U.S. Department of Labor

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

BRB No. 20-0336 BLA

ROGER D. GALLION	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW RIDGE MINING COMPANY	)	DATE ISSUED: 10/08/2021
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Denying Benefits (2018-BLA-05638) rendered on a claim filed on February 21, 2017, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 32.18 years of underground or substantially similar surface coal mine employment, but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 718.305(b)(i). He therefore determined Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2018),[1] or establish an essential element of entitlement, and denied benefits.[2]

On appeal, Claimant challenges the ALJ's finding that he did not establish total disability. Employer responds, urging affirmance of the denial.[3] The Director, Office of Workers' Compensation Programs, did not file a substantive response.

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 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 Associates, Inc.*, 380 U.S. 359, 362 (1965).

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

[2] The ALJ did not consider whether Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). However, Claimant does not allege he suffers from complicated pneumoconiosis.

[3] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established 32.18 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Decision and Order at 4 n.3; Hearing Transcript at 28.

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

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine 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 consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the 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).

Claimant asserts the ALJ erred in failing to consider the validity of the April 6, 2017 pulmonary function study obtained as part of the Department of Labor's (DOL's) complete pulmonary evaluation, and erred in weighing the medical opinion evidence.[5] We agree.

Pulmonary Function Studies

The ALJ considered the results of two pulmonary function studies. Decision and Order at 7, 11-12; Director's Exhibits 15, 32. Dr. Gaziano obtained the DOL's April 6, 2017 study, which produced non-qualifying values with no bronchodilator administered.[6] Director's Exhibit 15. Dr. Vuskovich concluded Claimant "did not put forth the effort required to generate valid spirometry results" because "[h]e did not take an initial deepest breath possible[,]" which artificially lowered his FVC and FEV1 values and rendered the study invalid. Director's Exhibit 29. Dr. Tuteur obtained the October 24, 2017 study, which produced non-qualifying values both before and after the administration of bronchodilators. Director's Exhibit 32.

Although the ALJ correctly found the studies were uniformly non-qualifying and therefore did not establish total disability under 20 C.F.R. §718.204(b)(2)(i), he did not resolve the validity of the pulmonary function study evidence. Decision and Order at 12.

[5] We affirm, as unchallenged, the ALJ's findings that the blood gas study evidence does not establish total disability and that 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*, 6 BLR at 1-711; Decision and Order at 12.

[6] On the "Report of Ventilatory Study" form, Dr. Gaziano circled "Good" concerning Claimant's cooperation and his ability to understand and follow instructions. Director's Exhibit 15.

The validity of this evidence is relevant to whether Claimant may establish total disability at 20 C.F.R. §718.204(b)(2)(i) and also to whether the physicians' opinions relying on those tests provided reasoned and documented opinions regarding the elements of entitlement: total disability, pneumoconiosis, and disability causation. Moreover, if the DOL-provided pulmonary function study is invalid, then Claimant did not receive a complete pulmonary evaluation. Claimant's Brief at 11-12.

The Act requires that "[e]ach miner . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994). When an objective test "is not administered or reported in substantial compliance with the provisions of [20 C.F.R. Part 718] . . . the district director must schedule the miner for further examination and testing." 20 C.F.R. §725.406(c). Where the report's deficiencies "are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result."[7] 20 C.F.R. §725.406(c). If the ALJ determines that any part of the complete pulmonary evaluation "fails to comply with the applicable quality standards," he must either "remand the claim to the district director with instructions to develop only such additional evidence as is required" to remedy the defect or "allow the parties a reasonable time to obtain and submit such evidence[.]" 20 C.F.R. §725.456(e).[8]

Consequently, because the ALJ did not resolve the validity of the pulmonary function study evidence,[9] and as further development of the record may be required, we vacate his determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

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[7] Claimant has not been afforded an additional opportunity by the district director to perform a pulmonary function study.

[8] Because the regulations specifically contemplate an ALJ remanding a claim to the district director for additional objective testing when it "fails to comply with the applicable quality standards," 20 C.F.R. §725.456(e), we reject Employer's assertion that only the district director can order such testing. *See* Employer's Brief at 9.

[9] Dr. Tuteur discussed the April 6, 2017 pulmonary function study but did not comment on its validity. *See* Director's Exhibits 32, 34; Employer's Exhibit 1 at 10-11. He opined that the pre-bronchodilator portion of the October 24, 2017 study he obtained was invalid because the tracings were not reproducible. Director's Exhibit 34; Claimant's Brief at 11-13.

Medical Opinion Evidence

The ALJ considered the opinions of Drs. Gaziano, Tuteur, and Vuskovich. Decision and Order at 12-13. Relying on the April 6, 2017 study he administered and recognized as "extremely close" to qualifying, Dr. Gaziano stated that "the presence of obesity adds an additional burden on his breathing impairment which would impair him from doing the medium to heavy work required at his usual coal mine job."[10] Director's Exhibit 35; *see also* Claimant's Exhibit 1 at 10. He also indicated Claimant's "FEV1 level alone is at a level that would preclude [his] capacity to do coal mine work." Director's Exhibit 18.

Dr. Tuteur diagnosed a moderate obstructive ventilatory abnormality and opined Claimant is totally and permanently disabled from returning to coal mine employment or engaging in employment requiring similar effort "predominately due to his morbid obesity and its related consequences of diabetes mellitus, peripheral neuropathy, degenerative joint disease and symptoms consistent with obstructive sleep apnea." Director's Exhibit 32. In a supplemental report, Dr. Tuteur reviewed the pulmonary function study evidence and opined that from a purely pulmonary standpoint, Claimant's "degree of impairment is insufficient to render [him] totally disabled from returning to his last coal mining position as a heavy equipment operator."[11] Director's Exhibit 34. During his deposition, Dr. Tuteur stated "there's no evidence that his obesity is impairing pulmonary function" but from "an excessive work standpoint" if you are obese, it takes more energy to move your body between locations.[12] Employer's Exhibit 1 at 19-20. He again concluded that Claimant does not have a totally disabling respiratory or pulmonary impairment. *Id*. at 12.

[10] Dr. Gaziano initially determined that Claimant's pulmonary function study values met the DOL values for disability but was later notified they did not. Director's Exhibit 15; *see* Director's Exhibits 17-18; Claimant's Exhibit 1.

[11] He also explained that Claimant's pulmonary function study results improved after Dr. Gaziano's study showing an improvement in lung capacity and eliminating the possibility of a restrictive impairment. Employer's Exhibit 1 at 11-12.

[12] Pursuant to 20 C.F.R. §718.204(a), "if . . . a nonpulmonary or nonrespiratory condition or disease [i.e. obesity] causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a); *see* 20 C.F.R. §718.204(c) (disability causation). Thus, the issue is not whether a respiratory or pulmonary impairment is due to an intrinsic, or extrinsic, disease process; the relevant

Dr. Vuskovich found the April 6, 2017 pulmonary function study was invalid and also reviewed the October 24, 2017 pulmonary function study. Director's Exhibit 29; Employer's Exhibit 2. He opined Claimant did not have a restrictive impairment and that his "below average lung volume[] determination[] results with mild air trapping was consistent with morbid obesity." Employer's Exhibit 2. He concluded it was "medically reasonable" to assume Claimant's lung capacity would be normal if he was not obese and that Claimant has "the pulmonary ability to return to his most recent coal mine job operating surface mining equipment." *Id.*

The ALJ accorded more weight to Drs. Tuteur and Vuskovich because he found their opinions were supported by the objective evidence, and he considered Dr. Tuteur to be the most qualified physician based on his credentials. Decision and Order at 8-10, 13. He therefore determined Claimant did not establish total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13.

To the extent the ALJ's weighing of the medical opinions was dependent on his findings with regard to the pulmonary function studies, we vacate his determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, an ALJ must determine the exertional requirements of a miner's usual coal mine work and then consider them in conjunction with the medical opinions assessing disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). Claimant's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

The ALJ determined Claimant's last coal mine employment was as "a labor and heavy equipment operator." Decision and Order at 5. He noted Claimant had to lift items ranging from fifty to one hundred pounds and the job required "heavy labor." *Id*. These findings are unchallenged on appeal and we therefore affirm them. *Skrack*, 6 BLR at 1-711. However, Claimant correctly asserts the ALJ did not compare the exertional requirements of Claimant's usual coal mine employment with the physicians' assessments

inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present.

of his respiratory impairment when weighing their medical opinions.[13] *See Cornett*, 227 F.3d at 578; Decision and Order at 12-13; Claimant's Brief at 5-7.[14]

Claimant also correctly alleges Dr. Vuskovich relied on his invalidation of the April 6, 2017 pulmonary function study in forming his opinion. Claimant's Brief at 8; *see* Director's Exhibits 15, 17-18, 35; Claimant's Exhibit 1. As previously addressed, the ALJ erred in not resolving the conflict concerning the validity of this study. Moreover, Dr. Vuskovich also relied on Dr. Tuteur's non-qualifying October 24, 2017 study, finding Claimant "put forth the effort required to generate valid spirometry results," without addressing Dr. Tuteur's statement that a portion of this study is invalid.[15] Employer's Exhibit 2. In addition, the ALJ did not discuss Dr. Tuteur's comments concerning the validity of the October 24, 2017 pulmonary function study when crediting his opinion. *See* Decision and Order at 13. Because the ALJ credited the opinions of Drs. Tuteur and Vuskovich as supported by the objective evidence without resolving whether the pulmonary function studies are valid, we must also vacate his determination that their

[13] Dr. Gaziano opined Claimant's "breathing impairment would impair him from doing the medium to heavy work required at his usual coal mine job [as a heavy equipment operator]," including lifting 50 to 100 pounds. Director's Exhibit 35; Claimant's Exhibit 1 at 10. Dr. Tuteur noted that for the majority of the time, Claimant operated heavy equipment. Director's Exhibit 32. He stated "[f]rom a cardiopulmonary symptom standpoint, he is limited to walking 225 feet, both because of knee pain and breathlessness;" "[h]e can barely climb four steps." *Id*. He subsequently opined that the improvement in Claimant's pulmonary function study values would not prevent him from returning to work as a heavy equipment operator. Director's Exhibit 34; Employer's Exhibit 1 at 12. Dr. Vuskovich concluded, based on a review of records, that Claimant "had the pulmonary ability to return to his most recent coal mine job operating surface mining equipment." Employer's Exhibit 2; *see* Director's Exhibit 29.

[14] Our dissenting colleague agrees with Claimant's assertion that the ALJ failed to address whether Dr. Tuteur had an accurate understanding of the exertional requirements of Claimant's usual coal mine work. *See* Claimant's Brief at 5. Because the ALJ did not make any specific findings as to whether the physicians had an accurate understanding of Claimant's work requirements as he is required to do, his finding on total disability is not affirmable. *Banks*, 690 F.3d at 489; *Cornett*, 227 F.3d at 578.

[15] Claimant asserts that if Dr. Tuteur's October 24, 2017 pre-bronchodilator pulmonary function study is invalid then Dr. Vuskovich's opinion is not based upon a valid study and therefore is not reasoned. Claimant's Brief at 11. If the ALJ finds this study invalid on remand, he must consider Claimant's argument.

opinions support a finding Claimant did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv). We therefore also vacate his finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2).

Remand Instructions

On remand, the ALJ must initially address whether the April 6, 2017 pulmonary function study is valid. If he determines it is invalid, he must address Claimant's argument that remand to the district director is necessary for further testing and to ensure Claimant receives a complete pulmonary evaluation in accordance with 20 C.F.R. §725.406. *See* Claimant's Brief at 11-12. The ALJ must also determine the validity of the October 24, 2017 study. If a pulmonary function study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must explain his findings in accordance with the Administrative Procedure Act (APA).[16] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The ALJ must also consider whether the physicians' opinions are based on valid objective testing[17] and whether they adequately address whether Claimant can perform the exertional requirements of his usual coal mine work. In weighing the opinions, he must take into consideration the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). He must then reweigh the evidence as a whole, setting forth his findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. Further, in weighing the evidence, the ALJ should be aware that the inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §718.204(c) or in consideration of whether an employer rebuts the Section 411(c)(4)

[16] The Administrative Procedure Act 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).

[17] On remand, the ALJ must also address Claimant's contention that Dr. Tuteur erred in relying upon the post-bronchodilator portion of the October 24, 2017 pulmonary function study given the DOL's recognition that post-bronchodilator results do not provide an adequate assessment of a miner's disability. Claimant's Brief at 13; *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

presumption. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984); 20 C.F.R. §718.204(b), (c).

If Claimant establishes total disability on remand, he will have invoked the Section 411(c)(4) presumption, in which case the ALJ must consider whether Employer has rebutted it. In order to rebut the presumption, Employer must establish Claimant has neither legal nor clinical pneumoconiosis,[18] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). If the ALJ finds Claimant is not totally disabled, he will have failed to establish an essential element of entitlement. *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).

[18] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from my colleagues' decision to vacate and remand this case on total disability for reconsideration of all findings with respect to total disability, including the validity of the pulmonary function studies. It is uncontested that none of the pulmonary function studies are qualifying. Decision and Order at 7-8, 11-12; Director's Exhibits 15, 32. Consequently, the ALJ's finding that the pulmonary function studies considered in isolation do not establish total disability is affirmable. *See Banks*, 690 F.3d at 489; *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 12. Thus, any error in not resolving the validity argument is harmless as to the pulmonary function studies themselves. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, Dr. Tuteur's remarks regarding his October 24, 2017 testing indicate the pre-bronchodilator values are "invalid as an assessment of maximum function since they are not reproducible." Director's Exhibit 34. He did not say the testing was invalid for all purposes; Claimant was capable of producing results at least as good as those registered, and likely better. *See, e.g. Anderson v. Youghiogheny & Ohio Coal Co*., 7 BLR 1-152, 1-154 (1984) (holding that a non-qualifying ventilatory study that represents poor

cooperation is still a valid measure of the lack of respiratory disability); *see also Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-479 (1983); Employer's Brief at 8.

In concluding Claimant does not have a totally disabling respiratory or pulmonary impairment, Dr. Tuteur relied both on the October 24, 2017 pulmonary function study he performed and Dr. Gaziano's April 6, 2017 pulmonary function study, which he considered valid.[19] Director's Exhibits 32, 34; Employer's Exhibit 1. Further, the ALJ permissibly gave the greatest weight to Dr. Tuteur's opinion based on his professional credentials and Claimant has not challenged this finding. *Banks*, 690 F.3d at 489; Decision and Order at 13. Consequently, any error concerning the ALJ's weighing of Dr. Vuskovich's opinion, which considered Dr. Gaziano's April 6, 2017 pulmonary function study values invalid, is harmless as the ALJ considered Dr. Tuteur's opinion worthy of more credence. *See Larioni*, 6 BLR at 1-1278.[20]

Moreover, concerning the medical opinion evidence, Claimant has not shown that Dr. Tuteur lacked an adequate understanding of the exertional requirements of Claimant's last coal mine employment. Claimant's Brief at 5-7. Contrary to Claimant's contention, Dr. Tuteur described Claimant's work as involving more than working as a heavy equipment operator, noting he performed "general labor, working at the tipple, and for the majority of that time, operating heavy equipment."[21] Director's Exhibit 32. Dr. Tuteur indicated his assessment was based on his interview with Claimant and his "careful review"

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[19] Claimant also suggests Dr. Tuteur improperly relied on an improvement shown by his post-bronchodilator test results to determine that Claimant was not totally disabled. Claimant's Brief at 12-13. This contention was not raised below and therefore should not be considered. *Taylor v. 3D Coal Co.*, 3 BLR 1-350, 1-355 (1981). If it were cognizable, however, contrary to Claimant's contention, Dr. Tuteur considered both his test results and those of Dr. Gaziano and noted that there was only a "marginal" improvement in his results. Employer's Exhibit 1 at 11. Dr. Tuteur did distinguish his results from those of Dr. Gaziano in that he had total lung capacity information, which Dr. Gaziano did not. His results showed Claimant did not have a restrictive impairment. *Id.* at 11-12.

[20] Dr. Vuskovich considered the pulmonary evaluations of Drs. Gaziano and Tuteur, both of whom noted Claimant's work as a laborer. Employer's Exhibit 2. His report considered Dr. Gaziano's testing invalid and both pre and post-bronchodilator results of Dr. Tuteur's testing valid. *Id.*

[21] This is consistent with Claimant's hearing testimony that he performed labor and was a heavy equipment operator and "worked around the tipple quite a bit." Hearing Transcript at 12-15.

of Dr. Gaziano's report, which described Claimant as a heavy equipment operator and as performing any necessary general labor.[22] *Id.*; *see* Director's Exhibit 15. However, as Claimant points out, in his supplemental report, Dr. Tuteur stated that Claimant was able to perform his usual coal mine employment as a heavy equipment operator.[23] Claimant's Brief at 6; *see* Director's Exhibit 34. Claimant contends that Dr. Tuteur's opinion that Claimant could perform his usual coal mine work addressed only Claimant's work as a heavy equipment operator and did not encompass heavy work, as found by the ALJ. Claimant's Brief at 5-7. Because this issue was raised below and not addressed by the ALJ, I would remand for the ALJ to determine whether the multiple instances where Dr. Tuteur opined Claimant could perform his usual coal mine work were all confined to Claimant's work as a heavy equipment operator and did not include heavy work. If the ALJ concludes Dr. Tuteur addressed work congruent with his finding, he would reinstate his finding that total disability was not established. If he found to the contrary, he would be required to reconsider all of the evidence with regard to disability, including the exertional requirements considered in each physician's opinion, the physicians' credentials, the documentation underlying their decisions, and their rationales. *See Wojtowicz*, 12 BLR at 1-165.

Claimant raises no other objections to the ALJ's analysis of the medical opinions and to Dr. Tuteur's opinion. *See* Claimant's Brief at 4-7, 12-13. Unless the ALJ finds that Dr. Tuteur's opinions as to total disability did not encompass heavy work, it is not necessary for him to consider the validity of the pulmonary function tests or Claimant's argument concerning the DOL's failure to provide a complete pulmonary examination, since Dr. Tuteur, whose opinion the administrative law judge gave greatest weight, did not

[22] The administrative law judge found "Claimant's last coal mine job was a labor (sic) and heavy equipment operator." Decision and Order at 5.

[23] Dr. Tuteur made this statement in response to a letter from Employer specifically requesting that he "comment on whether …you would consider claimant to be totally disabled from returning to his last coal mine employment as a heavy equipment operator." Employer's Exhibit 34. He had previously opined that Claimant could return to his usual coal mine employment in the report in which he outlined Claimant's work as encompassing more than being a heavy equipment operator. Employer's Exhibit 32.

consider the tests conducted as part of the DOL examination invalid. In all other respects, I agree with my colleagues.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge