U.S. Department of Labor

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

BRB No. 20-0309 BLA

JAMES G. HUDDLESTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING,	)	
Self-insured through CONSOL ENERGY INCORPORATED	)	DATE ISSUED: 4/27/2022
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Daniel Sherman and Ryan Driskill (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

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

Cynthia Liao (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

ROLFE and GRESH, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2011-BLA-05063) rendered on a claim filed on November 16, 2009, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has thirteen years of coal mine employment, and therefore cannot invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Considering entitlement under 20 C.F.R. Part 718, he found Claimant established he is totally disabled due to legal pneumoconiosis and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[2] It also argues the ALJ erred in remanding the claim for a complete pulmonary evaluation. Finally, Employer argues the ALJ erred in finding Claimant totally disabled due to legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional challenge. However, he agrees the ALJ erred in remanding the case for a complete

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

[2] 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.

pulmonary evaluation and therefore urges the Board to remand the case for the ALJ to strike certain evidence and reconsider Claimant's entitlement to benefits.

> The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Appointments Clause Challenge

Employer urges the Board to vacate the award 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).[4] Employer's Brief at 36-41. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (Department) ALJs on December 21, 2017, but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment as the ratification took place two years after the ALJ conducted a hearing in the case.[5] *Id.* at 36. It further argues it did not forfeit

---

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[4] *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 ALJ are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[5] 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 Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

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

this argument by failing to raise the issue while the case was pending before the ALJ. *Id.* at 37-41. The Director contends Employer forfeited its Appointments Clause argument. Director's Response Brief at 6-7. We agree with the Director.

Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.")

Although *Lucia* was decided nearly two years before the ALJ rendered his decision,[6] Employer did not raise any challenge to the ALJ's authority to decide the case while the matter was before him; instead, it raises this argument for the first time on appeal. Had Employer timely raised its Appointments Clause challenge to the ALJ, he could have considered the issue and, if appropriate, provided the relief Employer requests. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021); *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge to discourage "sandbagging"); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019). Instead, Employer waited to raise the issue until after the ALJ issued an adverse decision.

Employer raises no basis for excusing its forfeiture of the issue beyond stating it was not required to do so, which we have rejected. Employer's Brief at 36-39. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962); *Kiyuna*, 53 BRBS at 11 (Appointments Clause argument is an "as-applied" challenge that the ALJ can address and thus can be waived or forfeited). Because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its forfeited arguments.[7] *See Davis*, 937 F.3d at 591-92; *Powell*, 53 BRBS at 15; *Kiyuna*, 53 BRBS at 11.

---

[6] A hearing in this case was held on June 23, 2015, and the case was remanded to the district director for a complete pulmonary evaluation on February 19, 2016. Decision and Order at 2. The case was returned to the ALJ on December 22, 2016, and he conducted a telephone conference on April 20, 2017. *Id.* The parties were allowed additional time to submit evidence and closing arguments, and the ALJ issued his Decision and Order on May 1, 2020.

[7] Employer contends the Board's precedent on this issue is inconsistent, citing to the Board's holdings in *Gamblin* v. *Island Creek Kentucky Mining*, BRB Nos. 18-0299& 18-0300, slip op. at 2 n.7 (Feb. 28, 2019) (unpub.) and *Kiyuna v. Matson Terminals, Inc.*,

Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Complete Pulmonary Evaluation

At issue in this case is whether the ALJ acted appropriately in attempting to ensure Claimant was provided a complete pulmonary evaluation.[8] Employer and the Director contend the ALJ erred in remanding the case for a third pulmonary function study after the Director had already provided Claimant with two studies. Employer's Brief at 31-36; Director's Response Brief at 7-9.

On December 17, 2009, Dr. Chavda conducted the Department of Labor (DOL) sponsored complete pulmonary evaluation, performing a physical examination and administering a chest x-ray, pulmonary function study, and arterial blood gas study. Director's Exhibit 12. At the request of the district director, Dr. Mettu reviewed the test and found Claimant's pulmonary function study invalid due to "[l]ess than optimal effort, cooperation and comprehension." Director's Exhibit 12. Dr. Chavda administered a new pulmonary function study on February 6, 2010. 20 C.F.R. §725.406(c); Director's Exhibit 12. Again at the request of the district director, Dr. Gaziano reviewed the test and found it invalid for "[l]ess than optimal effort, cooperation and comprehension." Director's Exhibit 12.

Following Employer's request for a hearing and after the ALJ conducted a hearing in the case, the ALJ addressed on his own accord whether Claimant had received a complete pulmonary evaluation from the DOL. February 19, 2016 Order. As Dr. Gaziano invalidated the repeat pulmonary function study that the DOL provided, he remanded the claim to the district director to provide an additional pulmonary function study and for Dr.

---

53 BRBS 9, 11 (2019). *Gambill* is non-precedential as it is unpublished; moreover, it predates the Board's published cases. *Powell v. Service Employees Int'l, Inc.*, 53 BRBS 13, 15 (2019) (the claimant's *Lucia* challenge is forfeited because she did not raise it before the ALJ); *Kiyuna*, 53 BRBS at 11 (affirming forfeiture where ALJ rejected Appointments Clause argument raised for the first time after briefing closed).

[8] The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994). A complete pulmonary evaluation includes a "report of physical examination, a pulmonary function study, a chest radiograph, and, unless medically contraindicated, a blood gas study. 20 C.F.R. §725.406(a).

Chavda, the DOL-sponsored physician, to provide a supplemental opinion based on the study. *Id.* The ALJ rejected Employer's Motion for Reconsideration, reaffirming his prior determination. April 11, 2016 Order. On remand, Dr. Chavda administered a third pulmonary function study on August 8, 2016. Director's Exhibit 38 at 18. He further offered an opinion on the study and participated in a deposition. Director's Exhibit 38 at 9; Employer's Exhibit 9.

Although the DOL is required to sponsor a complete pulmonary evaluation, it is not required to provide an evaluation sufficient to meet a claimant's burden of proof. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 642 (6th Cir. 2009); *Cline v. Director, OWCP*, 917 F.2d 9 (8th Cir. 1990). The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. §923(b) "when it pays for an examining physician who (1) performs all of the [required] medical tests . . . and (2) specifically links each conclusion in his or her medical opinion to those medical tests." *See Greene*, 575 F.3d at 642.

Contrary to the ALJ's findings, Claimant is not "entitled to a valid pulmonary function test." February 19, 2016 Order at 2. Rather, when a DOL-sponsored pulmonary evaluation test is not administered, or is not in substantial compliance with the quality standards set forth at 20 C.F.R. Part 718, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director "shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c). Where deficiencies in a test are "the result of lack of effort on the part of the miner, the miner will be afforded *one additional opportunity* to produce a satisfactory result." 20 C.F.R. §725.406(c) (emphasis added). In accordance with the regulations, Claimant was afforded a second pulmonary function study on February 6, 2010. Director's Exhibit 12. Even though Dr. Gaziano found that study was also invalid, Claimant was not entitled to a third study. 20 C.F.R. §725.406(c).

Consequently, the ALJ erred in remanding the case for a third pulmonary function study and supplemental medical opinion. 20 C.F.R. §725.406(c). As discussed below, we must therefore vacate the award of benefits and remand the case for the ALJ to reconsider Claimant's entitlement to benefits without consideration of the August 8, 2016 pulmonary function study, Dr. Chavda's undated supplemental opinion, and the May 26, 2017 deposition of Dr. Chavda, consistent with our holding.

Part 718 Entitlement

Without the benefit of the Section 411(c)(4) presumption,[9] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). In order to establish legal pneumoconiosis, Claimant must prove that he has a "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, holds a claimant satisfies this standard by establishing the miner's lung disease or impairment was caused "in part" by coal mine employment. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594 (6th Cir. 2014).

The ALJ considered the medical opinions of Drs. Chavda, Baker, Selby, and Castle. Decision and Order at 8-20. Dr. Chavda opined Claimant has legal pneumoconiosis in the form of an obstructive and restrictive lung disease due to cigarette smoking, coal mine dust exposure, and a paralyzed hemidiaphragm. Director's Exhibits 12, 38 at 9-13, 849-894; Employer's Exhibit 19. Similarly, Dr. Baker opined Claimant has legal pneumoconiosis in the form of obstructive lung disease due in part to coal mine dust exposure.[10] Director's Exhibit 38 at 554-589; Claimant's Exhibit 6. On the other hand, Dr. Selby opined Claimant does not have legal pneumoconiosis, but instead has respiratory "symptoms" due to obesity, chronic anemia, severe coronary artery disease, a paralyzed hemidiaphragm, clinical asthma, and microscopic emphysema due to smoking. Director's Exhibit 38 at

[9] The irrebutable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 is not applicable because there is no evidence in the record that Claimant has complicated pneumoconiosis. 30 U.S.C. §921(c)(3).

[10] Dr. Baker also opined Claimant's primary lung disease is restrictive and that, while coal mine dust exposure may have contributed to this disease, he was unsure of the actual cause. Director's Exhibit 38 at 554-589; Claimant's Exhibit 6.

142-191. Dr. Castle also opined Claimant does not have legal pneumoconiosis, but instead has significant restrictive lung disease due to a paralyzed hemidiaphragm, obesity, and cardiac disease. Director's Exhibit 38 at 658-685.

The ALJ credited the opinions of Drs. Chavda and Baker as well-reasoned and documented. Decision and Order at 19-20. Conversely, he found the opinions of Drs. Selby and Castle not well-reasoned or well-documented, and inconsistent with the preamble to the revised regulations. *Id*. at 17-19. He therefore found the medical opinion evidence establishes legal pneumoconiosis in the form of obstructive lung disease due in part to coal mine dust exposure. *Id*. at 19.

As discussed above, the ALJ erred in remanding the case for a third pulmonary function study and supplemental medical opinion from Dr. Chavda. *See supra* p. 8-10. As his consideration of this evidence may have influenced his weighing of the medical opinion evidence, we also vacate his determination that the medical opinion evidence establishes pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2); 718.202(a)(4). On remand, the ALJ should reconsider the medical opinion evidence, without consideration of the excluded evidence, to determine if Claimant has established the existence of legal pneumoconiosis. Specifically, the ALJ must consider if Claimant's has an obstructive or restrictive[11] lung disease or other impairment arising out of coal mine employment.[12] 20 C.F.R. §718.201(a)(2).

[11] Employer notes the record contains evidence reflecting that a significant component of Claimant's impairment is restrictive. Employer's Brief at 11-14. For example, Dr. Castle opined Claimant is totally disabled due to a restrictive defect and Dr. Baker opined Claimant's totally disabling respiratory impairment is primarily restrictive in nature. *See* 20 C.F.R. §718.201(a)(2) (defining legal pneumoconiosis as either an obstructive or restrictive disease or impairment arising out of coal mine employment); Director's Exhibit 38 at 554-589, 658-685; Claimant's Exhibit 6.

[12] On remand, the ALJ should first clarify the evidence of record. At the hearing on June 23, 2015, the ALJ afforded Employer sixty days to submit Dr. Selby's deposition as Employer's Exhibit 18. Hearing Transcript at 10-11. Before the deadline to submit this evidence passed, the ALJ remanded the claim for a new pulmonary function study. February 19, 2016 Order. After the case was returned to the ALJ, he indicated Employer's Exhibits 1-18 were included in the Director's Exhibits. Decision and Order at 2 n.6. However, the ALJ does not discuss or cite to Dr. Selby's deposition, and it does not appear in the record. Employer contends Dr. Selby explains in his deposition why Claimant's restrictive lung disease does not constitute legal pneumoconiosis and Claimant is not totally disabled. Employer's Brief at 25, 28. The ALJ should determine if Dr. Selby's deposition

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 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 considered five pulmonary function studies conducted on November 11, 2010, June 21, 2011, May 29, 2012, May 24, 2013, and August 8, 2016.[13] Decision and Order at 21-22. He accurately noted each study was qualifying before and after the administration of bronchodilators.[14] Director's Exhibit 38 at 18, 110, 197; Claimant's Exhibits 3, 4. Because all of the pulmonary function studies were qualifying, the ALJ found the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 22.

As discussed above, the ALJ erred in remanding the claim for Claimant to be provided a third DOL-sponsored pulmonary function study, which Claimant performed on August 8, 2016. However, because all of the pulmonary function study evidence was qualifying, any error in also crediting the August 8, 2016 study is harmless. *See Larioni*, 6 BLR at 1-1278. Consequently, we affirm the ALJ's determination that the pulmonary

---

was admitted into evidence and, if so, should address this evidence. 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984).

[13] The ALJ also considered the December 17, 2009 and February 16, 2010 qualifying pulmonary function studies, but found them invalid. Decision and Order at 21; Director's Exhibit 12.

[14] 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).

function study evidence establishes total disability.[15] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 22.

The ALJ further considered the medical opinions of Drs. Chavda, Baker, Selby, and Castle.[16] Dr. Chavda initially opined Claimant has a moderately severe airway disease that is totally disabling.[17] Director's Exhibit 38 at 861-62. Dr. Baker opined Claimant has a moderate pulmonary impairment. Director's Exhibit 38 at 564, 569. Dr. Castle opined Claimant has a "significant restrictive pulmonary process" and "a severe reduction in the forced vital capacity and FEV1." Director's Exhibit 38 at 7, 683. Finally, Dr. Selby opined Claimant has the respiratory capacity to perform any and all of his prior jobs in coal mines. Director's Exhibit 38 at 146. The ALJ stated he relied upon his prior findings regarding the existence of pneumoconiosis to credit the opinions of Drs. Chavda and Baker, and accorded little weight to the opinions of Drs. Selby and Castle. Decision and Order at 23. Consequently, he found the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23.

Employer contends the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 27-30, 34-35. We agree.

As discussed above, the ALJ erred in remanding the case for a third pulmonary function study and supplemental opinion from Dr. Chavda. *See supra* p. 8-10. Because we cannot determine the effect this error had on the ALJ's analysis of Dr. Chavda's opinion, we vacate his determination that Dr. Chavda offered a well-reasoned and well-documented opinion that Claimant is totally disabled based upon the pulmonary function study evidence. Decision and Order at 23. Moreover, contrary to the ALJ's findings, Dr. Baker did not conclude Claimant is totally disabled or has a severe impairment. Decision

[15] The ALJ rationally found the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 20, 22.

[16] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant's usual coal mine employment maintaining the belts required heavy labor and exertion. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23.

[17] The ALJ did not consider Claimant's treatment records from MultiCare because he found they were incomplete. Decision and Order at 16, n.13. However, some of the available records are relevant to the issue of total disability, including the September 9, 2013 pulmonary function study which Dr. Chavda initially relied upon in finding Claimant totally disabled. Director's Exhibit 38 at 861-62. The ALJ erred in failing to consider them, and should do so on remand. 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *McCune*, 6 BLR at 1-998.

and Order at 23. Rather, he opined Claimant has a moderate respiratory impairment. Director's Exhibit 38 at 564, 569, 573. While a moderate impairment may be totally disabling, the ALJ did not address this diagnosis, in conjunction with the exertional requirements of Claimant's usual coal mine employment, in determining if Claimant established total disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). Consequently, we vacate the ALJ's crediting of the opinions of Drs. Chavda and Baker, and therefore vacate his determination that the medical opinion evidence establishes total disability.[18] 20 C.F.R. §718.204(b)(2)(iv).

The ALJ determined Dr. Selby does not explain how he determined Claimant has no pulmonary impairment in light of the qualifying studies he considered. Decision and Order at 23. Employer contends Dr. Selby explained his position in his deposition. Employer's Brief at 28-29. As discussed above, the ALJ must determine whether Dr. Selby's deposition was admitted into evidence and, if so, consider Dr. Selby's opinion in light of his explanation.

We therefore vacate the ALJ's determination that the medical opinion evidence establishes total disability, 20 C.F.R. §718.204(b)(2)(iv), and the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2). Decision and Order at 23. On remand, the ALJ should determine if Dr Selby's deposition was admitted into the record, and then reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). In doing so, the ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, their understanding of the exertional requirements of Claimant's usual coal mine employment, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Crisp*, 866 F.2d at 185; s*ee also Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240-42 (2007) (en banc) (when a medical report is based, in whole or in part, on inadmissible evidence, the ALJ may, in her discretion, exclude that report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the opinion is entitled.). The ALJ must also reweigh the evidence as a whole and determine whether Claimant has

[18] We further note the ALJ did not consider whether Dr. Castle's diagnosis of a severe impairment is a diagnosis of total disability in light of the exertional requirements of Claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); Director's Exhibit 38 at 7, 683. On remand, he should do so.

established total disability pursuant to 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

Because we have vacated the ALJ's finding that Claimant is totally disabled, 20 C.F.R. §718.204(b)(2), we must also vacate his determination that Claimant is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c)(1).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues' rejection of Employer's Appointments Clause challenge. I further concur that the ALJ erred in remanding the claim for the district director to provide Claimant with a third pulmonary function evaluation as part of his complete pulmonary evaluation.

I respectfully disagree with their decision to address the ALJ's findings in piecemeal fashion. Instead, I agree with the Director that the ALJ's error requires remand for reconsideration of Claimant's entitlement to benefits. Director's Response Brief at 1. The ALJ's consideration of the third pulmonary function study, Dr. Chavda's supplemental opinion, and Dr. Chavda's deposition could have colored his consideration of the other evidence. *See Director, OWCP, v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *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).

Consequently, I would vacate the award of benefits and remand for the case to be transferred to a new ALJ for a fresh look at the evidence, unprejudiced by the improperly added evidence. *Cochran v. Consolidation Coal Co*., 16 BLR 1-101 (1992). I would further instruct the new ALJ not to review the previously issued Decision and Order and to consider the evidence anew. *Id.*[19]

Accordingly, I concur in part and dissent in part from the majority's opinion.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

[19] This would require consideration of all relevant evidence, including all opinion evidence of record from Dr. Selby.