U.S. Department of Labor

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

BRB No. 23-0335 BLA

GLEN A. GREEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	**NOT-PUBLISHED**
DRUMMOND COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 01/29/2025
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

James E. Fleenor, Jr. (Fleenor Law, LLC), Tuscaloosa, Alabama, for Claimant.

Will A. Smith (Maynard, Cooper & Gale, PC), Birmingham, Alabama, for Employer.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

BUZZARD and JONES, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits (2017-BLA-05483) rendered on a claim filed on September 10,

2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Claimant established twenty-two years of surface coal mine employment in conditions substantially similar to those in an underground mine. She also found he established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and thus invoked the Section 411(c)(4) presumption[2] of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

The Benefits 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

[1] Administrative Law Judge (ALJ) Tracy A. Daly issued a "Decision and Order Denying Benefits" on August 7, 2019. Decision and Order Denying Benefits (Aug. 7, 2019). Subsequently, the Director, Office of Workers' Compensation Programs, submitted a "Motion for Reconsideration and Remand for Supplemental Section 413(b) Medical Examination" on September 7, 2019, conceding Claimant did not receive a complete pulmonary examination as required under the Act because Dr. Barney's examination on March 29, 2016, was insufficient to allow a factfinder to determine whether Claimant is totally disabled. *See* 30 U.S.C. §923(b); Order to Show Cause (Sept. 18, 2019); Director's Exhibit 12. By Order dated October 24, 2019, ALJ Daly granted the motion and remanded the case to the district director for a complete pulmonary examination. Order of Remand for Complete Pulmonary Examination (Oct. 24, 2019).

[2] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established twenty-two years of surface coal mine employment in conditions substantially similar to those in an underground mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 6.

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).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[5] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. The ALJ must weigh all relevant evidence supporting total disability against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 9-11. However, she found Claimant established total disability based on the medical opinions and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-16.

Medical Opinions

Prior to considering the medical opinion evidence, the ALJ determined that Claimant's February 8, 2016, June 1, 2016, and February 2, 2022 pulmonary function studies are non-qualifying and therefore do not support a finding of total disability.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; November 20, 2017 Hearing Transcript at 14-15.

[5] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values listed 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).

Decision and Order at 9. Employer does not challenge that finding but alleges the ALJ erred in determining that the studies are entitled to "some weight" despite allegedly not meeting the regulatory quality standards. Employer's Brief at 5. According to Employer, because these studies are invalid the ALJ erred in crediting the medical opinions that relied on them to diagnose total disability. *Id.* at 5-12. We reject Employer's arguments.

The ALJ considered the medical opinions of Drs. Barney, Connolly, and Rosenberg. Decision and Order at 12-16. Drs. Barney and Connolly opined Claimant is totally disabled by a respiratory or pulmonary impairment, while Dr. Rosenberg opined he is not. Director's Exhibits 12, 17, 46; Claimant's Exhibit 1; Employer's Exhibit 3. The ALJ found Drs. Barney's and Connolly's opinions well-reasoned and documented. Decision and Order at 15. In contrast, she found Dr. Rosenberg's opinion unpersuasive and assigned it little weight. *Id.* at 16. Weighing the evidence together, she found the medical opinion evidence supports a finding of total disability. *Id.*

Dr. Barney conducted the Department of Labor-sponsored complete pulmonary evaluation of Claimant on March 29, 2016. Director's Exhibit 12. He noted Claimant has symptoms of sputum, wheezing and dyspnea on exertion, and shortness of breath. *Id.* at 3-4. He opined that the February 8, 2016 pulmonary function study demonstrates "moderate airflow obstruction" and diagnosed Claimant with chronic obstructive pulmonary disease (COPD). *Id.* In response to a request from the district director to review additional evidence, including specifically Dr. Connolly's June 1, 2016 pulmonary function study, Dr. Barney opined that the "available medical records[,] including medical exams and pulmonary testing performed after" his evaluation of Claimant, demonstrate a moderate airflow obstruction. Director's Exhibit 46 at 1. He acknowledged that, while the February 8, 2016 pulmonary function study he reviewed as part of his evaluation did not meet American Thoracic Society (ATS) criteria, "subsequent testing [] does." *Id.* He thus concluded Claimant is unable to perform his last coal mine employment. *Id.*

Dr. Connolly similarly opined Claimant is totally disabled due to the moderate obstruction without a bronchodilator response and mild reduction in diffusion capacity seen on the June 1, 2016 pulmonary function study. Director's Exhibit 17 at 13, 33-34. He also opined Claimant has moderate COPD and symptoms of moderate pulmonary impairment. *Id.* at 14, 36-37. In a supplemental report, Dr. Connolly stated Claimant has shortness of breath and exertional dyspnea. Claimant's Exhibit 1 at 1. He opined Claimant can climb only ten steps slowly before stopping and can walk on level ground for only fifty yards before stopping. *Id.* He also opined Claimant experiences "significant pulmonary limitations in most activities" throughout the day. *Id.* He concluded Claimant's "reports of symptoms and limitations" are consistent with his impairment on pulmonary function testing and he is totally disabled from performing his last coal mine employment. *Id.* at 2.

Dr. Rosenberg acknowledged Claimant has shortness of breath with exertion and is being treated for COPD. Employer's Exhibit 3 at 1, 5. However, he opined Claimant does not have evidence of an obstructive or restrictive impairment because his pulmonary function studies are invalid. *Id.* at 4-5. He opined the shape of the flow-volume and volume-time curves show incomplete efforts. *Id.* at 1-2. He opined Claimant's more recent pulmonary function study values are reduced due to incomplete efforts likely caused by multiple sclerosis, which makes "it difficult for him to exhale in [a] forceful way." *Id.* at 5. He thus concluded Claimant is not disabled "from a pulmonary perspective," but rather "is disabled as a whole person." *Id.*

Because the ALJ credited Drs. Barney's and Connolly's opinions that the June 1, 2016 pulmonary function study demonstrates total disability, we first consider Employer's argument that the study is invalid and, therefore, their medical opinions should not have been credited. Decision and Order at 9. Under the regulations, pulmonary function studies that are not in "substantial compliance" with the regulatory quality standards do not "constitute evidence of the presence or absence of a respiratory impairment." 20 C.F.R. §§718.101(b), 718.103(c). However, compliance with the quality standards is presumed. 20 C.F.R. §§718.101(b), 718.103(c); *see* Appendix B to 20 C.F.R. Part 718. Therefore, the party challenging the validity of a study must affirmatively establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

Dr. Rosenberg generally opined that Claimant's most recent pulmonary function studies are invalid because Claimant lacks the ability to exhale forcefully due to multiple sclerosis. Employer's Exhibit 3 at 5. With respect to the June 1, 2016 study in particular, he opined it is "invalid" due to "incomplete efforts . . . as evident based on the shape of the flow-volume and volume-time curves." *Id*. at 1. The technician who conducted the study, however, stated that the "data is acceptable" although not "reproducible." Director's Exhibit 17 at 21. The ALJ found Dr. Rosenberg's statement that Claimant's multiple sclerosis prevents him from exhaling with enough force to produce valid testing is unsupported by the evidentiary record and contradicted by Claimant's credible testimony that no doctor has ever attributed his breathing problems to his multiple sclerosis diagnosis. Decision and Order at 16. The ALJ also noted the regulatory quality standards relating to a miner's "effort" state that individuals "with obstructive disease or rapid decline in lung function will be less likely to achieve" adequate reproducibility in the three required curves and therefore such studies "may still be submitted for consideration in support of a claim for black lung benefits." Decision and Order at 8, *citing* 20 C.F.R. Part 718, Appendix B(2)(ii)(G).

Given these factors, the ALJ permissibly rejected Dr. Rosenberg's opinion that the study is entitled to no evidentiary weight[6] and credited the contrary opinions of Drs. Barney and Connolly that the June 1, 2016 study evidences total respiratory disability notwithstanding Dr. Rosenberg's opinion that the curves are defective.[7] *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v.*

[6] At times, the ALJ confusingly refers to the June 1, 2016 study as being "invalid," a term that typically denotes lack of compliance with the quality standards. However, the context of her statements and overall findings reflects a clear rejection of Dr. Rosenberg's opinion that the study is invalid and an explicit finding that the record demonstrates the study's "inherent reliability" for purposes of rendering a total disability diagnosis. Decision and Order at 15.

[7] We disagree with our dissenting colleague that the quality standard the ALJ discussed relating to the reproducibility of a study's curves is wholly irrelevant to Dr. Rosenberg's opinion that the June 1, 2016 study shows "incomplete efforts" based on the flow-volume and volume-time curves. Employer's Exhibit 3. The quality standards directly tie questions about whether a miner has given "acceptable effort," achieved maximum expiration, and produced valid FEV1 and FVC results to the flow-volume and volume-time curves. *See* 20 C.F.R. Part 718, Appendix B(1)(v), (2)(ii). The ALJ accurately noted that one method for determining "unacceptable" effort relates to "excessive variability" between the three required flow-volume and volume-time curves – but even then, such studies can support a claim because "individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility." *See* 20 C.F.R. Part 718, Appendix B(2)(ii)(G). Given the regulation's allowance that miners with obstructive lung disease may not be able to achieve sufficient effort as measured by excessive variability in the curves, we see no error in the ALJ's permissible determination that Dr. Rosenberg's statement that the curves show incomplete effort does not convincingly render the study entitled to no weight. 20 C.F.R. §718.103(c); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

We note, moreover, that while Dr. Rosenberg very generally identified the "shape" of the curves as supporting his conclusion that Claimant gave incomplete effort, he did not provide any further description of the shape or explain why that shape does not meet the quality standards. Although the quality standards relating to effort contemplate shape – at a minimum the curves should have "an obvious plateau" for at least two seconds, 20 C.F.R. Part 718, Appendix B(2)(ii)(C), and "a smooth contour revealing gradually decreasing flow throughout expiration," 20 C.F.R. Part 718, Appendix B(2)(ii)(D) – Dr. Rosenberg discussed neither standard and the ALJ permissibly discredited his remaining opinion that Claimant is incapable of performing a valid test due to multiple sclerosis.

Benefits Review Board, 876 F.2d 1455, 1460 (11th Cir. 1989); Decision and Order at 15. The ALJ also permissibly found Drs. Barney's and Connolly's opinions are supported by Claimant's medical treatment records and the pulmonary function studies contained therein which the ALJ found "overwhelming[ly] . . . demonstrate[] that Claimant suffers from an obstructive impairment" including "some progression" in its severity. *See Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; Employer's Exhibit 4 at 88, 89, 99, 136, 148, 174, 180, 202, 215; Claimant's Exhibit 2; Decision and Order at 15.[8] For similar reasons, the ALJ permissibly found those same treatment records undermined Dr. Rosenberg's opinion that Claimant "does not have evidence of fixed airflow obstruction."[9] Decision and Order at 10; *see Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; Employer's Brief at 6-7.

It is the ALJ's duty to weigh the evidence, and associated credibility determinations are reserved to the discretion of the factfinder; the Board may not substitute its inferences for the ALJ's but must affirm her findings unless they are contrary to law or unsupported by substantial evidence. *See Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; *Taylor v. Ala. By-Products Corp.*, 862 F.2d 1529, 1531 n.1 (11th Cir. 1989). Having affirmed the ALJ's rejection of Dr. Rosenberg's rationale for invalidating the June 1, 2016 pulmonary function study, as well his finding that Dr. Rosenberg's total disability opinion is unsupported by the evidence, we affirm the ALJ's decision to give Dr. Rosenberg's opinion "little weight." 20 C.F.R. §718.204(b)(2)(iv); *see Jordan*, 876 F.2d at 1460; *Scott*, 60 F.3d at 1141; Decision and Order at 10, 15-16. Employer's argument that Dr. Rosenberg's

[8] Employer asserts that Dr. Rosenberg's opinion establishes that all the pulmonary function studies are invalid, and thus argues the opinions of Drs. Barney and Connolly are not credible to the extent that their respective conclusions are based on invalid testing. Employer's Brief at 4-8. Contrary to Employer's argument, Dr. Barney did not rely on the February 8, 2016 or February 2, 2022 pulmonary function studies to diagnose total disability; rather, the ALJ credited his reliance on the June 1, 2016 study. While Dr. Connolly's later medical report relied in part on the February 2, 2022 study, Claimant's Exhibit 1, he too independently diagnosed total disability based on the June 1, 2016 study. Given our affirmance of the ALJ's crediting of Drs. Barney's and Connolly's reliance on the June 1, 2016 study, Employer has not explained how a finding of invalidity with respect to the other two studies would make a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] The ALJ noted Claimant's treatment records progress from "mild ventilatory impairment" in 2003 to "moderate ventilatory impairment" in 2011 to "severe obstructive ventilatory impairment" from 2013 onward. Decision and Order at 10, *citing* Employer's Exhibits 4, 8; Claimant's Exhibit 2.

opinion is more "consistent with the objective evidence" amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As it is supported by substantial evidence, we affirm the ALJ's determination that the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 16. Further, we affirm her finding that all the relevant evidence weighed together establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 16. Therefore, we affirm her finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 16.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[10] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.[11]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered Dr. Rosenberg's opinion that Claimant does not have legal pneumoconiosis because he does not have an intrinsic lung disease or impairment evidenced by objective testing. Employer's Exhibit 3. He opined Claimant has asthma

[10] "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[11] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 18.

and chronic sinus disease unrelated to coal mine dust exposure. *Id.* The ALJ found Dr. Rosenberg's opinion unpersuasive and unsupported by Claimant's treatment records. Decision and Order at 19-21. Employer identifies no error in the ALJ's credibility findings; we thus affirm them. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Because the ALJ permissibly discredited Dr. Rosenberg's opinion, the only medical opinion supportive of Employer's burden on rebuttal, we affirm her finding Employer failed to disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 21. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Total Disability Causation

The ALJ also found Employer did not rebut the presumption by establishing "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Oder at 22. Because Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, we affirm them. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22. We therefore affirm her finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's finding that Claimant established total disability. I agree with Employer that the ALJ erred by giving weight to invalid pulmonary function testing. Decision and Order at 10; Employer's Brief at 8. The ALJ *ignores* the language of the regulation that precludes use of pulmonary function tests developed for purposes of determining entitlement as evidence of impairment if they are not in substantial compliance with the regulation or Appendix B 20 C.F.R. §718.101. This is a regulatory requirement and the ALJ must apply it. Although 20 C.F.R. Part 718 Appendix B specifically allows consideration of tests not meeting the reproducibility requirement, it does not provide for consideration of tests not meeting the other requirements in the standards. Thus, the failure of testing to meet requirements for the number of tracings present, and more particularly the effort Claimant put forth, must be evaluated and a determination made as to whether the tests substantially comply with the standards.[12] In this case the ALJ found the pulmonary function tests were "invalid" but

[12] The regulations require that pulmonary function test results developed in connection with a claim for benefits include a statement signed by the physician or technician conducting the test setting forth, *inter alia,* the claimant's ability to understand the instructions, ability to follow directions and degree of cooperation in performing the tests. 20 CFR §718.103(b)(5). Appendix B outlines standards for when a claimant's effort will be judged unacceptable. Appendix B to Part 718 (2)(ii)(A)-(G), (iii)(A)-(D). Dr. Rosenberg opined many of the pulmonary function studies were invalid due to Claimant's incomplete efforts and other technical issues. Employer's Exhibits 3, 4, 8. Moreover,

nonetheless considered them based on the regulatory language relating to reproducibility. Decision and Order at 10. This was error and it was not harmless as the ALJ not only considered the testing itself, but also utilized the testing in evaluating the physicians' opinions.[13]

Further, the ALJ failed to properly consider the testing from treatment records. Although treatment record testing is not subject to the requirement for substantial

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several technicians also noted technical issues and/or poor effort. Director's Exhibit 14, Claimant's Exhibit 1.

[13] The ALJ also briefly cites the prefatory language to Appendix B as a basis for not requiring that evidence comply with the regulatory standards. Decision and Order at 9-10. To the extent she relies on that language to except evidence developed by a party from substantially complying with the regulatory standards or treatment evidence from meeting the requirement of reliability, she errs. Although 20 C.F.R. §718.101(b) allows evidence developed by a party to establish entitlement without meeting the substantial compliance rule when "otherwise provided," there are only limited exceptions that the regulations clearly set forth. *See* 20 C.F.R. §718.103(c) (permitting certain pulmonary function testing not in substantial compliance with the requirements to be considered when the miner is deceased). As read by the ALJ, the prefatory provision in Appendix B would override the requirement for substantial compliance with the standards as a general matter with respect to all pulmonary function testing, making a nullity of the substantial evidence requirement at the ALJ's discretion. Given the regulatory use of express language to set forth exceptions to the substantial compliance requirement, the Department's clear language on substantial compliance with the standards, and the interpretive rule that provisions must be read together in harmony (if that is possible, to effectuate their purpose), that is not a proper reading here. *SEC v. Levin*, 849 F.3d 995, 1003 (11th Cir. 2017) (quoting *CBS Broad. Inc. v. Echostar Commc'ns Corp.*, 532 F.3d 1294, 1300–01 (11th Cir. 2008) ("To determine the plain meaning of a statute or regulation, we do not look at one word or term in isolation, but rather look to the entire statutory or regulatory context.")). The substantial evidence requirement and the prefatory language of Appendix B can be read together in a way that makes sense -- by considering the prefatory language in the Appendix as permitting the ALJ to reduce the weight afforded when a standard is not met, although there is substantial compliance. Consequently, given the use of express language in the regulation to identify specific exceptions, the Department's strong stance in establishing a substantial compliance requirement for evidence developed by a party, and the ability to read the two provisions in tandem in a manner that effectuates the purpose and language of both, the prefatory language cannot be read to create an exception that swallows the rule at the ALJ's discretion. The ALJ therefore must consider whether the pulmonary function testing

compliance with the standards, the ALJ must determine if it is reliable in order to consider it. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). The ALJ considered the treatment testing based on the language in the regulations regarding testing which is not reproducible. However, the reliability of that testing was challenged by Employer not only because of variability/reproducibility, but also as to Claimant's effort, and the ALJ failed to address the effort issue.[14] Because effort is a significant factor in whether a test is reliable, and the ALJ gave weight to the treatment testing and physician opinions related to it, this error was not harmless. Decision and Order at 10, 14-16; *see Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985) (physician's opinion regarding reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study).

In addition, the ALJ erred in her consideration of the medical opinion evidence because she failed to explain how medical opinions that relied on invalid testing were reasoned and documented. The ALJ states that despite the testing being invalid Drs. Connolly and Barney nonetheless were able to make determinations that Claimant had an obstructive defect and thus the testing they relied on makes their opinions reasoned.[15] The fact they made those determinations, however, does not in and of itself validate their

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developed by a party is in substantial compliance with the standards in the regulations and Appendix B. If she finds it is in substantial compliance with the standards, she may further adjust the weight afforded if one or more standards are not met in full. If she finds it is not in substantial compliance with the standards, she may not consider it as evidence of the fact for which it is proffered. 20 C.F.R. §718.101(b) 20; C.F.R. Part 718 Appendix B.

[14] As noted *supra*, the regulations require that pulmonary function test results developed in connection with a claim for benefits include a statement signed by the physician or technician conducting the test setting forth, *inter alia*, the claimant's ability to understand the instructions, ability to follow directions, and degree of cooperation in performing the tests. 20 C.F.R. §718.103(b)(5). Appendix B outlines standards for when a claimant's effort will be judged unacceptable. Appendix B to Part 718 (2)(ii)(A)-(G), (iii)(A)-(D).

[15] The ALJ concedes that the doctors relied on invalid testing. The "subsequent valid testing" the majority cites with respect to Dr. Barney's 2020 supplementary opinion is, as Employer points out, not identified by Dr. Barney, and the ALJ confirms that the testing included in DOL's letter to Dr. Barney requesting the supplementary opinion was invalid and finds that Dr. Barney relied on that testing in rendering his supplementary opinion. Decision and Order at 14-15. Further, the ALJ finds the 2022 testing invalid. *Id.* at 15.

disability determinations since both determinations arise from the same invalid pulmonary testing. Without further adequate explanation, her analysis amounts to circular reasoning. She has not explained how an opinion based on unreliable testing is reliable and reasoned; simply because the opinion was rendered does not make it reasonable. Nor does the fact testing was utilized to render judgments make the testing reliable.

Under the APA, the ALJ 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). She also must consider all relevant evidence. 30 U.S.C. §923(b); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285-87 (4th Cir. 2010). Since she has not done so, I would vacate the ALJ's findings and determinations that the pulmonary function study and medical opinion evidence support finding total disability, that the evidence as a whole establishes total disability, that Claimant invoked the Section 411(c)(4) presumption, and that the Claimant has established entitlement to benefits.[16]

[16] My colleagues have helpfully supplied findings and explanations for the ALJ; however, making such findings and explanations is the province of the ALJ, not the Board. *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989). Moreover, the Administrative Procedure Act, 5 U.S.C. 557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), requires that *the ALJ* independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

I would remand for the ALJ to properly consider the evidence as to disability in accordance with the foregoing before proceeding further to consider entitlement to benefits. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.305.

JUDITH S. BOGGS
Administrative Appeals Judge