U.S. Department of Labor

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

BRB Nos. 23-0058 and 23-0059 BLA

JAMES DAVID HILL, JR. (o/b/o JAMES DAVID HILL, SR., deceased Miner, and BETTIE J. HILL, deceased Survivor)	)	
Claimant-Petitioners	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 03/29/2024
and	)	
CONSOL ENERGY, INCORPORATED	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judge.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order Denying Benefits (2018-BLA-06337; 2018-BLA-06066) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on August 28, 2014,[1] and a survivor's claim filed on July 21, 2017,[2] and is before the Benefits Review Board for a second time.

In his initial Decision and Order Denying Benefits issued on September 29, 2020, the ALJ credited the Miner with twenty-four years of underground coal mine employment. He found Claimant did not establish the Miner had complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability or death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Further, he found Claimant did not establish the Miner had a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b), and thus could not invoke

[1] The Miner filed four prior claims for benefits. Miner's Claim (MC) Director's Exhibits 1-4. The district director denied his most recent previous claim, filed on December 22, 2003, because he failed to establish a totally disabling respiratory or pulmonary impairment. MC Director's Exhibit 4. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he 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(c); *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 did not establish total disability in his prior claim, Claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of the Miner's current claim. *White*, 23 BLR at 1-3.

[2] The Miner died August 19, 2016, while his claim was pending. MC Director's Exhibit 43. Thereafter the Miner's widow filed her survivor's claim, but she died on October 20, 2017, while it was pending. Survivor's Claim (SC) Director's Exhibit 11 at 1-3. Claimant is the son of the Miner and the Survivor and is pursuing their respective claims on behalf of their estates. MC Director's Exhibit 43; SC Director's Exhibit 11 at 1-3.

the rebuttable presumption of total disability or death due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). Based on Claimant's failure to establish total disability, an essential element of entitlement, the ALJ denied benefits in the miner's claim.

In the survivor's claim, the ALJ found Claimant established the Miner suffered from both clinical and legal pneumoconiosis, 20 C.F.R. §718.202(a), but did not establish the Miner's death was due to pneumoconiosis. He thus denied benefits in the survivor's claim. 20 C.F.R. §718.205(b).

Pursuant to Claimant's appeal, the Board affirmed the ALJ's finding that Claimant did not establish complicated pneumoconiosis. *Hill v. Island Creek Coal Co.*, BRB Nos. 21-0030 BLA, 21-0031 BLA, slip op. at 3 n.7 (Sept. 29, 2021) (unpub.). However, the Board held the ALJ erred in weighing the arterial blood gas study and medical opinion evidence on the issue of total disability.[4] *Id.* at 5-6. Thus it vacated his findings that Claimant did not establish this element of entitlement or invoke the Section 411(c)(4) presumption and, therefore, vacated his denial of benefits in both claims. *Id.* at 5-6.

In his November 1, 2022 Decision and Order Denying Benefits that is the subject of this appeal, the ALJ again found Claimant did not establish the Miner was totally disabled. 20 C.F.R. §718.204(b). He therefore denied benefits in both claims.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability or death was 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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] The Board affirmed the ALJ's findings that the pulmonary function studies do not support total disability under 20 C.F.R. §718.204(b)(2)(i), and the evidence is insufficient to establish the Miner had cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii). *Hill v. Island Creek Coal Co.*, BRB Nos. 21-0030 BLA, 21-0031 BLA, slip op. at 4 n.10, 6-7 n.15 (Sept. 29, 2021) (unpub.).

On appeal, Claimant argues the ALJ again erred in finding he did not establish total disability. Employer responds in support of the denial of benefits.[5] The Director, Office of Workers' Compensation Programs (Director), has not filed a response brief.

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.[6] 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).

Miner's Claim - Total Disability

To invoke the Section 411(c)(4) presumption or establish entitlement without the presumption under 20 C.F.R. Part 718, a claimant 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. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must 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). Qualifying evidence in any one 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 the arterial blood gas studies and medical opinions do not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order on Remand at 11, 23. Claimant argues the ALJ erred in his consideration of both categories of evidence. Claimant's Brief at 22-59.

[5] We affirm, as unchallenged on appeal, the ALJ's finding the Miner had twenty-four years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 12; Hearing Transcript at 22.

Arterial Blood Gas Studies

The ALJ considered fourteen arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(ii). Eight of the studies were conducted in connection with the Miner's prior claims and are non-qualifying.[7] Miner's Claim (MC) Director's Exhibits 1 at 92, 335-36, 346; 3 at 45, 100-02; 4 at 74-76; 26 at 17, 19; Decision and Order on Remand at 7-8. Of the remaining six studies conducted in connection with the present claim, a January 5, 2016 study produced qualifying values, while studies dated November 6, 2009, August 17, 2011, October 14, 2014, June 13, 2016, and August 14, 2016 produced non-qualifying values. MC Director's Exhibits 17 at 15-17; 20 at 14-15; 27 at 13; 74 at 13; Survivor's Claim (SC) Director's Exhibit 11 at 269, 569.

The ALJ found the January 5, 2016 study is unreliable because the Miner had an acute respiratory illness when it was performed. Decision and Order on Remand at 10-11. Further, he noted the record contains two non-qualifying studies dated June 13, 2016, and August 14, 2016, and there is no indication these studies are unreliable. *Id*. The ALJ thus found the non-qualifying blood gas studies outweigh the single qualifying study. *Id*. Claimant argues the ALJ erred in his consideration of the blood gas studies. Claimant's Brief at 20-37. We agree with Claimant's argument in part.

January 5, 2016 Arterial Blood Gas Study

Considering the qualifying January 5, 2016 blood gas study, the ALJ noted that, in a contemporaneous treatment record accompanying the test, Dr. Chavda listed "Chronic obstructive pulmonary disease with acute lower respiratory infection" under a heading "Dx" indicating diagnosis.[8] SC Director's Exhibit 11 at 17; *see* Decision and Order on Remand at 10-11. Based on that treatment record, the ALJ found the blood gas study is not reliable because the regulatory quality standards state blood gas studies "must not be performed during or soon after an acute respiratory or cardiac illness." Decision and Order on Remand at 9-11, quoting Appendix C to 20 C.F.R. Part 718.

In reaching this finding, the ALJ weighed Dr. Chavda's deposition testimony that, despite the listed diagnosis, the Miner did not have an acute respiratory infection on that

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

[8] During this visit, the Miner presented with "shortness of breath, chest congestion, chest tightness, cough, [and] dyspnea on exertion." SC Director's Exhibit 11 at 15.

date. Claimant's Exhibit 3 at 21-22, 26-27, 45-46. The doctor explained he was obligated to select "Chronic obstructive pulmonary disease with acute respiratory infection" on the electronic health records (EHR) form he completed because it lacked an option to select chronic obstructive pulmonary disease [COPD] without an infection. *Id*. He further testified that, had he actually diagnosed an acute infection, the treatment records would reflect a prescription for antibiotics or prednisone to treat the infection, and the lack of any such treatment indicates he did not diagnose one. *Id*. at 45-47.

While Dr. Chavda testified that he was bound by the EHR system to pick the diagnosis of COPD with an acute respiratory infection, the ALJ noted a September 22, 2015 treatment record reflects a diagnosis using the acronym "COPD" without any mention of an infection.[9] Decision and Order on Remand at 10; *see* SC Director's Exhibit 11 at 5, 7. He found Dr. Chavda did not adequately explain "why he was able to accomplish this on September 22, 2015 but was unable to do so on January 5, 2016." Decision and Order on Remand at 10.

We agree with Claimant's argument that the ALJ failed to consider relevant evidence when finding the Miner had an acute respiratory infection at the time of the January 5, 2016 blood gas study. Claimant's Brief at 34-40. Although the ALJ noted Dr. Tuteur's opinion that Claimant's January 5, 2016 test is "consistent with impairment of gas exchange due to lower respiratory infection," the ALJ did not consider Dr. Krefft's testimony that any infection Claimant may have had at that time would no longer be classified as "acute," but would constitute a chronic condition because it lasted more than twenty days, having first been diagnosed on December 10, 2015. Decision and Order at 11; Director's Exhibit 28 at 13; Employer's Exhibit 1 at 23-24. Because the ALJ failed to consider this relevant evidence, we vacate his finding that the January 5, 2016 blood gas

[9] During his deposition, Dr. Chavda stated the Miner presented on September 22, 2015, with symptoms of shortness of breath, cough, and chest tightness. Claimant's Exhibit 3 at 20. He stated these were likely acute symptoms developed on top of the Miner's chronic conditions. *Id*. Further, he acknowledged he diagnosed the Miner with "COPD" and shortness of breath on that date as reflected in the treatment record. *Id*. at 20-21. When asked by Claimant's counsel if the Miner had an acute respiratory infection on September 22, 2015, Dr. Chavda stated that this diagnosis is listed on a December 10, 2015 treatment note. *Id*. at 21-22. He opined, however, that the Miner only had COPD on December 10, 2015, but the EMR system required him to select COPD with an acute respiratory infection or no diagnosis at all. *Id*. at 21-23. But he clarified the Miner did not have an acute respiratory infection on December 10, 2015, because he was not prescribed antibiotics and he became progressively more symptomatic over time. *Id*. at 22-23.

study is invalid. *See* 30 U.S.C. §923(b) (ALJ must consider all relevant evidence); *Rowe*, 710 F.2d at 255; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

With respect to Dr. Chavda's opinion, under the DX [diagnosis] section, the September 22, 2015 treatment record form uses the acronym "COPD." SC Director's Exhibit 11 at 7. The three subsequent treatment notes spell out "Chronic obstructive pulmonary disease with acute lower respiratory infection." SC Director's Exhibit 11 at 12, 17, 28. Dr. Chavda explained that the forms after September 2015 did not allow him to choose otherwise. Claimant's Exhibit 3 at 21-23. In any event, Dr. Chavda explained in his deposition that the Miner did not actually have an acute infection in December 2015 or January 2016. *Id*. at 22-23. Those diagnoses are consistent with the September 2015 treatment record indicating no infection. Thus, the ALJ's discrediting of Dr. Chavda's testimony is not rational without some further reason to question the veracity of his explanation that his diagnoses were actually consistent (no acute infection) at all of those times. We therefore vacate the ALJ's discrediting of Dr. Chavda's opinion as to the validity of the January 5, 2016 blood gas study.

June 13, 2016 and August 14, 2016 Arterial Blood Gas Studies

Claimant argues the ALJ erred with respect to the reliability of the non-qualifying June 13, 2016 and August 14, 2016 blood gas studies. Claimant's Brief at 21-25. We agree.

In crediting these tests, the ALJ indicated there is no evidence of record questioning their reliability. Decision and Order on Remand at 10-11. The ALJ erred in reaching this finding.

During his deposition, Dr. Chavda initially noted the Miner was acutely ill with a fever at the time of the August 14, 2016 study and thus it was not performed at the Miner's "baseline." Claimant's Exhibit 3 at 49, 53. He indicated that arterial blood gas studies should not be considered if a miner performs them during an acute respiratory or cardiac illness. *Id*. After Claimant's counsel correctly noted the study was taken as part of the Miner's hospitalization for a hemorrhagic stroke, Dr. Chavda opined the study did not accurately reflect the Miner's condition, as the study was taken on the day of the Miner's stroke and five days prior to his death on August 19, 2016. *Id*. at 54-55; *see* SC Director's Exhibit 27 at 269-70.

Further, Dr. Krefft noted Miner was prescribed supplemental oxygen at the time of the August 14, 2016 study and opined the PO2 value from the study was abnormally high. Employer's Exhibit 1 at 31-32. She opined the lingering effects of supplemental oxygen use could result in inflated blood gas study values unless the Miner was taken off his supplemental oxygen for a sufficient period of time prior to conducting the study, and she

was unsure whether these steps were taken. *Id.* Similarly, Dr. Tuteur, who conducted the June 13, 2016 arterial blood gas study, reported that the Miner "uses oxygen at home." MC Director's Exhibit 27 at 3.

Although the ALJ found there is no evidence of record that the Miner was on supplemental oxygen, this finding is not supported by substantial evidence. *Rowe*, 710 F.2d at 255. In a December 10, 2015 treatment note, Dr. Chavda indicated the Miner "will need O2 at [two] liter[s] for" twenty-four hour use. Claimant's Exhibit 2 at 28-30. Further, as noted above, Dr. Tuteur stated the Miner uses oxygen at home in his June 13, 2016 report. MC Director's Exhibit 27 at 13. In the Miner's deposition taken July 28, 2016, less than one month prior to the August 14, 2016 study, the Miner stated he was on oxygen "[w]hen . . . home, . . . well on it all the time." SC Director's Exhibit 52 at 19.

Thus we hold the ALJ erred by failing to consider relevant evidence in finding there is no indication the June 13, 2016[10] and August 14, 2016 blood gas studies are unreliable. *See* 30 U.S.C. §923(b); *Rowe*, 710 F.2d at 255; *McCune*, 6 BLR at 1-998. We therefore vacate the ALJ's crediting of those tests.

Because the ALJ erred in his consideration of the January 5, 2016, June 13, 2016, and August 14, 2016 blood gas studies, we vacate his determination that the blood gas study evidence does not support a finding of total disability.[11] 20 C.F.R. §718.204(b)(2)(ii); Decision and Order on Remand at 11.

[10] Claimant also argues the ALJ erred in relying on the June 13, 2016 arterial blood gas study because it was "incomplete," as it produced a non-qualifying resting result but did not include a subsequent exercise test as the regulations require. Claimant's Brief at 31-33; *see* 20 C.F.R. §718.105(b). But the Board previously rejected this argument because Claimant had not raised it to the ALJ. *See Hill v. Island Creek Coal Co.*, BRB Nos. 21-0030 BLA, 21-0031 BLA, slip op. at 5 n.13 (Sept. 29, 2021). The Board's rejection of this argument remains the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Because Claimant has not shown the Board's decision was clearly erroneous or established any other exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *Id.*

[11] To the extent the ALJ finds the January 5, 2016 qualifying study is reliable and the non-qualifying studies are reliable, he should address Claimant's contention that the opinions of Drs. Chavda and Krefft support the conclusion that the qualifying study is a better indicator of whether the Miner was totally disabled. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) (Administrative Procedure Act requires the

Medical Opinions

The ALJ considered the medical opinions of Drs. Chavda and Krefft, who opined the Miner was totally disabled by a respiratory impairment, and the contrary opinion of Dr. Tuteur. Decision and Order on Remand at 12-24; MC Director's Exhibits 17, 27, 28; Claimant's Exhibits 1, 3, 4; Employer's Exhibit 1.

The ALJ discredited Dr. Chavda's opinion because the doctor failed to discuss the October 14, 2014 and August 14, 2016 non-qualifying blood gas studies. Decision and Order on Remand at 15-16. In addition, the ALJ found Dr. Chavda "made clear" that his diagnosis of total disability was based on the January 5, 2016 qualifying blood gas study which the ALJ found unreliable and outweighed by the non-qualifying studies. *Id*. The ALJ also found Dr. Krefft's opinion not credible because the doctor incorrectly assumed the Miner had cor pulmonale with right-sided congestive heart failure when diagnosing total disability. *Id*. at 22-23. Further, he found she was inconsistent as to the cause of the Miner's disability and also based her opinion on the unreliable January 5, 2016 blood gas study. *Id*. In contrast, the ALJ found Dr. Tuteur's opinion reasoned and documented as it is consistent with the non-qualifying blood gas testing. Decision and Order on Remand at 18-19.

Because the ALJ's erroneous weighing of the blood gas studies[12] affected his credibility determinations with respect to the medical opinions, we vacate them and thus his finding the medical opinions do not support total disability. 20 C.F.R. §718.204(b)(2)(iv).

ALJ to consider all relevant evidence in the record, and to set forth their "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ."); Claimant's Brief at 24, 28-29. We further note that an ALJ may not credit more recent blood gas study evidence solely on the basis of recency if it shows the miner's condition has improved. *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 5-11 (Nov. 17, 2023).

[12] As Claimant correctly argues, Dr. Chavda did address the October 14, 2014 and August 14, 2016 non-qualifying blood gas studies. Claimant's Brief at 44-45. He acknowledged the October 14, 2014 study is non-qualifying, but based his opinion on more recent objective testing. Claimant's Exhibit 3 at 16-19. Moreover, as discussed above, he questioned the reliability of the August 14, 2016 study. Claimant's Exhibit 4 at 49, 53. Thus we vacate the ALJ's finding that Dr. Chavda failed to discuss the October 14, 2014 and August 14, 2016 non-qualifying blood gas studies as it is not supported by substantial evidence. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

In addition, we agree with Claimant's argument that the ALJ's additional reasons for discrediting the opinions of Drs. Chavda and Krefft are flawed.

First, the ALJ erred in discrediting Dr. Chavda's opinion on the basis that the doctor relied exclusively on the January 5, 2016 qualifying blood gas study to diagnose total disability. Decision and Order on Remand at 15-16. Contrary to the ALJ's finding, Dr. Chavda stated in a December 10, 2015 treatment note, which pre-dated the study, that the Miner had respiratory symptoms of shortness of breath, sputum production, chest tightness, cough, and dyspnea with exertion. Claimant's Exhibit 2 at 27-30. He classified the shortness of breath as a Class IV impairment under the New York Heart Association impairment ratings, which he testified indicates the Miner becomes short of breath with any exertion. Claimant's Exhibit 3 at 24-25. Further, he stated the Miner has "significant hypoxemia" based on his respiratory symptoms and the results of a six-minute walk test conducted on December 10, 2015. Claimant's Exhibit 2 at 27-30. He concluded the Miner was totally disabled due to the hypoxemia because it necessitates his use of supplemental oxygen. *Id*. The ALJ erred in failing to consider these aspects of Dr. Chavda's opinion when he discredited it. *See* 30 U.S.C. §923(b); *Rowe*, 710 F.2d at 255; *McCune*, 6 BLR at 1-998.

Further, in his August 17, 2017 medical report, Dr. Chavda opined the Miner was totally disabled based on single breath carbon monoxide diffusion capacity (DLCO) results standing alone, notwithstanding the blood gas study results.[13] Claimant's Exhibit 1 at 3-5. He explained that, under the American Medical Association (AMA) standards, an individual is considered to have a class 4 disability if their DLCO values are less than fifty percent.[14] *Id*. Although he acknowledged the Miner did not reach this threshold on the

[13] Moreover, the ALJ's statement that "only [blood gas] studies are *directly* probative of total pulmonary disability" is not in accordance with applicable law. Decision and Order on Remand at 16. Although the regulations at 20 C.F.R. §718.204(b)(2)(i)-(iii) specify certain types of medical evidence that may presumptively establish total disability in the absence of contrary probative evidence, they do not indicate that only these types of evidence are probative on the issue. The regulations allow that "[w]here total disability cannot be shown" utilizing those types of evidence, "total disability may nonetheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes [that a miner was totally disabled.]" 20 C.F.R. §718.204(b)(2)(iv).

[14] In his deposition, Dr. Chavda testified the DLCO results meet both the AMA and Social Security Administration standards for total disability. Claimant's Exhibit 3 at 41-42.

DLCO testing from June 13, 2016 and December 22, 2016, he noted DLCO testing was measured as forty-five percent of predicted on August 20, 2013, thirty-eight percent of predicted on October 8, 2014, and twenty-four percent of predicted on January 5, 2016. *Id*. Thus he opined the Miner's DLCO studies have been "persistently" less than fifty percent over time, and he is totally disabled by a respiratory impairment based on this testing. *Id*.

During his deposition, Dr. Chavda reiterated that the Miner was totally disabled based on DLCO results that are below fifty percent. Claimant's Exhibit 3 at 10-11, 40-43. He explained DLCO values are normal if they are eighty percent of predicted or higher, but evidence a severe impairment if they are fifty percent of predicted or lower. *Id*. at 10-11. Discussing objective testing the Miner performed on October 8, 2014, Dr. Chavda opined the Miner's pulmonary function study from that day did not meet the Department of Labor standards for total disability because his FEV1 and FVC values are non-qualifying, and his blood gas testing from that day is non-qualifying. *Id*. at 13-19. However, he opined the Miner was totally disabled based on the reduced DLCO values from that day and the exertional requirements of the Miner's usual coal mine employment. *Id*. at 19-20. He further noted the June 13, 2016 DLCO test Dr. Tuteur conducted was more than fifty percent of predicted but is a problematic study because it did not indicate the source of the predicted values. *Id*. at 40.

Finally, Dr. Chavda disagreed with Dr. Tuteur as to whether DLCO results can evidence disability when blood gas testing is normal. Claimant's Exhibit 3 at 41-43. Explaining that DLCO testing relates to whether the lungs are getting enough blood; he noted that if a miner has "fibrosis or thickening of the alveolar wall, then . . . the diffusions will be impaired." *Id*. He stated sometimes blood gas testing may not be accurate and DLCO testing will be accurate. *Id*. In addition, he explained the AMA standards for disability still apply even if blood gas testing is normal. *Id*. Thus the ALJ erred by failing to consider the entirety of Dr. Chavda's opinion on the issue of total disability. *See* 30 U.S.C. §923(b); *Rowe*, 710 F.2d at 255; *McCune*, 6 BLR at 1-998.

Further, we agree with Claimant that the ALJ erred in discrediting Dr. Krefft's opinion because the doctor opined the Miner had cor pulmonale with right-sided congestive heart failure. Claimant's Brief at 41-43.

Dr. Krefft opined the Miner had a totally disabling pulmonary impairment. Claimant's Exhibit 4 at 8-10. In explaining why the Miner had a severe pulmonary impairment, she stated he had chronic lung disease that included emphysema, chronic bronchitis, and pneumoconiosis with evidence of pulmonary fibrosis. Claimant's Exhibit 4 at 8-9. She stated the fibrosis resulted in frequent symptoms of cough, chest tightness, intermittent wheezing, and need for respiratory medications "used to treat severe asthma and emphysema." *Id*. Further, she noted the Miner has "persistently abnormal [DLCO

results] as well as several [blood gas studies] that showed abnormal arterial oxygen tension or a decline in arterial oxygen tension with exercise." *Id.* She opined his persistently abnormal DLCO results were "likely due to his baseline clinical pneumoconiosis . . . and likely cor pulmonale with intermittent decompensated heart failure." *Id.*

Separately, Dr. Krefft discussed the Miner's use of supplemental oxygen "for decompensated congestive heart failure due to probable pulmonary hypertension/cor pulmonale as well as heart disease." Claimant's Exhibit 4 at 8-9. She stated his use of supplemental oxygen supports the presence of a severe impairment. *Id.* In addition, Dr. Krefft noted the Miner frequently became "winded" when just talking or "ambulating as little as [twenty to fifty] feet." *Id.* She opined his need to frequently rest further supports the presence of a severe impairment, and concluded his impairment is related to "diffusion abnormalities and hypoxemia and not severe ventilatory compromise." *Id.*

With respect to his usual coal mine employment, Dr. Krefft stated the Miner's job involved working as an underground mechanic which required welding, performing repairs, fixing continuous miners and shuttle cars, and lifting between five and 250 pounds. Claimant's Exhibit 4 at 11-12. Because the Miner was unable to ambulate for twenty to fifty feet, experienced shortness of breath with minimal exertion, and had a severe diffusion abnormality, Dr. Krefft opined the Miner would not have been able to perform his usual coal mine employment. *Id.* Further, she stated if he returned to the dust conditions of his work, his pneumoconiosis and cor pulmonale would worsen. *Id.*

In discussing the Miner's medical history, Dr. Krefft stated the Miner suffers from decompensated heart failure that was likely related to both cor pulmonale and left heart disease. Claimant's Exhibit 4. She opined that because of the Miner's "lung disease and heart disease, he is more susceptible to recurrent [congestive heart failure] exacerbations that may explain the variability in his DLCO measurements over the years." *Id.* But, "[d]espite this variability and what appears to be a slight improvement in oxygenation during testing conducted by Dr. Tuteur in [June 2013]," Dr. Krefft noted that the Miner "still had disabling lung disease with a markedly abnormal DLCO and poor exercise tolerance that was substantially related to his pulmonary impairment." *Id.*

Thus, contrary to the ALJ's finding, Dr. Krefft's diagnosis of total disability was not based on or limited to the Miner having cor pulmonale with right sided congestive heart failure. Although she discussed that condition as one of the potential causes of the Miner's disabling impairment, she squarely diagnosed the existence of that disabling impairment based on other factors such as persistently low DLCO values, hypoxemia, need for

supplemental oxygen, and symptoms of shortness of breath with minimal exertion.[15] Decision and Order on Remand at 22. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the miner has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305.[16] *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023).

Based on the foregoing, we vacate the ALJ's findings that Claimant failed to establish total disability, 20 C.F.R. §718.204(b)(2), invoke the Section 411(c)(4) presumption, and establish entitlement to benefits.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on the blood gas studies. 20 C.F.R. §718.204(b)(2)(ii). He must consider whether the results of the January 5, 2016, June 13, 2016, and August 14, 2016 blood gas studies are reliable. As discussed herein, he must address all relevant evidence, including the opinions of Drs. Chavda, Krefft, and Tuteur to the extent they bear upon the reliability of those studies, and resolve any conflicts in the evidence. *Rowe*, 710 F.3d at 254-55.

The ALJ must also reweigh the medical opinion evidence on the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). He should address 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. *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 254-55.

If the ALJ determines total disability has been demonstrated by the blood gas studies, medical opinions, or both, he must weigh the evidence supportive of a finding of

[15] Thus, while a diagnosis of pneumoconiosis and cor pulmonale with right sided congestive heart failure can itself form the basis of a total disability finding, *see* 20 C.F.R. §718.204(b)(2)(iii), it is evident that Dr. Krefft's identification of the existence of a totally disabling impairment did not hinge on a cor pulmonale diagnosis.

[16] For the same reason, we vacate the ALJ's discrediting of Dr. Krefft's opinion because she was inconsistent on the cause of the Miner's disability. Decision and Order on Remand at 22.

total disability against any contrary probative evidence of record to determine whether the Miner was totally disabled. *See Defore*, 12 BLR at 1-28-29.

If Claimant establishes total disability, she will invoke the Section 411(c)(4) presumption and the ALJ must consider if Employer has rebutted it.[17] 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant does not establish total disability, the ALJ may reinstate the denial of benefits in the Miner's claim. *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). In reaching his credibility determinations on remand, the ALJ must set forth his findings in detail and explain his rationale in accordance with the Administrative Procedure Act.[18] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Survivor's Claim

Because we vacate the ALJ's determination that Claimant did not establish entitlement to benefits in the Miner's claim, we also vacate his finding that Claimant is not entitled to derivative benefits in the survivor's claim under Section 422(*l*). Further, because we vacate the ALJ's determination that Claimant did not establish total disability, we must also vacate his finding that Claimant did not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act. 20 C.F.R. §718.205(b)(4).[19]

[17] If Employer successfully rebuts the presumption of total disability due to pneumoconiosis in the Miner's claim, the ALJ must also consider whether it has rebutted the presumption of death due to pneumoconiosis in the survivor's claim. 20 C.F.R. §718.305(d)(1), (2).

[18] The Administrative Procedure Act requires the ALJ to consider all relevant evidence in the record, and to set forth his "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).

[19] If the ALJ finds Claimant has not established total disability in the Miner's claim and, thus, is not entitled to the presumption of death due to pneumoconiosis, he still must determine whether Claimant established death due pneumoconiosis in the survivor's claim. 20 C.F.R. §718.205(a)(3).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge