies, the exertional requirements of the Miner's usual coal mine work, and other objective evidence. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). In weighing the medical opinions, she must consider the physicians' qualifications, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Rowe*, 710 F.2d at 255.

In reaching her credibility determinations, the ALJ must set forth her findings in detail and explain her rationale in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165. If the ALJ determines total disability is demonstrated by the pulmonary function studies or medical opinions, or both, she must consider the evidence as a whole and reach a determination as to whether the Miner was totally disabled. 20 C.F.R. §718.204(b)(2); *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *see Shedlock*, 9 BLR at 1-198.

If Claimant fails to establish total disability, benefits are precluded, and the ALJ may deny benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). If the ALJ again finds Claimant establishes at least fifteen years of qualifying coal mine employment and total disability, Claimant will thereby invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4). The ALJ must then consider whether Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d); *see also Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015). However, if the ALJ finds Claimant establishes total disability and less than fifteen years of qualifying coal mine employment, then she must consider whether Claimant has established entitlement under 20 C.F.R. Part 718 in both the miner's and survivor's claims. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Granting Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully disagree with my colleagues with respect to footnote twenty, which affirms the discrediting of Dr. Vuskovich's opinion as to whether the pulmonary function studies are qualifying for an individual over the age of seventy-one because he did not explain why the Knudson predicted values should be used. *Supra* note 20.[21]

The question is whether the Knudson predicted values are a credible basis for assessing the miner's pulmonary function. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24. BLR 1-40, 1-47 (2008). An explanation may be required so that the ALJ can determine the answer to that question. *Id.*; *see also Director, OWCP, v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (in evaluating credibility of a medical opinion, ALJ must examine the validity of the opinion's reasoning in light of studies conducted and objective indications on which the opinion is based). However, once an explanation has been supplied, then the purpose of requiring an explanation has been satisfied. *See Rowe*, 710 F.2d at 255. The ALJ has Dr. Rosenberg's explanation from which to make a determination. *See* Employer's Exhibit 5 at 7. If, based on that explanation, the ALJ determines that the Knudson values are a credible basis for such assessments, then their use by Dr. Vuskovich is just as valid as their use by Dr. Rosenberg (absent some error in their use by Dr. Vuskovich which has not been brought to our attention). This is the logical result since the issue is raised in Employer's overall contention of error (for discrediting Drs. Vuskovich and Rosenberg for using the Knudson values), no purpose is served by requiring a separate redundant explanation from

[21] Contrary to footnote twenty, this discrediting of Dr. Vuskovich's opinion was subsumed in Employer's contention that the ALJ erred in discrediting Dr. Vuskovich and Dr. Rosenberg for using the Knudson predicted values. Moreover, as explained *infra*, considering Dr. Vuskovich's opinion is a logical concomitant of accepting the use of the values as a credible basis for assessing total disability if the ALJ finds the Knudson values credible for that purpose.

Dr. Vuskovich, there is no explicit requirement to that effect, and imposing such a requirement results in failure to consider relevant evidence.

Consequently, I would vacate the ALJ's discrediting of Dr. Vuskovich's opinion as to whether the pulmonary function tests are qualifying and instruct the ALJ to consider Dr. Vuskovich's opinion if the ALJ finds, on remand, that the Knudson predicted values for individuals over the age of seventy-one provide a credible basis for assessing pulmonary function of such individuals.

In all other respects, I concur in the majority opinion.

JUDITH S. BOGGS
Administrative Appeals Judge