U.S. Department of Labor

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

BRB Nos. 23-0082 BLA
and 23-0082 BLA-A

STEPHEN J. NEWMASTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	
	)	DATE ISSUED: 05/20/2024
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

Samantha Steelman (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

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

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

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge Steven D. Bell's Decision and Order Denying Benefits (2020-BLA-05888) rendered on a claim filed on May 22, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-nine years of qualifying coal mine employment based on Employer's stipulation. He further found Claimant did not establish a totally disabling respiratory or pulmonary impairment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Because Claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability.[2] Employer responds in support of the denial of benefits. On cross-appeal, Employer contends the ALJ erred in finding it stipulated that Claimant has twenty-nine years of qualifying coal mine employment. It further argues that if the Benefits Review Board vacates the ALJ's Decision and Order, it should instruct him to address its arguments on remand that Peabody Energy Corporation (Peabody Energy) is not the liable carrier for the payment of benefits if any are awarded. Claimant did not respond to Employer's cross-appeal. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in either appeal.

[1] 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.

[2] Claimant argues Dr. Tuteur's medical opinion on legal pneumoconiosis is not well reasoned. 20 C.F.R. §718.201(a)(2). We will not address Claimant's argument regarding the existence of legal pneumoconiosis; the ALJ made no findings on whether legal pneumoconiosis is established because he found Claimant failed to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718.

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.[3] 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).

Section 411(c)(4) Presumption: Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or surface coal mines in conditions substantially similar to conditions in an underground mine. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). The ALJ found the parties' stipulated to twenty-nine years of qualifying coal mine employment. Decision and Order at 3, 24.

Employer concedes it stipulated to twenty-nine years of coal mine employment but asserts the ALJ erred in finding it stipulated that Claimant's coal mine employment was qualifying for purposes of invoking the Section 411(c)(4) presumption. Employer's Brief at 5-7. We disagree.

Employer stated in its post-hearing brief that "Claimant has established [fifteen] years of qualifying coal-mine employment," and when addressing whether Claimant invoked the Section 411(c)(4) presumption, it asserted only that Claimant failed to establish total disability. Employer's Post-Hearing Brief at 8-9. Likewise, after having affirmed its stipulation to twenty-nine years of coal mine employment at the hearing, Employer listed the issues which it still contested, namely the existence of pneumoconiosis, total disability, and disability causation. Hearing Transcript at 10-11. It did not indicate it contested whether Claimant's twenty-nine years of coal mine employment is qualifying for invoking the Section 411(c)(4) presumption. *Id.* We therefore reject Employer's argument on cross-appeal and affirm the ALJ's finding that Claimant established twenty-nine years of qualifying coal mine employment based on the parties' stipulation. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013) (party is bound by its stipulations and concessions); *Nippes v. Florence Mining Co.*, 12 BLR 1-108 (1985); Decision and Order at 3, 24; Hearing Transcript at 10-11; Employer's Post-Hearing Brief at 8-9.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11; Director's Exhibit 3.

Section 411(c)(4) Presumption: Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work. *See* 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 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 he is totally disabled by any method.[4] Decision and Order at 24-27.

The ALJ considered three pulmonary function studies dated September 16, 2019, August 24, 2020, and June 24, 2021. Decision and Order at 7, 25-26; Director's Exhibit 12 at 15; Employer's Exhibits 1 at 21, 5 at 10. The September 16, 2019 and August 24, 2020 studies produced qualifying values[5] before and after the administration of bronchodilators, whereas the June 24, 2021 study produced nonqualifying values before and after the administration of bronchodilators. Director's Exhibit 12 at 15; Employer's Exhibits 1 at 21, 5 at 10.

As the ALJ observed, Drs. Go[6] and Selby opined the September 16, 2019 pre-bronchodilator study did not meet the Department of Labor's (DOL) standards for reproducibility. Decision and Order at 25 (citing Claimant's Exhibit 2 at 12; Employer's Exhibit 1 at 11). He further observed Drs. Go, Selby, and Tuteur similarly opined the August 19, 2020 pre- and post-bronchodilator studies do not meet DOL standards for

[4] We affirm, as unchallenged on appeal, the ALJ's findings that the arterial blood gas studies do not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24, 26.

[5] A "qualifying" pulmonary function study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[6] The ALJ states Dr. Selby provided both reliability opinions of the September 16, 2019 pulmonary function study, but he cites to Dr. Go's supplemental report. Decision and Order at 25 (citing Claimant's Exhibit 2 at 12). We consider the ALJ's statement to be a scrivener's error and assume he intended to refer to Dr. Go's opinion as well as Dr. Selby's. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

reproducibility.[7] *Id.* (citing Claimant's Exhibit 2 at 3-5; Employer's Exhibits 1 at 3-4, 7 at 23). Thus, he found those studies invalid. Decision and Order at 25. Weighing the valid, qualifying September 16, 2019 post-bronchodilator study and the valid, non-qualifying June 24, 2021 pre- and post-bronchodilator studies together, the ALJ determined Claimant failed to establish total disability based on the preponderance of the pulmonary function study evidence because "two of the three valid [pulmonary function studies], including the most recent, were non-qualifying." Decision and Order at 25-26. We affirm the ALJ's determination as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710,1-711 (1983).

The ALJ next considered the medical opinions of Drs. Go, Selby, and Tuteur. Decision and Order at 26-27. Dr. Go opined Claimant is totally disabled due to a respiratory or pulmonary impairment, while Dr. Selby opined he could not determine the level of Claimant's impairment and Dr. Tuteur opined Claimant is not disabled. Director's Exhibit 12 at 6; Claimant's Exhibit 2 at 12; Employer's Exhibits 1 at 12-13, 4 at 36, 7 at 28. The ALJ discredited Drs. Go's and Selby's opinions as not well-reasoned or documented. Decision and Order at 27. Crediting Dr. Tuteur's opinion, the ALJ found the medical opinion evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 27.

Claimant contends the ALJ erred in discrediting Dr. Go's opinion. Decision and Order at 2-10. We agree.

Dr. Go conducted the DOL-sponsored complete pulmonary examination of Claimant. Director's Exhibit 12. He noted Claimant's most recent coal mining job was as a mechanic, which required him to frequently lift fifty to sixty pounds. *Id.* at 24. He specifically opined the September 16, 2019 pulmonary function studies meet the American Medical Association's criteria for a Class 3 pulmonary impairment. *Id.* at 27. He further opined that the arterial blood gas testing, though not qualifying, showed hypercapnia at rest and during exercise, and the exercise testing demonstrated Claimant has a ventilatory restriction that would prevent him from performing the lifting requirements of his last coal mining job. *Id.* at 26-27. Thus, he opined Claimant has a totally disabling obstructive impairment. *Id.*

[7] The ALJ further found there was excessive variability between the two greatest FEV1 values produced by the August 19, 2020 pulmonary function study, thus supporting a finding that the study is unreliable. Decision and Order at 25; *see* 20 C.F.R. Part 718 Appendix B.

Dr. Go provided a supplemental opinion dated August 3, 2021. Claimant's Exhibit 2. He stated he agreed with Dr. Selby that the pre-bronchodilator September 16, 2019 pulmonary function study did not meet DOL standards for reproducibility. *Id.* at 12. However, he opined that the study did meet the American Thoracic Society's criteria for acceptability and repeatability and is therefore satisfactory for interpretation. *Id.* He also opined the September 16, 2019 and June 24, 2021 pulmonary function studies demonstrate a moderate to moderately severe obstructive ventilatory defect with a moderate reduction in diffusion capacity. *Id.* at 4-5. Further, he opined cardiopulmonary exercise testing performed on September 16, 2019, shows Claimant experiences ventilatory flow limitation preventing further exercise after performing seventy-two watts of work. *Id.* at 12. He thus again concluded Claimant is totally disabled and unable to perform his usual coal mine work, "which entailed climbing, crawling, and frequent carrying of [fifty to sixty] pound loads." *Id.*

The ALJ found Dr. Go's opinion not well-reasoned and not well-documented because he relied in part on the invalid pre-bronchodilator results from the September 16, 2019 pulmonary function study and failed to address the fact that Claimant's June 24, 2021 study was non-qualifying. Decision and Order at 26-27. However, as Claimant correctly argues, the regulations specifically provide for disability when "a physician exercising reasoned medical judgment, based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine employment or comparable gainful employment]." 20 C.F.R. §718.204(b)(2)(iv); Claimant's Brief at 6-7. Thus, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005). Indeed, a medical opinion may establish disability if it merely provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion."); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may infer total disability by comparing physician's description of physical limitations with the exertional requirements of the miner's usual coal mine work); *see also Cornett v. Benham Coal, Inc*., 227 F.3d 569, 577 (6th Cir. 2000) (even a mild impairment may be totally disabling if it prevents the miner from performing the exertional requirements of his usual coal mine work).

Dr. Go diagnosed a moderate to moderately severe obstructive impairment based on objective test results that he believed prevent Claimant from performing his usual coal mine work. Claimant's Exhibit 2 at 12. He explained that, although the September 16,

2019 pulmonary function study did not meet DOL requirements for reproducibility, it did meet the requirements of the American Medical Association and is therefore acceptable for interpretation. *Id.* Other than finding that Dr. Go's opinions did not conform with the non-qualifying results and stating he did not address the non-qualifying June 24, 2021 pulmonary function study,[8] however, the ALJ neither adequately explained what he found lacking in Dr. Go's opinion nor independently compared the physician's assessments with the physical requirements of Claimant's usual coal mine employment.[9] The ALJ's consideration of his opinion is therefore incomplete.[10] *See Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52; *see also Cornett*, 227 F.3d at 578.[11]

[8] Contrary to the ALJ's statement, Dr. Go reviewed the June 24, 2021 pulmonary function study and opined it demonstrated a moderate ventilatory defect and moderate reduction in diffusion capacity. Claimant's Exhibit 2 at 5.

[9] The ALJ failed to determine the exertional requirements of Claimant's usual coal mine work. *See McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to the miner's work capabilities).

[10] Further, to the extent the ALJ discredited Dr. Go's opinion on the basis that the non-qualifying June 25, 2021 pulmonary function study is more persuasive based on its recency, he erred as it is irrational to credit evidence solely on the basis of recency where it suggests the miner's condition has improved. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Kincaid v. Island Creek Coal Co.*, BLR , BRB No. 22-0024 BLA and 22-0024 BLA-A, slip op. at 7-11 (Nov. 17, 2023); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14 (June 23, 2023).

[11] Our dissenting colleague asserts that the ALJ permissibly found Dr. Go did not adequately explain his total disability opinion in light of the non-qualifying June 24, 2021 pulmonary function study results and the fact that the preponderance of the pulmonary function studies overall weighs against total disability. But Dr. Go further found that Claimant's blood gas testing, though not qualifying, nevertheless demonstrated Claimant has a ventilatory restriction that would prevent him from performing the lifting requirements of his last coal mining job. Further, despite the fact that the results of the June 24, 2021 pulmonary function study are non-qualifying, Dr. Go still diagnosed a moderate to moderately severe obstructive impairment that he believed prevents Claimant from performing his usual coal mine work. Thus, the fact that the June 24, 2021 pulmonary function study and the preponderance of the pulmonary function studies are non-qualifying

Consequently, we vacate the ALJ's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole.[12] We therefore vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption.[13]

Employer's Cross-Appeal: Responsible Carrier

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494,[14] that most recently employed the miner" for at

---

does not necessarily, without more, render Dr. Go's opinion unreasoned, *Killman*, 415 F.3d at 721-22, as Dr. Go provided a sufficient medical assessment of Claimant's physical limitations from which the ALJ could infer Claimant is unable to do his last coal mine job, but the ALJ did not compare Dr. Go's assessments with the physical requirements of Claimant's usual coal mine employment. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc).

[12] Claimant argues the ALJ erred in failing to evaluate evidence he has chronic obstructive pulmonary disease, emphysema, and shortness of breath related to his coal mine employment. Claimant's Brief at 5-10. But the relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the Miner's respiratory or pulmonary condition precludes the performance of his usual coal mine work. The etiology of the Miner's pulmonary impairment concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or the issue of Employer's rebuttal of the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1).

[13] Because the burden of proof may change on remand, we decline to address, as premature, Claimant's arguments relating to Dr. Tuteur's opinions concerning the existence of pneumoconiosis. Benefits are precluded if Claimant does not establish total disability; thus, Dr. Tuteur's opinions concerning the existence of pneumoconiosis are relevant only if Claimant establishes total disability and invokes the Section 411(c)(4) presumption.

[14] 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

least one year. 20 C.F.R. §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 identifies a potentially liable operator, that operator may be relieved of liability only if it proves it is financially incapable of assuming liability for benefits, or another operator more recently employed the miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

Having found Claimant failed to establish total disability, a necessary element of entitlement, the ALJ determined he need not address "other contested issues including . . . responsible operator." Decision and Order at 27 n.139. Employer asserts that, should the Board vacate the ALJ's determinations regarding total disability, it should remand the case for the ALJ to address the liability arguments it raised in its post-hearing brief. Employer's Response Brief at 7-8.

In its post-hearing brief to the ALJ, Employer raised several arguments to support its contention that Peabody Energy was improperly designated as the self-insured carrier in this claim. Employer's Post-Hearing Brief at 21-55. We conclude these arguments are not persuasive.

Employer did not contest before the ALJ and does not contest on appeal that Heritage Coal Company (Heritage) is the correct responsible operator or that it was self-insured by Peabody Energy on the last day it employed Claimant. *See* Employer's Response Brief at 7-8; Employer's Post-Hearing Brief at 21-55. Nonetheless, Employer alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and therefore, if Claimant is found entitled to benefits, liability should transfer to the Black Lung Disability Trust Fund (Trust Fund).[15] Employer's Response Brief at 7-8; Employer's Post-Hearing Brief at 21-56.

---

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).

[15] Employer also "preserve[s]" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Post-Hearing Brief at 52-53. Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act (APA). *Id*. Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of these issues. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*,

Patriot was initially another Peabody Energy subsidiary. *See* Director's Exhibit 20. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy sold a number of its subsidiaries, including Heritage, to Patriot. Director's Closing Brief. That same year, Patriot was spun off as an independent company. *See* Director's Exhibit 27 at 56. In 2011, the DOL authorized Patriot to self-insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Exhibit 29 at 53, 62. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. Employer's Post-Hearing Brief at 31; *see* Director's Exhibit 34 at 58. Neither Patriot's self-insurance authorization nor any other arrangement relieved Peabody Energy of liability for paying benefits to miners last employed by Heritage when Peabody Energy owned and provided self-insurance to that company.

Employer put forth several arguments that Peabody Energy was improperly designated as the self-insured carrier and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy: (1) the district director is an inferior officer not properly appointed under the Appointments Clause of the Constitution;[16](2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when at the same time the DOL also administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the DOL released Peabody Energy from liability; (5) the Director is equitably estopped from imposing liability on Peabody Energy; and (6) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply

---

10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

[16] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. Employer first raised this constitutional argument in a post-hearing brief to the ALJ. Employer's Post-Hearing Brief at 45-51.

with its duty to monitor Patriot's financial health.[17] Employer's Response Brief at 7; Employer's Post-Hearing Brief at 21-56. Moreover, it maintains that a separation agreement—a private contract between Peabody Energy and Patriot—released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure.[18] Employer's Response Brief at 7; Employer's Post-Hearing Brief at 24-33.

The Board previously considered and rejected the same and similar arguments under the same dispositive material facts related to the Patriot bankruptcy in *Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-323, 1-327-39 (2022) (en banc); *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). *Bailey*, *Howard*, and *Graham* control this case and establish—as a matter of law—that Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim. Consequently, for the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments and decline to instruct the ALJ to address Employer's arguments on remand. *See Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 558 (7th Cir. 1991) (remand unnecessary when outcome is foreordained); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence establishes a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). First, he must determine the exertional requirements of Claimant's usual coal mine employment. *See McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). He must then consider the physicians' opinions in conjunction with those exertional

[17] Employer also states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Post-Hearing Brief at 53-55. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[18] Employer also argues 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the APA. Employer's Post-Hearing Brief at 52. That regulation specifies "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). Employer has not identified any documentary evidence relevant to liability that the ALJ excluded; thus, we decline to address this argument. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

requirements and draw appropriate inferences. *See Poole*, 897 F.2d at 894; *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). If Claimant establishes total disability based on the medical opinion evidence, the ALJ must determine whether he is totally disabled based on consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232.

If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the ALJ must determine whether Employer is able to rebut it. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. If Claimant does not establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). In rendering his findings on remand, the ALJ must explain his findings as the APA requires.[19] 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).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[19] The APA provides every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the denial of benefits. Contrary to the majority's analysis, the ALJ did not ignore that a doctor can diagnose total disability even when the objective testing is non-qualifying, nor did he discredit Dr. Go's total disability diagnosis simply because the more recent objective testing is non-qualifying.

Rather, within his discretion, the ALJ first discredited Dr. Go's opinion because it was based in part on the qualifying September 16, 2019 pre-bronchodilator study that the ALJ found invalid for assessing disability. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); 20 C.F.R. §718.103(c) (invalid tests do not "constitute evidence of the *presence* or absence of a respiratory or pulmonary impairment") (emphasis added); Decision and Order at 26-27. Next, also within his discretion, the ALJ found Dr. Go did not adequately explain his total disability opinion in light of the valid, non-qualifying pre- and post-bronchodilator studies conducted on June 24, 2021, which Dr. Go "reviewed" but did not "address" in setting forth his opinion. *See Poole*, 897 F.2d at 895; *Burns*, 855 F.2d at 501; Decision and Order at 26.

Claimant suggests the ALJ should have credited Dr. Go's reliance on the invalid September 16, 2019 pulmonary function study because, although the physician agreed this study does not meet "DOL criteria for reproducibility," he further opined the study does meet "American Thoracic Society criteria for acceptability and reproducibility." Claimant's Exhibit 2 at 12. But that fact does not demonstrate error in the ALJ's decision.

As the majority notes, Claimant does not challenge the ALJ's finding that the September 16, 2019 pre-bronchodilator study on which Dr. Go relied is invalid under the applicable regulatory criteria. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Nor does he challenge the ALJ's finding that because the pre- and post-bronchodilator studies conducted on June 24, 2021 are valid and non-qualifying, the preponderance of the pulmonary function studies overall weighs against total disability. *Id*. Given those findings, the ALJ acted well within his discretion in considering whether Dr. Go's opinion was adequately explained and supported by the underlying objective evidence of record.[20] *See Poole*, 897 F.2d at 895; *Burns*, 855 F.2d at 501.

[20] Although the ALJ at times referenced the fact that the June 24, 2021 studies are the most recent of record, he did not rely on their recency to find Claimant not totally disabled. *See 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) (ALJ may not credit more recent

Finally, as evidence that Dr. Go relied on more than just the pulmonary function studies to diagnose total disability, Claimant points to the physician's statement that his "diffusion capacity measurements" indicated a level of impairment that is "incompatible" with coal mine employment. Claimant's Exhibit 2 at 12. However, Claimant does not challenge the ALJ's finding that Dr. Tuteur credibly explained why Claimant's non-qualifying and non-disabling blood gas studies are a better measure of impairment than diffusion capacity. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27; Employer's Exhibit 7 at 25-28.

Claimant's arguments are largely a request to reweigh the evidence, which the Board may not do. *See Poole*, 877 F.2d at 895; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ's total disability finding is adequately explained and supported by substantial evidence, I would affirm it. *See Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why he did it).

GREG J. BUZZARD
Administrative Appeals Judge

pulmonary function study evidence solely on the basis of recency if it shows the miner's condition has improved). Rather, as noted, he found a preponderance of the studies overall are non-qualifying, and appropriately considered whether, notwithstanding the preponderantly non-qualifying objective testing, the physicians offered reasoned and documented medical opinions.