U.S. Department of Labor

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

BRB No. 24-0277 BLA

KENNETH E. PETTY Claimant-Petitioner v. U.S. STEEL MINING COMPANY, LLC and UNITED STATES STEEL CORPORATION Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 06/17/2025 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk PLLC), Beckley, West Virginia, and Bren J. Pomponio (Mountain State Justice, Inc.), Charleston, West Virginia, for Claimant.

Aimee M. Stern and Denise D. Pentino (Dinsmore & Shohl, LLP), Wheeling, West Virginia, for Employer.[1]

[1] On December 30, 2024, Howard G. Salisbury, Jr. of Kay Casto & Chaney PLLC filed a motion to withdraw as counsel. We grant the motion to withdraw as counsel and

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

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

Claimant appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Denying Benefits (2020-BLA-06157) rendered on a claim filed on November 5, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ declined to render a determination on the length of Claimant's coal mine employment[2] but found he failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, she found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718. Therefore, she denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer responds in support of the denial of benefits. The Acting Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

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grant the motion to substitute Employer's counsel as Aimee M. Stern and Denise D. Pentino of Dinsmore & Shohl, LLP.

[2] The ALJ noted the parties stipulated during the hearing that Claimant worked thirteen years in coal mine employment. Decision and Order at 4; Hearing Tr. at 15-16, 49. She also noted Claimant subsequently alleged in his closing brief that he worked more than fifteen years in coal mine employment. Decision and Order at 4; Claimant's Closing Brief at 2-4. Further, she acknowledged the district director determined Claimant worked 13.53 years in coal mine employment. Decision and Order at 4; Claimant's Exhibit 3. Finding Claimant failed to establish total disability and that the difference between thirteen and 13.53 years is "of no consequence," the ALJ declined to render a finding on the length of Claimant's coal mine employment. Decision and Order at 4.

[3] 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.

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, 361-62 (1965).

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

To invoke the Section 411(c)(4) presumption, a 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 employment.[5] *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,[6] 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 Claimant failed to establish total disability by any method.[7] 20 C.F.R. §718.204(b)(2); Decision and Order at 24-29.

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 43-44.

[5] The ALJ found Claimant's usual coal mine work as a section foreman required light to medium exertion. Decision and Order at 5. As no party challenges this finding, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields results that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] We affirm, as unchallenged on appeal, the ALJ's findings that the pulmonary function study and arterial blood gas study evidence does not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 22-23.

Medical Opinions

The ALJ considered the medical opinions of Drs. Werntz, Krefft, Zaldivar, and McSharry. Decision and Order at 13-28. Drs. Werntz and Krefft opined Claimant is totally disabled, while Drs. Zaldivar and McSharry opined he is not. Director's Exhibits 13, 18; Claimant's Exhibits 2, 4; Employer's Exhibits 1, 2, 4, 6-9. The ALJ found Drs. Krefft and McSharry inaccurately characterized some of the objective testing and thus their opinions are entitled to little weight. Decision and Order at 27-28. She also found Dr. Werntz's opinion not reasoned. *Id*. at 26. In contrast, she found Dr. Zaldivar's opinion reasoned and documented. *Id*. at 26-27. She thus concluded the medical opinion evidence does not support a finding of total disability. *Id.* at 28.

Claimant argues the ALJ erred in discrediting Dr. Werntz's opinion. Claimant Brief at 11-12. This argument has merit.

Dr. Werntz examined Claimant and considered his coal mine employment; cigarette smoking and medical histories; symptoms; and objective test results. Director's Exhibits 13, 18. He noted Claimant's work as a section foreman required "considerable walking," "monitoring ventilation," and "directing his crew" and thus fell within the "moderate aerobic demand category." Director's Exhibit 13 at 4. He also noted Claimant's January 15, 2018 pulmonary function study produced FVC values before the administration of a bronchodilator that met the Department of Labor "criteria for disability."[8] *Id*. In addition, he stated the FVC results of the August 6, 2009 pulmonary function study,[9] which was obtained prior to Claimant's coronary artery bypass surgery, are "abnormal" and reveal "significant restrictive lung disease." Director's Exhibit 18 at 4. Further, he concluded that although the January 15, 2018 arterial blood gas study produced normal resting values, Claimant was only able to exercise up to three metabolic equivalents (METs) compared to the aerobic demands of his last job, which required four to five METs. Director's Exhibits 13 at 4; 18 at 5-6. He thus opined Claimant does not have adequate pulmonary capacity to meet the aerobic demands of his last coal mine job. *Id*.

[8] The ALJ found the January 15, 2018 pulmonary function study produced qualifying values before the administration of a bronchodilator and non-qualifying values after the administration of a bronchodilator. Decision and Order at 11.

[9] The August 6, 2009 pulmonary function study was administered in preparation for Claimant's August 7, 2009 coronary artery bypass surgery by a thoracic surgeon. Director's Exhibit 19 at 2,423. Dr. Werntz reported the study revealed an FVC value of 59% of predicted, an FEV_1 of 69% of predicted, and an FEV_1/FVC ratio of 85%. Director's Exhibit 18 at 3.

The ALJ discredited Dr. Werntz's opinion because he "failed to consider *the totality of the pulmonary function evidence*," which she found is "preponderantly" non-qualifying for total disability. Decision and Order at 26 [emphasis added]. However, although our dissenting colleague asserts the ALJ permissibly discredited Dr. Werntz's opinion because "he lacked a complete picture of the Miner's condition supportive of finding of disability," the ALJ did not address Dr. Werntz's additional underlying rationale that the January 15, 2018 exercise arterial blood gas study demonstrates Claimant does not have adequate pulmonary capacity to meet the aerobic demands of his last coal mine job. Director's Exhibits 13 at 4; 18 at 5-6.

A physician may offer a reasoned medical opinion diagnosing total disability even if the objective studies are non-qualifying. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Here, as discussed, Dr. Werntz explained why the non-qualifying arterial blood gas study does not preclude total disability. Director's Exhibits 13 at 4; 18 at 5-6; *see also Sheranko v. Jones & Laughlin Steel Corp*., 6 BLR 1-797, 1-798 (1984) (because arterial blood gas studies and pulmonary function studies measure different types of impairment, the results of pulmonary function testing do not call into question the results of an arterial blood gas study). As the ALJ did not adequately explain why Dr. Werntz's opinion that Claimant is totally disabled is not credible, her finding does not comport with the Administrative Procedure Act (APA),[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), and thus we cannot affirm it. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with Claimant's argument that the ALJ erred in weighing Dr. Zaldivar's opinion. Claimant's Brief at 7-10.

In determining whether a claimant is entitled to benefits, the ALJ must consider *all relevant evidence* and indicate explicitly that such evidence has been weighed and its weight. *Addison*, 831 F.3d at 252-53; *Hicks*, 138 F.3d at 533; *see Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 880 (6th Cir. 2012) ("[T]he Black Lung Benefits

[10] The Administrative Procedure Act requires that every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162, 1-165 (1989).

Act commands judges to consider '*all* relevant evidence' in determining the validity of a given claim.").

Dr. Zaldivar examined Claimant and reviewed medical records, including pulmonary function and arterial blood gas studies that produced predominately non-qualifying results. Employer's Exhibits 1 at 4-5; 2 at 2; 7 at 1. He stated Claimant's diaphragmatic paralysis and spirometry, including the pre-operative testing before his coronary artery bypass surgery, demonstrate mild restriction. Employer's Exhibits 1 at 4; 7 at 1. Further, he found the August 6, 2009 pulmonary function study contained in Claimant's treatment record, which Drs. Werntz and Krefft relied on, invalid because it "was performed with submaximal effort."[11] Employer's Exhibits 7 at 2-4; 8 at 2-3. In addition, he disagreed with Dr. Werntz's opinion that Claimant's exercise arterial blood gas testing demonstrates total disability because there is "no measure of the amount of ventilation" Claimant used to exercise. Employer's Exhibit 7 at 6. Similarly, he disagreed with Dr. Krefft's opinion that Claimant's exercise arterial blood gas testing reflects his maximum breathing capability. Employer's Exhibit 8 at 2-3. He concluded Claimant does not have a disabling pulmonary impairment as his lung function testing can be explained by his paralyzed right diaphragm and obesity. Employer's Exhibits 1 at 5; 2 at 2.

The ALJ noted Dr. Zaldivar found the August 6, 2009 pulmonary function study "technically unacceptable but nonetheless unsupportive of a restrictive finding" before Claimant's coronary artery bypass surgery. Decision and Order at 27. She also noted Dr. Werntz's summary of the study indicates it is non-qualifying, but the ALJ declared she was unable to determine its validity absent further examination. *Id.* However, although she refused to examine the validity of the study because it "is buried in a 2,799-page exhibit with no summary,"[12] she found Dr. Zaldivar's opinion "well-documented and well-reasoned." *Id*. Although our dissenting colleague asserts the ALJ permissibly found Dr.

[11] Dr. Zaldivar opined that for purposes of determining total disability, the August 6, 2009 pulmonary function study is technically unacceptable because the tracings showed suboptimal effort. Employer's Exhibit 7 at 2-4. However, he stated the study was useful to the thoracic surgeon performing Claimant's coronary bypass artery surgery because it shows his "minimal breathing capacity" is "sufficient to allow him to undergo surgery safely" and he "should have no respiratory difficulties during surgery or afterwards." Employer's Exhibit 7 at 3.

[12] At the hearing, the ALJ admitted Director's Exhibit 19 into the record. Hearing Tr. at 6-8. Director's Exhibit 19 contains 2,799 pages of medical records, including chest x-rays, pulmonary function studies, blood gas studies, and physicians' notes and reports documenting Claimant's treatment for his coronary artery disease and bypass surgeries. Director's Exhibit 19.

Zaldivar's opinion overall well-reasoned and entitled to "significant" weight because it is supported by the underlying objective evidence of record, the ALJ did not consider all the relevant evidence. Thus, we vacate her finding that Dr. Zaldivar's opinion is credible. *See Wojtowicz*, 12 BLR at 1-165 (factfinder is required to examine the validity of the reasoning of a medical opinion in light of the objective evidence upon which the opinion is based); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 26-27.

Because the ALJ's weighing of Drs. Werntz's and Zaldivar's medical opinions on remand may affect her credibility determinations with respect to the medical opinions of Drs. Krefft and McSharry, we must also vacate her weighing of their opinions on the issue of total disability. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27-28. Thus, we vacate the ALJ's finding that the medical opinion evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration of all the relevant evidence.

Finally, we reject Claimant's argument that the ALJ was required to consider his lay testimony when addressing the issue of total disability. Claimant Brief at 6-7. The pertinent regulation provides that in a living miner's claim, "a finding of total disability due to pneumoconiosis shall not be made *solely* on the miner's statements or testimony." 20 C.F.R. §718.204(d)(5) (emphasis added). Because the ALJ found the medical evidence did not establish total disability pursuant to Section 718.204(b)(2), lay testimony alone cannot alter the ALJ's findings. *See* 20 C.F.R. §718.204(d)(5); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

Given the foregoing errors, we vacate the ALJ's findings that Claimant failed to establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232. Because we vacate the ALJ's finding that Claimant failed to establish total disability, we also vacate her finding that Claimant failed to invoke the Section 411(c)(4) presumption. Consequently, we vacate the ALJ's denial of benefits and remand the case for further consideration.

On remand, the ALJ must reconsider the medical opinion evidence on the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). In rendering her credibility findings, the ALJ must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). She must also explain her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. If the ALJ finds the medical opinion evidence establishes total disability, she must weigh all of the relevant evidence,

including Claimant's testimony, together to determine whether Claimant has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 1-198.

If the ALJ finds the evidence establishes total disability, she must determine whether Claimant established at least fifteen years of qualifying coal mine employment and can thereby invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018). The ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305(d)(1); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015).

If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Finally, if the ALJ ultimately finds Claimant is entitled to benefits, she must determine whether Employer is the properly named responsible operator.[13] If, however, she finds Claimant is not entitled to benefits, she need not address the responsible operator issue as it would be moot.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[13] The ALJ noted Employer contested the Director's designation of it as the responsible operator but declined to render a determination on the issue because she found Claimant is not entitled to benefits. Decision and Order at 6.

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the ALJ's finding that Claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). The ALJ permissibly discredited the medical opinion of Dr. Werntz on the basis that he lacked a complete picture of the Miner's condition supportive of finding of disability. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). Further, she gave lesser weight to the opinions of Drs. Krefft and Werntz on the basis that they were not consistent with her findings as to the pulmonary function and blood gas studies, while Dr. Zaldivar's opinion was in accord with those findings, a determination not contested by Claimant. *Id*. Since these actions by the ALJ are sufficient to support her determination that the medical opinion evidence did not support finding total disability, I would affirm that determination. *Lane v. Union Carbide Corp*., 105 F.3d 166, 174 (4th Cir 1997). Any error as to consideration of the lay testimony thus would be harmless.[14] *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Accordingly, since Claimant raises no other arguments as to consideration of the other categories of evidence or that would otherwise affect consideration of the evidence as to disability as a whole, I would affirm her determination that Claimant failed to invoke the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2)(iv), 718.305(b)(1)(iii); *see O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965). Further, I would affirm that Claimant failed to establish total respiratory or pulmonary disability, an element required to establish entitlement. *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987). Consequently, I would affirm the denial of benefits.

The ALJ noted Drs. Werntz and Krefft opined Claimant is totally disabled and Drs. Zaldivar and McSharry opined he is not. Decision and Order at 26-28; Director's Exhibits 13, 18; Claimant's Exhibits 2, 4; Employer's Exhibits 1, 2, 4, 6-9. She found Dr.

[14] The majority fails to explain how not considering Dr. Werntz's rationale as to a particular test could make a difference when the ALJ found he lacked an adequate picture of the Claimant's condition overall. Since the ALJ permissibly discredited the opinion of Dr. Werntz, and the ALJ's findings as to opinions of Drs. Krefft and McSharry (which were opposed to each other and found by the ALJ to be entitled to the same weight) were unchallenged by Claimant, Claimant has failed to carry his burden of proof. Any error as to the weighing of the opinion of Dr. Zaldivar thus would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Further, particularly because Claimant is represented by Counsel, it seems unduly onerous to require the ALJ to evaluate a test that can only be located by examining thousands of pages of an exhibit. The ALJ is a judge, not an investigator, under the Act Congress established.

McSharry's opinion entitled to "some, but not significant, weight" because while his opinion "generally corresponds" to her finding that the pulmonary function studies do not "preponderantly" establish total disability, he inaccurately characterized "the FEV_1 values in Dr. Werntz's exam to unilaterally [sic] be non-qualifying." Decision and Order at 27. She also found Dr. Krefft's opinion entitled to "some, but not significant, weight" because while she "asserted" that "Claimant's 'baseline FVC' was qualifying for disability . . . , this only is true of the FVC in the [January 15, 2019] test, not in the later [December 4, 2019] test, where all of the Claimant's FVCs were non-qualifying." *Id*. at 28. In addition, she found that while Dr. Krefft opined Claimant's arterial blood gas studies produced pO2 results that "dropped with exercise" and "he did not demonstrate the adequate [metabolic equivalents (METs)] to perform his usual coal mine employment," the doctor's opinion is contrary to the underlying arterial blood gas study "data" that "simply did not qualify for total disability." *Id*.

Further, she found Dr. Werntz's opinion unpersuasive and entitled to "little" weight because he did not "consider the totality of the designated pulmonary function study evidence" that "fail[ed] to be preponderantly qualifying for total disability."[15] Decision and Order at 26. Indeed, she observed," even with his supplemental report, Dr. Werntz has only considered half of the pulmonary function tests." *Id*. In contrast, she noted Dr. Zaldivar "relied on the totality of the [pulmonary function study] and [arterial blood gas study] evidence, as well as substantially accurate exertion levels of the Claimant's last coal mine job." *Id*. at 27. She found Dr. Zaldivar's opinion overall well-reasoned and documented and thus entitled to "significant" weight because it is supported by the "underlying" objective tests of record and corresponds with her finding that these tests do not establish total disability. *Id*. Thus, she concluded the preponderance of the medical opinion evidence does not support a finding of total disability. *Id.* at 28.

It is not the function of this Board to reweigh the evidence for the ALJ. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Here, the ALJ sufficiently explained the bases for her determinations at 20 C.F.R. §718.204(b)(2)(iv) in accordance with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). She questioned the credibility of Dr. Werntz's opinion because it was not based on a complete picture of Claimant's condition. Decision and Order at 26. In essence, she questioned whether Dr. Werntz would have given the same opinion if he

[15] The ALJ noted that while Dr. Werntz "asserted that significant restrictive changes also appeared in the pre-operative" August 6, 2009 pulmonary function study, the doctor's summary of the test showed it "did not produce qualifying values, although the FEV_1 alone did fall below [the] qualifying threshold." Decision and Order at 26; Director's Exhibit 13. She also noted Dr. Werntz "only considered half of the pulmonary function tests" in his supplemental report. Decision and Order at 26; Director's Exhibit 18.

had reviewed the full record. *Id*. Based on this reasoning, she permissibly gave Dr. Werntz's opinion "little" weight.[16] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (medical opinion may be rejected if a physician does not have a complete picture of the miner's health); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984) (ALJ may assign less weight to a physician's opinion which reflects an incomplete picture of miner's health); *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 [she] did it"); Decision and Order at 26. Moreover, she permissibly found Dr. Zaldivar's opinion overall well-reasoned and entitled to "significant" weight because it is supported by the underlying objective evidence of record. *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 26-27.[17] Because the ALJ found the medical evidence did not establish total disability pursuant to Section 718.204(b)(2), lay testimony alone cannot alter the ALJ's findings. *See* 20 C.F.R. §718.204(d)(5); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Consequently, any error as to consideration of Claimant's testimony is harmless. *Larioni*, 6 BLR at 1-1278. No question has been raised as to the ALJ's weighing of the

[16] The ALJ further noted Dr. Werntz opined that although the arterial blood gas studies produced non-qualifying results, "the [January 15, 2018] exercise test revealed [arterial blood gas study] changes with three METs of activity, whereas he estimated that the Claimant's last coal mine employment required 4-5 METs." Decision and Order at 26; Employer's Exhibit 13 at 4. Because the ALJ neither found the exercise test unreliable, nor relied on it to discredit Dr. Werntz's opinion, Claimant has not explained how the error, if any, he asserts "could have made any difference." *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *see* Claimant's Brief at 11-12.

[17] Claimant did not raise below any issue with Dr. Zaldivar's report based on any failure to offer Claimant an exercise test. Consequently, Claimant's arguments in this regard are raised too late to be considered by this Board. Moreover, whether to give less weight to Dr. Zaldivar's report on the basis that he did not conduct an exercise test is a matter consigned to the discretion of the ALJ. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). Claimant has not shown that the ALJ abused her discretion in this regard, nor shown error as to her finding that overall Dr. Zaldivar's opinion was consistent with the objective testing considered as a totality.

other evidence. Consequently, I would affirm the ALJ's determination that Claimant failed to establish that he is totally disabled under the Act and the denial of entitlement to benefits.

JUDITH S. BOGGS
Administrative Appeals Judge