U.S. Department of Labor

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

BRB No. 24-0041 BLA

DORIS A. KITTS AND TRACEY EVANS (o/b/o CLYDE SMITH, JR., deceased)	)	
Claimants-Respondents	)	
v.	)	
TAYWOOD MINING, INCORPORATED	)	**NOT-PUBLISHED**
and	)	DATE ISSUED: 01/30/2025
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

William M. Bush (Emily Su, Deputy Solicitor for the National Office; Jennifer Feldman Jones, Acting Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Acting

Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2021-BLA-05547) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on June 1, 2018.[1]

The ALJ found Employer is the properly designated responsible operator. She also found Claimants[2] established the Miner had 18.41 years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary disability. 20 C.F.R. §718.204(b). Thus, she found Claimants established a change in an applicable condition of entitlement,[3] 20 C.F.R. §725.309(c), and invoked the presumption

[1] The Miner filed two prior claims for benefits. He withdrew his first claim. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). On April 25, 2017, the district director denied the Miner's prior claim, filed on August 2, 2016, because he failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2 at 9. The Miner took no further action until filing his current claim. Director's Exhibit 4.

[2] Claimants are the daughters of the Miner, who died on October 16, 2020, while his claim was pending before the district director. Director's Exhibit 22. They are pursuing the miner's claim on behalf of their father's estate. Director's Exhibit 56; Hearing Tr. at 1.

[3] 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 she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *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 Miner failed to establish total disability in his prior claim, Claimants had to submit new evidence establishing this element to obtain review of the merits of the Miner's current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c).

of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 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 it is the properly designated responsible operator liable for payment of benefits. On the merits of entitlement, Employer argues the ALJ erred in finding Claimants established total disability and thus invoked the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it failed to rebut the presumption. Claimants have not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's arguments concerning its designation as the responsible operator.

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.[5] 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).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[6] 20 C.F.R.

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

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 39.

[6] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

§725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it shows either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

In a Proposed Decision and Order dated December 21, 2020, the district director determined Employer is the designated responsible operator and dismissed Horizon Natural Resources (Horizon) as a potentially liable operator, explaining:

> [The Miner] indicates that he last worked as a coal miner for Addington Enterprises in Kentucky from 2001 through 2004 or 2006. No earnings are reported for Addington Enterprises on [the Miner's] Social Security Earnings Record. [The Miner] stated that he does not have any W-2 forms, pay stubs or any type of proof of this employment. Therefore, Addington Enterprises cannot be considered as the potentially liable operator in this claim.
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> Working back in time, [the Miner] indicated he worked a full calendar year as a core driller/coal prospector for [Horizon] in both Kentucky and West Virginia ending in the summer of 2000. Earnings are reported by [Horizon] from 1998 through 2000. [The Miner] stated he last worked in West Virginia. The Secretary of State website shows [Horizon] is out of business. Records maintained by the U.S. Department of Labor's Responsible Operator section show that [Horizon] was uninsured in 2000 for the state of West Virginia. A statement as required by [20 C.F.R. §725.495(d)] verifying the lack of insurance coverage is enclosed.
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> Next, [the Miner] indicates he worked [for Employer] in West Virginia. Earnings are reported in 1987 and 1989 through 1990. The exact dates of employment are not known. However, based on the daily average earnings it appears he worked at least 406 days (1987 - $12,280.40 ÷ $126.00 = 97.46, 1989 - $20,005.84 ÷ $130.00 = 153.89, 1990 - $20,717.76 ÷ $133.68 = 154.98 for a total of 406.33). This appears to be over a year of coal mine employment. Records maintained by the U.S. Department of Labor's Responsible Operator section show that [Employer] was insured by the WV CWP Fund in 1990.

Director's Exhibit 80 at 4, 12-13. Thereafter, Employer requested a hearing, and the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 87, 94.

Before the ALJ, Employer argued it is not the responsible operator because Pittston Coal Company (Pittston) and Horizon more recently employed the Miner for more than one year. Post-Hearing Brief at 3-4. Specifically, Employer argued Pittston purchased Addington Enterprises from Horizon and thus its self-insurance covered the Miner's last coal mine employment with Addington Enterprises.[7] *Id*. at 3. It also argued the district director erred in limiting her inquiry concerning Horizon's insurance status to West Virginia because the Miner stated he worked for Horizon in both Kentucky and West Virginia. *Id*. at 3.

The ALJ rejected Employer's assertion that Pittston was the liable operator because Employer did not address Pittston's statement that it had no record of the Miner's employment. Decision and Order at 19. She also rejected Employer's assertion that Horizon was the liable operator because Employer ignored the Miner's statement that he was "sure" he last worked for Horizon in West Virginia. *Id*. Further, she found Horizon is not a potentially liable operator because it is not financially capable of assuming liability for benefits. *Id*. at 18-19. However, she found Employer meets the regulatory definition of a potentially liable operator.[8] 20 C.F.R. §725.494(a)-(e); Decision and Order at 19. She further found Employer failed to demonstrate that a more recent potentially liable operator employed the Miner for at least one year. *Id*. at 19. She thus found Employer is the properly designated responsible operator. *Id*.

Employer argues it should be dismissed as the responsible operator because, it asserts, Pittston purchased Horizon and its subsidiary Addington Enterprises and thus "was self-insured when the [the Miner] worked for Horizon." Employer's Brief at 10. However, it does not challenge the ALJ's rejection of its argument that Pittston was the liable operator because it failed to address evidence indicating that Addington Enterprises never employed the Miner. Further, it did not submit any evidence to the district director or the ALJ that could establish the Miner worked for Addington Enterprises after his employment with Horizon ended. Moreover, as the Director asserts, Pittston disclaimed that it ever employed

[7] In his Employment History CM-911a form, the Miner indicated his most recent coal mine employment was with Addington Enterprises from 2001 to 2004.

[8] Employer does not challenge the ALJ's finding that it meets the regulatory criteria of a potentially liable operator; thus, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the Miner.[9] Director's Brief at 7. Because Employer did not submit any evidence to support its contention that Addington Enterprises employed the Miner after Pittston purchased it from Horizon, we reject its argument that Pittston's self-insurance covered the Miner's last coal mine employment with Horizon. *See* 20 C.F.R. §725.495(c)(2) (designated responsible operator has the burden to establish that another potentially liable operator more recently employed the miner for at least one year).

Employer also argues the district director's designation of Horizon as the responsible operator in the Miner's prior claim is binding in his subsequent claim. Employer's Brief at 8-10.[10] It specifically contends the regulation at 20 C.F.R. §725.309(c) renders the Director unable to alter the responsible operator designation from the prior claim. *Id*. The Director responds, arguing that the regulation permits identification of Employer as the responsible operator. Director's Response Brief at 4-5. We agree with the Director's argument.[11]

In the Miner's prior claim, the district director issued a Proposed Decision and Order on April 25, 2017, that designated Horizon as the responsible operator. Director's Exhibit 2 at 9. The district director noted the Miner's Social Security Administration (SSA) earnings records show he had earnings with Horizon from 1998 to 2000. *Id*. at 14. She also noted the Department of Labor's Responsible Operator Section reported that Horizon

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[9] In a letter dated August 14, 2014, the personnel administrator of HealthSmart Casualty Claims Solutions, Angie Buress, stated Pittston "has no record of employment for [the Miner]" working for Addington Enterprises from 2001 to 2004. Director's Exhibit 12.

[10] We reject Employer's argument that the ALJ erroneously determined Horizon Natural Resources (Horizon) was not a potentially liable operator because the Miner's work for it as a core driller and prospector did not constitute the work of a "miner." Employer's Brief at 5-8. The ALJ found the evidence did not establish the Miner's work for Horizon, which occurred at surface mines, was performed in conditions substantially similar to those in an underground mine. Decision and Order at 13-14. She therefore found the Miner's employment with Horizon was not "qualifying" coal mine employment for the purpose of invoking the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 14-15. This is unrelated to the ALJ's finding that Horizon was not a potentially liable operator - a finding based on her determination that Horizon "did not meet the financial responsibility as a potentially liable operator in the Miner's case." Decision and Order at 18; *see* 20 C.F.R. §725.495(a)(3).

[11] Employer does not challenge the ALJ's finding that Horizon does not meet the regulatory definition of a potentially liable operator.

sold Addington Enterprises to Pittston, which "was self-insured on [the Miner's] last date of coal mine employment." *Id.* Further, she noted the Miner alleged his last coal mine employment "of at least one full calendar year" was with Addington Enterprises from 2001 to 2004, but she found "no earnings" reported to the SSA for the Miner after the year 2000. *Id.* Therefore, she did not consider Addington Enterprises as a potentially liable operator in this case. *Id.*; Director's Exhibit 44 at 2.

Section 725.309(c)(5), which controls the balance between promoting finality of claims and allowing a court to reconsider findings, provides that:

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (*see* § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. §725.309(c)(5).

As discussed below, the ALJ found Claimants established a change in an applicable condition of entitlement. Decision and Order at 33 n.57. Consequently, no findings made in connection with the prior claim are binding; by definition, this includes the designation of a responsible operator. Thus, contrary to Employer's argument, the regulation provides clear authority for the relitigation of an operator's liability. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 318-20 (6th Cir. 2014). We therefore reject Employer's argument that the ALJ was bound by the district director's designation of Horizon as the properly designated responsible operator in the Miner's prior claim.

Because Employer has not demonstrated that it is financially incapable of assuming benefits, or that another potentially liable operator that more recently employed the Miner is financially capable of assuming benefits, we affirm the ALJ's finding that Employer is the properly designated responsible operator liable for payment of benefits. Decision and Order at 19; *see* 20 C.F.R. §725.495(c).

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

To invoke the Section 411(c)(4) presumption, Claimants must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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 and arterial blood gas studies,[12] 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 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).

The ALJ found Claimants established total disability based on the pulmonary function studies, medical opinions, and evidence as a whole.[13] Decision and Order at 20-33.

Pulmonary Function Studies

The ALJ considered two pulmonary function studies dated July 16, 2018, and February 28, 2019. Decision and Order at 20-22. Both studies produced qualifying results before and after the administration of bronchodilators. Director's Exhibits 27 at 10; 32. The ALJ found the February 28, 2019 study valid and reliable but the July 16, 2018 study invalid. Decision and Order at 22; *see* Director's Exhibit 31; Employer's Exhibits 1 at 11-14; 2 at 3; 3 at 2. She concluded the pulmonary function study evidence supports a finding of total disability based on the February 28, 2019 study.

As the ALJ's finding that the July 16, 2018 study is invalid is unchallenged, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the ALJ erroneously substituted her opinion for that of a medical expert by relying on her own interpretation of the February 28, 2019 study to find it valid. Employer's Brief at 10-13. We disagree.

[12] 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 in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[13] The ALJ found Claimants did not establish total disability based on the arterial blood gas studies and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 22-23.

When considering pulmonary function study evidence, the ALJ must determine whether the studies are in substantial compliance with the quality standards.[14] 20 C.F.R. §§718.101(b), 718103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). "In the absence of evidence to the contrary, compliance with the [regulatory quality standards] shall be presumed." 20 C.F.R. §718.103(c). Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The ALJ considered the opinions of Drs. Gaziano, Forehand, Fino, and Goodman regarding the validity of the February 28, 2019 pulmonary function study, as well as notations on the report accompanying the study. Decision and Order at 21-22, 31-33.

The ALJ noted the report accompanying the February 28, 2019 pulmonary function study indicated the American Thoracic Society (ATS) criteria for reliability were not met for the pre- or post-bronchodilator results, due to the study having fewer than three acceptable efforts. Decision and Order at 22; Director's Exhibit 32 at 2. She permissibly gave the notation on the study no weight as there is no evidence in the record to explain how the ATS criteria relate to the regulatory standards for validating studies and establishing total disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 22.

The ALJ initially considered Dr. Gaziano's validation report. Decision and Order at 21-22. She correctly noted Dr. Gaziano reviewed the February 28, 2019 pulmonary function study and concluded the vents are acceptable. *Id.*; Director's Exhibit 33 at 1.

The ALJ next considered the opinion of Dr. Forehand. Decision and Order at 32. During Dr. Forehand's deposition, Employer's counsel informed the physician that the February 28, 2019 pulmonary function study did not meet the ATS criteria for reproducibility and asked him whether it was an invalid test. Employer's Exhibit 1 at 13.

[14] An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

Dr. Forehand responded in the affirmative, but he stated that the results nonetheless indicated total disability. Employer's Exhibit 1 at 13-14.

The ALJ acknowledged that Dr. Forehand opined the February 28, 2019 pulmonary function study was invalid, "but only after [Employer's][15] counsel informed him that the test did not meet 'ATS criteria.'" Decision and Order at 32 n.56. She further noted that although the study indicated the criteria were not met due to producing fewer than three acceptable efforts, three pre- and post-bronchodilator efforts were reported and there was no further explanation of why the efforts might be unacceptable.[16] *Id*.; *see* Director's Exhibit 32 at 2. She permissibly found Dr. Forehand's invalidation of the study unpersuasive because he did not adequately explain "how the ATS criteria were not met" and did not relate the study results to the standards for validity set forth in the regulations. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 31 n.53.

Dr. Goodman opined the data from the February 28, 2019 pulmonary function study was "technically superior" to that of the July 16, 2018 study, which he opined was invalid. Employer's Exhibit 2 at 3. Based on the physician's consideration of both studies, the ALJ permissibly found Dr. Goodman concluded the February 28, 2019 study produced valid results. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252 (4th Cir. 2016) (Board cannot substitute its inferences for those of the ALJ and must limit its review to whether the ALJ's factual findings are supported by substantial evidence); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Employer's Exhibit 2 at 10; Decision and Order at 32.

Finally, Dr. Fino opined the February 28, 2019 study was invalid due to submaximal effort evidenced by premature termination of exhalation, lack of reproducibility in expiratory tracings, and a lack of abrupt onset to exhalation. Employer's Exhibit 3 at 2.

[15] We consider the ALJ's reference to Claimants' counsel to be a scrivener's error as she cited to Dr. Forehand's deposition where Employer's counsel informed the doctor that the study did not meet ATS criteria and asked him whether he believed the study is valid. Decision and Order at 32 n.5; Employer's Exhibit 1 at 13.

[16] Employer argues the evidence is insufficient to support the ALJ's statement that the February 28, 2019 pulmonary function study reported three efforts, contending that the "legend for the testing indicates different colors which are unable to be determined from the black and white copies" of the tracings in the record. Employer's Brief at 12. Contrary to Employer's contention, the study also includes a chart of the results of each effort, which lists the results of three pre- and three post-bronchodilator efforts, as the ALJ accurately noted. Decision and Order at 31 n.53; Director's Exhibit 32 at 2.

The ALJ permissibly found the opinions of Drs. Goodman and Gaziano credible and persuasive regarding the validity of the February 28, 2019 pulmonary function study, and found their opinions outweighed the contrary opinion of Dr. Fino.[17] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 32-33. Thus, contrary to Employer's argument, the ALJ did not substitute her opinion for that of a medical expert, but acted within her discretion by weighing the medical opinions concerning the study's validity and by relying on the opinions of Drs. Goodman and Gaziano to find the February 28, 2019 study valid.[18] *See Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); Decision and Order at 22, 32-33.

The ALJ assigned greater weight to the validated February 28, 2019 study, and thus found the preponderance of the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 22. As substantial evidence supports her finding, we affirm it. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000).

As Employer raises no further argument on total disability, we further affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability, 20 C.F.R. §718.204(b)(2)(iv), and that Claimants established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b); *see Rafferty*, 9 BLR at 1-232; Decision and Order at 33.[19] We therefore affirm the ALJ's finding that Claimants established a change

[17] We reject Employer's argument that Dr. Gaziano's "checkmark form is not convincing as there is not an explanation." Employer's Brief at 12. Its argument amounts to a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[18] Employer argues the ALJ's finding that the February 28, 2019 pulmonary function study supports a finding of total disability is inadequately explained. Employer's Brief at 13. We disagree. Because we can discern the ALJ's basis for crediting the validating opinions of Drs. Gaziano and Goodman over the contrary opinions of Drs. Forehand and Fino, her finding satisfies the explanatory requirements of the Administrative Procedure Act (APA). *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (The APA does not "impose a duty of long-windedness on an ALJ;" to the contrary, "if a reviewing court can discern what the ALJ did and why [she] did it, the duty of explanation under the APA is satisfied.") (citations omitted).

[19] Our dissenting colleague asserts the ALJ failed to consider all of the relevant evidence in finding that the pulmonary function study and medical opinion evidence established total disability. Specifically, she asserts the ALJ failed to consider the opinions of Drs. Forehand and Fino that the February 28, 2019 pulmonary function study is invalid

in an applicable condition of entitlement, 20 C.F.R. §725.309(c); Decision and Order at 33 n.57, and invoked the Section 411(c)(4) presumption. Decision and Order at 33.

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

Because Claimants invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[20] or that "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.

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for reasons other than reproducibility, noting Dr. Fino opined the study is invalid due to submaximal effort, contrary to the regulations requiring maximal effort, and Dr. Forehand testified the study is invalid, in part, because the Miner only exhaled for three seconds, contrary to the regulations which require "six seconds." *See supra*.

But Employer has not raised any contention in its brief before the Board on appeal that the ALJ erred in failing to consider Dr. Fino's opinion that the study is invalid specifically due to "submaximal effort" or any contention regarding the duration of the Miner's exhalation when performing the study. The Board is not empowered to review a case as though for the first time, 20 C.F.R. §802.301, and must limit its review to contentions of error that the parties specifically raise on appeal. *See* 20 C.F.R. §802.211(b); *Edd Potter Coal Co., v. Director, OWCP* [*Salmons*], 39 F.4th 202, 210 (4th Cir. 2022) (any issue that could have been but was not raised on appeal is waived and thus not remanded); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). It is "well-settled that errors not raised by a party will not be addressed," and for the Board to raise issues of its own accord "would serve to abolish the doctrine of waiver . . . [and] would undermine the adversary system and jeopardize the appearance of impartiality which is crucial to the administration of justice." *See Norwood v. Ingalls Shipbuilding, Inc*., 26 BRBS 66, 69 n.3 (1992).

[20] "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). The definition includes "any 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). "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).

§718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the medical opinions of Drs. Goodman and Fino.[21] Decision and Order at 37-39. Dr. Goodman opined the Miner did not have legal pneumoconiosis but had a chronic lung disease unrelated to coal mine dust exposure. Employer's Exhibit 2 at 4. Dr. Fino opined the Miner did not have legal pneumoconiosis but had a disability due to heart failure and unrelated to coal mine dust exposure. Employer's Exhibit 3 at 5. The ALJ found Drs. Goodman's and Fino's opinions not reasoned and documented. Decision and Order at 38. She thus found Employer failed to disprove legal pneumoconiosis. *Id*. at 39.

Employer's sole argument – that the ALJ should have assigned more weight to the medical opinions of Drs. Fino and Goodman, that the Miner did not have legal pneumoconiosis, because they had access to more information and their opinions are more convincing – amounts to a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *see also Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986) (medical opinion need not be discounted merely because the physician did not review additional medical evidence of record; the ALJ properly considered whether the objective evidence offered as documentation adequately supported a medical opinion); Employer's Brief at 12.

Because the ALJ permissibly discredited the only medical opinions supportive of Employer's burden on rebuttal, we affirm her finding that Employer did not disprove legal pneumoconiosis. Decision and Order at 41-42. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.

[21] The ALJ also considered Dr. Forehand's medical opinion that the Miner had legal pneumoconiosis in the form of mixed restrictive and obstructive lung disease related to coal mine dust exposure and cigarette smoking. Decision and Order at 36-39; Director's Exhibit 27 at 4. She correctly found that his opinion does not aid Employer's burden to disprove legal pneumoconiosis. Decision and Order at 39.

20 C.F.R. §718.305(d)(1)(i). Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 41-42.

We further affirm, as unchallenged, her finding that Employer failed to establish no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 44. We therefore affirm the award of benefits.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's finding that the pulmonary function study and medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and that the evidence as a whole established total disability at 20 C.F.R. §718.204(b)(2). Employer argues that the ALJ improperly rejected the opinions of Drs. Fino and Forehand and ignored 20 C.F.R. §718.103(c), which requires that pulmonary function studies meet the regulatory standards and Appendix B of 20 C.F.R. Part 718. Employer's Brief at 11-12. This argument has merit, to the extent that in determining the Miner was totally disabled the ALJ failed to consider the physicians'

invalidation of the testing, and the specific reasons they cited, in conjunction with the applicable regulatory requirements.[22]

To constitute evidence of impairment, a pulmonary function test developed as evidence by a party must be in substantial compliance with the standards set forth by the Department of Labor in 20 C.F.R. §718.103 and Appendix B of Part 718. 20 C.F.R. §718.101 (b), (c).

Based on language from Section (2)(ii)(G) of Appendix B to Part 718, the ALJ rejected the opinions of Drs. Forehand and Fino that the February 28, 2019 pulmonary function study is invalid. Decision and Order at 31-33. The relevant portion of Appendix B recognizes that individuals with obstructive lung disease may be unable to achieve the degree of reproducibility normally required for valid testing, and therefore permits studies not meeting the requirement limiting the variability between three acceptable curves to be considered.[23] 20 C.F.R. Part 718, Appendix B (2)(ii)(G). However, this provision does

[22] Employer's arguments attack the ALJ's findings on the basis that she did not properly consider the physicians' opinions (which relate to meeting the regulatory requirements as well as those of ATS). Employer contends, given the physicians' opinions the testing is invalid, "there is no basis to find the 2018 testing valid and the 2019 testing is also invalid. As such this testing is not able to be used to establish impairment. *See* 20 C.F.R. § 718.103(c)." Employer's Brief at 12.

[23] Appendix B (2)(ii)(G) to 20 C.F.R. Part 718 provides that, with respect to FEV_1 and FVC measurements, a pulmonary function study shall be deemed unacceptable if it has an "excessive variability between the three acceptable curves," and the "variation between the two largest FEV_1's of the three acceptable tracings should not exceed 5 percent of the largest FEV_1 or 100 ml, whichever is greater." *Id*. However, it states "tests not meeting *this criterion* may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report . . . ." *Id.* (emphasis added).

There are additional requirements for pulmonary function tests in 20 C.F.R. §718.103 and Appendix B to Part 718. With the exception of the section cited above, these requirements (20 C.F.R. Part 718, Appendix B (1)(i)-(ix), (2)(i), (2)(ii)(A)-(F), (2)(iii)(A)-(D), (2)(iv), and (2)(v)(A)-(B)) are unaffected by the above language. Excepting studies which fail to meet the above-cited requirements relating to test variability and cases involving a deceased miner where no pulmonary function tests are in substantial compliance with the requirements, all pulmonary function test evidence developed by the parties must be in substantial compliance with these requirements in order to establish the fact for which the test is proffered. 20 C.F.R. §§718.101(b), 718.103(c). Consequently,

not absolve studies from meeting the other requirements for validity. Because Drs. Fino and Forehand each opined the study is invalid for reasons other than reproducibility, the ALJ erred by dismissing their opinions, failing to resolve the conflicting evidence concerning the study's validity and failing to determine whether the study is in substantial compliance with the quality standards. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); 20 C.F.R. §718.101(b) (tests proffered by the parties must be in substantial compliance with the standards); *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252 (4th Cir. 2016); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact-finder's failure to discuss relevant evidence requires remand).

Dr. Fino opined the February 28, 2019 pulmonary function study is invalid due to submaximal effort as evidenced by premature termination of exhalation and a lack of abrupt onset to exhalation. Employer's Exhibit 3 at 2. At his deposition, Dr. Forehand testified the study is invalid, in part, because the Miner only exhaled for three seconds, contrary to the regulations, which require "six seconds."[24] Employer's Exhibit 1 at 11-12.

As the portion of Appendix B that the ALJ cited does not address the physicians' opinions that the study is invalid for reasons other than its reproducibility and she provided no other consideration of their opinions, she erred. The ALJ is required to consider all

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the issue the ALJ must address is whether the test is in substantial compliance with the requirements.

[24] Appendix B (2)(ii) to 20 C.F.R. Part 718 provides:

> The subject will . . . make a maximum inspiration from the instrument and when maximum has been attained, without interruption, blow as hard, fast and completely as possible for at least 7 seconds, or until a plateau has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal effort. . . . The effort shall be judged unacceptable when the patient: . . . (B) Has not used maximal effort during the entire forced expiration; or (C) Has not continued the expiration for at least 7 sec. or until an obvious plateau for at least 2 sec. in the volume-time curve has occurred; . . . or (F) Has an unsatisfactory start of expiration, one characterized by excessive hesitation (or false starts). Peak flow should be attained at the start of expiration and the volume-time tracing (spirogram) should have a smooth contour revealing gradually decreasing flow throughout expiration.

20 C.F.R. Part 718, Appendix B (2)(ii).

relevant evidence and determine whether the regulatory requirements have been met. She did not do so in this case. Therefore, I would remand the case for the ALJ to consider the physicians' opinions concerning the validity of the study, and whether the study substantially complies with the standards of Appendix B.

Because the ALJ failed to follow the regulatory requirements and consider relevant evidence when weighing the pulmonary function study and medical opinion evidence, I would vacate the ALJ's finding that Claimants established total disability and invoked the Section 411(c)(4) presumption. Consequently I also would hold it is premature to address rebuttal and would vacate rebuttal and entitlement. I would remand for the ALJ to reconsider whether Claimants established total disability at 20 C.F.R. §718.204(b)(2).

I otherwise concur with the majority.

JUDITH S. BOGGS
Administrative Appeals Judge