U.S. Department of Labor

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

BRB No. 23-0273 BLA

EVERETT HOUNSHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIAMOND MAY MINING COMPANY	)	DATE ISSUED: 04/18/2024
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Everett Hounshell, Jackson, Kentucky.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

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

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Denying Benefits (2019-BLA-05653) rendered on a miner's subsequent claim[2] filed on July 20, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant failed to establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Because Claimant failed to establish an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits without addressing the remaining elements of entitlement.[3]

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

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[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed a previous claim on November 20, 2013, which the district director denied on September 12, 2014, for failure to establish total disability. Director's Exhibit 1 at 12-14, 109-12. The ALJ references two prior withdrawn claims in his decision, but there is no evidence of them in the record. *See* Decision and Order at 2 n.2. However, as withdrawn claims are considered "not to have been filed," the ALJ's error, if any, would be harmless. 20 C.F.R. §725.306(b); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds "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); *see 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 Claimant's prior claim for failure to establish total disability, Claimant is required to submit new evidence establishing that element of entitlement to warrant a review of this subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[3] The ALJ correctly found the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act is not applicable because there is no evidence of complicated pneumoconiosis in the record. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 3 n.10.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance 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 (1965).

Total Disability

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). 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). The ALJ found Claimant failed to establish total disability by any method.[6] 20 C.F.R. §718.204(b)(2); Decision and Order at 3-7.

Pulmonary Function Studies

[4] 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); Hearing Transcript at 12; Director's Exhibit 4.

[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] The ALJ accurately found none of the arterial blood gas studies produced qualifying values and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 3, 5-6; Director's Exhibit 12; Employer's Exhibits 3, 6. Thus we affirm his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

The ALJ considered the results of five pulmonary function studies, dated August 11, 2014, April 26, 2016, August 29, 2016, May 10, 2017, and May 10, 2018.[7] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 3-5; Director's Exhibits 12, 20; Claimant's Exhibit 3; Employer's Exhibits 3, 6, 8. The ALJ gave greatest weight to the most recent May 10, 2018 study that produced non-qualifying values as "most indicative of Claimant's current condition." Decision and Order at 5. In addition, he found a preponderance of the valid studies produced non-qualifying values. *Id*. Weighing the studies together, he concluded the preponderance of the pulmonary function study evidence failed to establish total disability. *Id*. The ALJ erred in his consideration of the pulmonary function studies.

The August 11, 2014 study is contained in Claimant's treatment records and produced qualifying results without the administration of bronchodilators. Decision and Order at 4; Director's Exhibit 20; Employer's Exhibit 8. The ALJ noted Dr. Vuskovich challenged the validity of this study, citing to Claimant's insufficient effort and the irregular curve of the results. Decision and Order at 5; Director's Exhibit 24; Employer's Exhibit 18 at 16-19.[8] Finding "no evidence in the record to refute" Dr. Vuskovich's opinion, the ALJ gave the testing no weight based on the doctor's opinion. Decision and Order at 5.

We initially note that as the August 11, 2014 study was not performed in anticipation of litigation, it is not subject to the regulatory quality standards. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008); *see* 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B. However, an ALJ must still determine if pulmonary function studies included in a miner's treatment record are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Here, the ALJ erroneously stated there was no evidence

[7] Because the studies reported different heights, the ALJ permissibly resolved the discrepancy by averaging the heights to find Claimant is 73.4 inches tall. Decision and Order at 4 n.13; *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). As the height falls between those provided in Appendix B of 20 C.F.R. Part 718, the ALJ used 73.6 inches, the closest greater table height, to determine qualifying values. *See Carpenter v. GMS Mine and Repair Maint., Inc.*, BLR , BRB No. 22-0100 BLA (Sept. 6, 2023); Decision and Order at 4 n.13.

[8] The ALJ erroneously referred to Dr. Vuskovich's discussion concerning the validity of the pulmonary function studies as contained in Employer's Exhibit 8, which contains treatment records from St. Charles Breathing Center. *See* Decision and Order at 5. Exhibit 18 contains Dr. Vuskovich's deposition transcript.

to refute Dr. Vuskovich's challenge to the validity of the study because the ALJ failed to address the hand-written notations on the study indicating Claimant had good effort and cooperation. *See* Decision and Order at 5; Director's Exhibit 20. The ALJ also failed to consider the notation indicating the study was "adequate for interpretation." Director's Exhibit 20. Because the ALJ did not discuss all the evidence relevant to the validity of the August 11, 2014 study, nor explain how he resolved the conflicts in the relevant evidence and the bases for his credibility determinations, his decision does not satisfy the Administrative Procedure Act (APA).[9] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir.1984) (finding which does not encompass discussion of contrary evidence does not warrant affirmance); *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) (factfinder's failure to discuss relevant evidence requires remand). Consequently, we vacate his determination to give no weight to the August 11, 2014 study.

The April 26, 2016 study contained in Claimant's treatment records did not produce qualifying results and therefore the ALJ accurately found it did not support a finding of total disability. Decision and Order at 4-5; Employer's Exhibit 8.

The August 29, 2016 study conducted in conjunction with the Department of Labor (DOL)-sponsored complete pulmonary examination of Claimant produced qualifying results before the administration of bronchodilators and non-qualifying results after the administration of bronchodilators. Decision and Order at 4; Director's Exhibit 12. Dr. Vuskovich also challenged the validity of this study because Claimant "did not generate maximum effort" and the tracings are irregular. Director's Exhibit 23; Employer's Exhibit 18 at 11-14. Drs. Gaziano and Ajjarapu both opined that the study is valid.[10] Director's

[9] The Administrative Procedure Act requires that every adjudicatory decision include 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), as incorporated into the Act by 30 U.S.C. §932(a).

[10] Dr. Gaziano checked a box indicating the vents are acceptable. Director's Exhibit 14. Dr. Ajjarapu reviewed the August 29, 2016 study and signed the ventilatory study report indicating it was conducted in compliance with DOL regulations and that the results are accurate. Director's Exhibit 12. She subsequently authored a supplemental report discussing the Knudson 76 values Dr. Vuskovich used to determine the validity of the pulmonary function studies as compared to the DOL criteria and concluded "[t]here is significant discordance between the prediction equations" of the two methods. Director's Exhibit 26 at 2.

Exhibits 12, 14, 26. The ALJ gave superior weight to Dr. Ajjarapu's opinion based on his belief that the doctor is a pulmonologist. Decision and Order at 5. In addition, the ALJ gave greater weight to the qualifying pre-bronchodilator testing, stating that "the question is whether the miner is able to perform his job, not whether he is able to perform his job after he takes medication." *Id.* (citing *Maynard v. Pen Coal Corp.*, BRB No. 09-0599 BLA, slip op. at 6 n.3 (July 27, 2010) (unpub.)). Thus, he found the August 2016 study supported a finding of total disability. Decision and Order at 5.

Contrary to the ALJ's finding, there is no evidence in the record supporting that Dr. Ajjarapu is a pulmonologist. Rather, her curriculum vitae states she is Board-certified in Family Medicine. Director's Exhibit 15. Thus, the ALJ erred in determining that "Dr. Ajjarapu's qualifications [] make [her] validity determination superior." Decision and Order at 5. Further, contrary to our dissenting colleague's assertion, any error in the ALJ's consideration of the validity of this study cannot be considered harmless as it was part of Claimant's DOL-sponsored complete pulmonary examination. *See infra* at 11 n.14. If the pulmonary function study is found invalid, the ALJ must consider whether Claimant is entitled to a new study. 20 C.F.R. §725.406(c) (requiring DOL to offer a miner a repeat study when the initial study does not comply with the quality standards); Director's Exhibit 12. Consequently, we vacate the ALJ's findings concerning the August 29, 2016 study.

The May 10, 2017 study produced non-qualifying results before the administration of bronchodilators and qualifying results after the administration of bronchodilators. Decision and Order at 4; Employer's Exhibit 6. The ALJ noted that Drs. Dahhan and Vuskovich, as well as the technician performing the study, indicated the post-bronchodilator values were invalid.[11] Decision and Order at 5; Claimant's Exhibit 3; Employer's Exhibits 6, 18 at 20-23. Thus, the ALJ permissibly gave weight to only the non-qualifying pre-bronchodilator values and determined this study did not support a finding of total disability. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012), Decision and Order at 5.

However, the ALJ erred in giving "greatest weight" to the May 10, 2018 study, which produced non-qualifying results. Decision and Order at 5; Employer's Exhibit 3 at 12-15. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction

[11] On the pulmonary function study report that Dr. Dahhan signed, next to cooperation, it stated "pre-good post-poor." Employer's Exhibit 6. Dr. Vuskovich did not specify whether he was addressing the pre- or post-bronchodilator values but generally testified that Claimant's "initial effort is absolutely not maximum" due to the flat and inconsistent flow volume loops and that none of Claimant's efforts were acceptable. Employer's Exhibit 18 at 20-23.

this case arises, has held it is irrational to credit evidence solely on the basis of recency where it shows the miner's condition has improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (given the progressive nature of pneumoconiosis, a fact-finder must evaluate evidence without reference to its chronological order when the evidence shows a miner's condition has improved) (citing *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (when the evidence shows improvement in condition, as opposed to deterioration, "[e]ither the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier")); *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 7-13 (Nov. 17, 2023); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14 (Jun. 27, 2023). Because the ALJ determined at least one of Claimant's prior pulmonary function studies was qualifying, we vacate the ALJ's decision to give the most weight to the May 10, 2018 study based on its recency alone.

As the ALJ did not set forth a valid basis for resolving the conflicts in the pulmonary function study evidence and failed to consider all relevant evidence, we vacate his finding that Claimant failed to establish total disability based on the pulmonary function testing. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 4-5.

Medical Opinions

The ALJ next considered medical opinions from Drs. Ajjarapu, Jarboe, and Tuteur, again erroneously identifying Dr. Ajjarapu as a pulmonologist.[12] Decision and Order at 6; *see* Director's Exhibit 15. Dr. Ajjarapu found Claimant to have a "severe pulmonary impairment" based on the qualifying pulmonary function study she obtained and opined Claimant lacks the pulmonary capacity to return to his previous employment.[13] Director's

[12] The ALJ indicated "[a]ll three physicians are board-certified pulmonologists." Decision and Order at 6.

[13] The ALJ cited to, but did not specifically discuss, Dr. Ajjarapu's supplemental report. Decision and Order at 6. Prior to preparing her supplemental opinion, at the request of DOL, Dr. Ajjarapu reviewed additional records, including a re-reading of the August 29, 2016 x-ray, Dr. Gaziano's August 29, 2016 pulmonary function study validation report, Dr. DePonte's April 26, 2016 chest x-ray interpretation, the August 14, 2014 pulmonary function study report that she validated, Dr. Vuskovich's August 11, 2014 and August 29, 2016 pulmonary function study validation reports, and Dr. Miller's August 29, 2016 x-ray interpretation. Director's Exhibit 25. Dr. Ajjarapu noted that Dr. Vuskovich used "Knudson 76 to get his values to validate spirometry testing" and discussed the use of those values as compared to the National Health and Nutrition Examination Survey III.

Exhibit 12 at 2. The ALJ noted her opinion "is well-reasoned based on the objective testing [s]he reviewed" but gave it less weight because she did not base her opinion on the entire record. Decision and Order at 6. Because two subsequent studies produced non-qualifying values, the ALJ determined that it is unclear whether the subsequent studies would have changed her position. *Id.* In contrast, the ALJ gave Drs. Tuteur and Jarboe full probative weight because they based their opinions on their non-qualifying tests and reviewed additional tests and treatment records. *Id.* Thus, he summarily found the medical opinion evidence did not establish total disability. *Id.*

Because the ALJ's erroneous findings regarding the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i) may have affected his weighing of the medical opinion evidence, we vacate his determination that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 6-7. In addition, we note that, contrary to the ALJ's findings, an ALJ is not required to discredit a physician, like Dr. Ajjarapu, who did not review all of a miner's medical records if the opinion is otherwise well reasoned, well documented, and based on her own examination of the miner and objective test results. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984). Thus, the ALJ erred in giving her opinion less weight solely on this basis.

Based on the foregoing errors, we vacate the ALJ's conclusion that Claimant did not establish total disability based on the evidence as a whole. Decision and Order at 7; *see Rafferty*, 9 BLR at 1-232. Consequently, we also vacate the ALJ's denial of benefits and remand the case for further consideration.

Remand Instructions

On remand, the ALJ must first reconsider whether Claimant established total disability based on the pulmonary function studies and provide an adequate rationale for his determinations. 20 C.F.R. §718.204(b)(2)(i). The ALJ must specifically reconsider whether the August 11, 2014 and August 26, 2016 studies are valid. If he determines the August 26, 2016 study is invalid, he must address whether remand to the district director is necessary for further testing to ensure Claimant receives a complete pulmonary evaluation in accordance with 20 C.F.R. §725.406(c).

Director's Exhibit 26 at 1-2. Then Dr. Ajjarapu reiterated that Claimant is unable to "perform his previous coal mine employment due to his pulmonary impairment." *Id.* at 3.

Thereafter, he must weigh the medical opinions, taking into consideration his findings regarding the pulmonary function studies, the exertional requirements of Claimant's usual coal mine work, and other relevant evidence. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). In weighing the medical opinions, he 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 Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983).

In reaching his credibility determinations, the ALJ must set forth his findings in detail and explain his 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, he must consider the evidence as a whole and determine whether Claimant has established total disability. 20 C.F.R. §718.204(b)(2); *Fields*, 10 BLR at 1-21; *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must address whether Claimant established at least fifteen years of qualifying coal mine employment and therefore invoked the Section 411(c)(4) presumption and, if so, whether Employer rebutted it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. If the ALJ finds Claimant established total disability but did not invoke the Section 411(c)(4) presumption, he must further consider whether Claimant has established entitlement under 20 C.F.R. Part 718.

Alternatively, if Claimant fails to 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).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I agree with the majority's affirmance of the ALJ's finding that Claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii). However, I respectfully dissent from the majority's decision to vacate the ALJ's determinations that Claimant did not establish total disability based on the pulmonary function studies and medical opinion evidence at 20 C.F.R. §718.204(b)(2)(i), (iv), and to vacate the denial of benefits. For the reasons that follow, I would affirm the ALJ's finding that Claimant did not establish total disability as it is consistent with law and supported by substantial evidence. *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965).

The ALJ considered the results of five pulmonary function studies, dated August 11, 2014; April 26, 2016; August 29, 2016; May 10, 2017; and May 10, 2018. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 3-5. The ALJ gave no weight to the August 11, 2014 study, determined the April 26, 2016, May 10, 2017, and May 10, 2018 studies did not support a finding of total disability, and found the August 29, 2016 study supported a finding of total disability. Decision and Order at 4-5. Giving the most weight to the more recent May 10, 2018 study and finding that a preponderance of the valid studies are non-qualifying, the ALJ determined Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 5.

Contrary to the majority's opinion, based on the facts of this case, the ALJ properly conducted both a qualitative and quantitative review of the pulmonary function studies.

Wojtowicz v. Duquesne Light Co., 12 BLR 1-162, 1-165 (1989); Decision and Order at 3-7. In resolving the conflict in the evidence, the ALJ permissibly afforded more weight to the pre-bronchodilator tests over the post-bronchodilator tests.[14] *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); Decision and Order at 5. Of the five studies, two of the pre-bronchodilator studies (August 11, 2014 and August 29, 2016) were qualifying and three of the pre-bronchodilator studies were not (April 26, 2016, May 10, 2017, and May 10, 2018). Thus, a preponderance of the pre-bronchodilator studies are non-qualifying. Even if the majority is correct that the ALJ erred in determining the qualifying August 11, 2014 pre-bronchodilator study is invalid, this error is harmless as it does not alter the posture of the evidence – at *most* two qualifying pre-bronchodilator studies and three non-qualifying pre-bronchodilator studies – meaning that the preponderance of the pulmonary function study evidence weighs against a finding of total disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Moreover, the majority's concern that the ALJ cited the recency of the evidence as support for finding the pulmonary function studies do not establish total disability is misplaced. *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJ may consider quantitative differences in the evidence when qualitative differences are also considered); Decision and Order at 4-5; Director's Exhibit 20; Claimant's Exhibit 3; Employer's Exhibits 3, 6, 8. The ALJ considered the validity of the studies[15] and cited both recency *and* the fact that a preponderance of the non-qualifying pre-bronchodilator studies are non-qualifying to support his conclusion. Decision and Order at 5; *see*

[14] Therefore, any error the ALJ made in weighing the validity of the pulmonary function studies is harmless because neither party challenged the validity of the *non-qualifying* pre-bronchodilator studies the ALJ primarily relied upon. Decision and Order at 4-5; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Exhibit 3; Employer's Exhibits 3, 6, 8.

[15] As noted *supra*, any errors the ALJ made in considering the studies' validity did not affect the validity of his conclusion that a preponderance of the valid pre-bronchodilator studies were non-qualifying. In addition, it is clear the ALJ did not rely on recency alone in making his determination. Further, the Sixth Circuit has not extended *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), which is a case involving x-rays, where a later negative reading cannot be compatible with an earlier positive reading (absent surgical removal of the pneumoconiosis, as through lung surgery), to pulmonary function testing, where indeed both a later non-qualifying test and an earlier qualifying test can both be correct as indicative of the miner's condition at the time of testing. *See Keathley*, 773 F.3d at 740 ("It is unnecessary to decide whether *Woodward* should be extended to cover the evaluation of pulmonary function tests . . . .").

Cumberland River Coal Co. v. Banks, 690 F.3d 477, 489 (6th Cir. 2012). I therefore would affirm the ALJ's determination that a preponderance of the non-qualifying pre-bronchodilator studies do not support a finding that Claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i).

Turning to the medical opinion evidence, the ALJ correctly noted that Dr. Ajjarapu relied on her qualifying pulmonary function testing to opine Claimant is totally disabled and did not have the opportunity to review the subsequent non-qualifying pulmonary function studies obtained on May 10, 2017 and May 10, 2018. Decision and Order at 4-6; Claimant's Exhibit 3; Employer's Exhibits 3, 6. The ALJ found Dr. Ajjarapu's opinion reasoned based on the evidence she reviewed but found that he could not ascertain whether her opinion as to total disability would have been affected by consideration of the subsequent non-qualifying test results. Decision and Order at 6. Because Dr. Ajjarapu reviewed less evidence in preparing her opinion than Drs. Jarboe and Tuteur in preparing their contrary opinions that Claimant is not totally disabled, the ALJ permissibly gave her opinion less weight. *See Banks*, 690 F.3d at 489 (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986) (medical opinion may be rejected if a physician does not have a complete picture of the miner's health); Decision and Order at 6; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (ALJ's "duty of explanation" is satisfied if "a reviewing court can discern what the ALJ did and why he did it").

While another ALJ could have concluded differently, his finding that Claimant did not establish total disability based on Dr. Ajjarapu's opinion was within his discretion. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 398 (6th Cir. 2019); *Elkins v. Sec'y of HHS*, 658 F.2d 437, 439 (6th Cir. 1981) ("If the [ALJ's] findings are supported by substantial evidence then we must affirm the [ALJ's] decision even though as triers of fact we might have arrived at a different result."). Thus, I would affirm the ALJ's rejection of Dr. Ajjarapu's opinion that Claimant is totally disabled, the only opinion supportive of Claimant's burden of proof, and therefore affirm the ALJ's conclusion that the medical opinion evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Consequently, I would affirm the ALJ's overall conclusion that Claimant is not totally disabled and the denial of benefits.

JUDITH S. BOGGS
Administrative Appeals Judge