U.S. Department of Labor

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

BRB No. 22-0008 BLA

MARY JUNE BOREN (o/b/o BURL R. BOREN)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 9/19/2023
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

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

Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

BUZZARD and ROLFE, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Paul C. Johnson Jr.'s Decision and Order on Remand Awarding Benefits (2017-BLA-05546) rendered on a miner's claim

filed on August 18, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This claim is before the Benefits Review Board for a second time.

In a Decision and Order Denying Benefits issued on September 25, 2019, the ALJ found the Miner had 20 years of qualifying coal mine employment but did not establish he was totally disabled due to a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] or establish entitlement at 20 C.F.R. Part 718 and denied benefits.

On appeal, the Board agreed with Claimant that the ALJ did not properly weigh the medical opinion evidence in considering total disability and thus vacated his finding at 20 C.F.R. §718.204(b)(2)(iv). *Boren v. Consolidation Coal Co.*, BRB No. 20-0037 BLA, slip op. at 5-6 (Oct. 21, 2020). Consequently, the Board vacated the ALJ's determination that the Miner did not establish total disability and remanded the case for him to reconsider whether Claimant invoked the Section 411(c)(4) presumption and established entitlement to benefits. *Id.*

On September 10, 2021, the ALJ issued a Decision and Order on Remand Awarding Benefits, which is the subject of this appeal. He found Claimant established total disability, and therefore invoked the Section 411(c)(4) presumption. He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in his consideration of the evidence regarding total disability and thereby in finding Claimant invoked the Section 411(c)(4) presumption. It further argues the ALJ erred in finding the presumption unrebutted. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply, reiterating its arguments.

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

[1] Claimant is the widow of the Miner, who died on January 21, 2019, and is pursing the claim on his behalf. Employer's Exhibit 11; Hearing Transcript at 6.

[2] 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); 20 C.F.R. §718.305.

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 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, 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 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). On remand, the ALJ determined the pulmonary function study evidence, medical opinions, and evidence as a whole establishes total disability. Decision and Order on Remand at 5.

Pulmonary Function Studies

The ALJ previously determined that a preponderance of the pulmonary function study evidence[4] did not establish total disability because the July 6, 2010 study produced non-qualifying values before and after bronchodilation, while the September 25, 2014 study produced qualifying values before, but not after, bronchodilation.[5] Decision and

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the Miner performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 10.

[4] The record contains three pulmonary function studies dated July 6, 2010, September 25, 2014, and April 16, 2016. The July 6, 2010 study was non-qualifying before and after the administration of bronchodilators. Employer's Exhibit 10 at 2183. The September 25, 2014 study was qualifying before bronchodilators and non-qualifying after bronchodilators. Director's Exhibit 15. The April 16, 2015 study was non-qualifying before the administration of bronchodilators and qualifying after. Employer's Exhibit 3. The ALJ found the July 6, 2010 and September 25, 2014 studies to be valid and the April 16, 2015 study to be invalid. Decision and Order at 20-21.

[5] Although not explicitly stated in the ALJ's decision, he effectively found these two studies in equipoise, as he neither credited one study over the other nor found them

Order at 21. The Board affirmed the ALJ's finding as unchallenged. *Boren*, 20-0037 BLA, slip op. at 3 n.5.

On remand, the ALJ reconsidered the pulmonary function study evidence and found it establishes total disability. Decision and Order on Remand at 2-3. Specifically, he found the September 25, 2014 study entitled to greatest weight because it is a more recent indicator of the Miner's condition than the non-qualifying July 6, 2010 study, and its qualifying pre-bronchodilator values provide a more accurate assessment of the Miner's ability to perform coal mine work than the non-qualifying post-bronchodilator values. *Smith v. Kelly's Creek Res.,* BLR , BRB No. 21-0329 BLA, slip op. at 15 n.26 (June 27, 2023) (due to progressive nature of pneumoconiosis, an ALJ may credit objective testing based on recency if it shows the miner's condition has deteriorated);[6] 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (post-bronchodilator results "do[] not provide an adequate assessment of the miner's disability"); Decision and Order on Remand at 3.

Employer argues the ALJ was precluded from reconsidering the pulmonary function study evidence, as the Board had affirmed his finding that the studies do not support total disability. Employer's Brief at 4. Employer contends that this error affected his weighing of the medical opinion evidence. *Id.* We disagree.

Regardless of whether the ALJ had the authority to reweigh the pulmonary function studies, they had no bearing upon his independent finding that Claimant established total disability based on the medical opinions. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any

---

preponderantly not disabling. Decision and Order at 21. Thus, because the ALJ found one study produced non-qualifying values and the other study produced qualifying values, he found they neither support nor undermine a finding of total disability. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *see also* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (post-bronchodilator results "do[] not provide an adequate assessment of the miner's disability"); Decision and Order at 21. A third study, dated April 16, 2015, produced non-qualifying values before and after bronchodilation, but because the ALJ found this study invalid, it does not "constitute evidence of the presence or absence of a respiratory or pulmonary impairment." 20 C.F.R. §718.103(c); Employer's Exhibit 3.

[6] *See also Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993) (quoting *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992)) (given the progressive nature of pneumoconiosis, an ALJ may credit a "later test or exam" as a "more reliable indicator of [a] miner's condition than an earlier one" only where a "miner's condition has worsened").

difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As discussed below, the ALJ did not credit or discredit the medical opinions based on the overall weight he accorded the pulmonary function studies on remand. He instead permissibly found the medical opinions establish total disability because Drs. Istanbouly's and Zaldivar's diagnoses of total disability were reasoned, while Dr. Selby's diagnosis of no disabling impairment was not. Decision and Order on Remand at 3-5.

Medical Opinion Evidence

Notwithstanding whether the objective testing is qualifying, total disability may be established by a reasoned medical opinion that the miner is unable to perform his usual coal mining work. 20 C.F.R. §718.204(b)(2)(iv); *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000). A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982). Even a mild impairment may be totally disabling depending on the exertional requirements of the miner's usual coal mine employment. *Cornett*, 227 F.3d at 578.

The record contains the medical opinions of Drs. Istanbouly and Zaldivar that the Miner had a totally disabling respiratory impairment and Dr. Selby's opinion that he did not.[7] Director's Exhibits 15, 24; Employer's Exhibits 3-8. On remand, the ALJ credited Drs. Istanbouly's and Zaldivar's opinions as well-documented and reasoned. Decision and Order on Remand at 4-5. He accorded little weight to Dr. Selby's opinion as it was not well-reasoned or adequately explained. *Id.* Consequently, the ALJ found the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 5.

Employer contends that the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 5-18. We disagree. As the ALJ recognized, Dr. Istanbouly and Dr. Zaldivar based their opinions on examination, objective tests, and the Miner's

[7] The ALJ initially accorded no weight to Dr. Istanbouly's opinion and little weight to the opinions of Drs. Zaldivar and Selby, and therefore found the medical opinion evidence did not establish total disability. Decision and Order at 22-24. The Board found the ALJ mischaracterized Dr. Istanbouly's opinion and failed to consider all relevant evidence in weighing his opinion. *Boren v. Consolidation Coal Co.*, BRB No. 20-0037 BLA, slip op. at 4-5 (Oct. 21, 2020). The Board therefore vacated the ALJ's finding that the medical opinion evidence did not establish total disability, and instructed the ALJ to reconsider all of the medical opinions and to explain the weight he accords them on remand. *Id*.

treatment records. Decision and Order at 4-5; Director's Exhibits 15, 24; Employer's Exhibits 6-8. The ALJ thus acted well within his discretion in finding the opinions documented, reasoned, and independently sufficient to establish disability, while finding Dr. Selby's contrary opinion less thorough and unpersuasive. *Cornett*, 227 F.3d at 578; 20 C.F.R. §718.204(b)(2)(iv).

First, Dr. Istanbouly examined the Miner on September 25, 2014. Director's Exhibit 15. He noted the Miner's medical and social histories, as well as symptoms of a daily productive cough, wheezing with any activity, and dyspnea after walking 100 feet. *Id*. He diagnosed a moderately severe obstructive impairment on pulmonary function studies with a good response to bronchodilators and noted that, while the Miner's arterial blood gas studies did not show hypoxemia, the Miner was unable to reach his target heart rate and pace due to arthritis. *Id*. He concluded the Miner was totally disabled from a pulmonary perspective based on the results of his pulmonary function study and symptoms. *Id*. After considering earlier testing and the results of Dr. Selby's examination of the Miner on April 16, 2015, Dr. Istanbouly again opined the Miner had a totally disabling obstructive lung disease and noted evidence of cor pulmonale likely related to his COPD. Director's Exhibit 24. He specifically reviewed the non-qualifying July 6, 2010 pulmonary function study, compared it to the September 25, 2014 test, and concluded the tests reveal an "obvious" and "remarkable worsening of [the Miner's] physical capacity with FEV1 declining to 1.32 liters, 59% predicted before bronchodilator treatment." *Id*.

Contrary to Employer's arguments, the ALJ permissibly found Dr. Istanbouly's total disability diagnosis reasoned and documented because the September 25, 2014 pre-bronchodilator pulmonary function study the physician conducted is "in fact qualifying" for total disability, and the physician explained why "*that* pulmonary function [study]" rendered the Miner incapable of performing his previous coal mine work. Decision and Order on Remand at 4 (emphasis added); 20 C.F.R. §718.204(b)(2)(iv) (medical opinion can support a finding of total disability if "based on medically acceptable clinical and laboratory diagnostic techniques"); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987) (reasoned opinion sets forth the physician's clinical findings, observations, test results, and other factors that support his assessment of a miner's health); Employer's Brief at 5-9.

Next, Dr. Zaldivar reviewed the Miner's records and opined he had evidence of an obstructive impairment as early as 2010, which would render him totally disabled "from performing his usual work or any significant manual labor." Employer's Exhibit 6 at 8. The ALJ permissibly credited Dr. Zaldivar's total disability diagnosis, as the physician reviewed both valid pulmonary function studies of record – the non-qualifying study dated July 6, 2010 and the qualifying study dated September 25, 2014 – and opined the tests reveal an obstructive impairment that has "persisted with time" and the Miner's "low FEV1

would prevent him from performing his usual work or any significant manual labor." *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08, 211 (4th Cir. 2000); *Fields*, 10 BLR at 1-21-22; Employer's Exhibit 6 at 3, 8.

Finally, Dr. Selby examined the Miner on April 16, 2015 and reviewed additional records, at which time he opined "[t]here is no definite impairment" as he believed none of the pulmonary function studies of record were reliable. Employer's Exhibit 3. He subsequently opined the Miner had an obstructive impairment that was "very reversible" as recently as 2014 and which could have been "aggressively treated to the point he likely would have had a normal pulmonary function study." Employer's Exhibits 4, 5. Contrary to Employer's arguments, the ALJ permissibly discredited Dr. Selby's opinion, the only contrary opinion diagnosing the Miner as *not* totally disabled, because the physician did not adequately explain his opinion, despite acknowledging that the September 25, 2014 study produced qualifying pre-bronchodilator results. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94 (7th Cir. 1990); Decision and Order on Remand at 4-5.

He also permissibly found the physician's primary explanation unreasoned because it is based on the reversibility of the obstruction seen on the Miner's September 25, 2014 pulmonary function study, and his assessment that the Miner would be able to work if the obstruction was treated "aggressively." Employer's Exhibit 4 at 48. But, as the ALJ rationally observed, reversibility of an impairment with bronchodilation is not an adequate basis to assess disability, *see* 45 Fed. Reg. at 13,682, and the relevant question at 20 C.F.R. §718.204(b) is whether the Miner's obstructive impairment prevented him from working, not whether he was capable of working if the obstruction were aggressively medicated. 20 C.F.R. §718.204(b)(2); Decision and Order on Remand at 4-5.

In sum, all three physicians reviewed the two valid pulmonary function studies of record, with Drs. Istanbouly and Zaldivar opining they demonstrate a totally disabling obstructive impairment, and Dr. Selby opining the obstruction seen on the qualifying study was not disabling because it was reversible with bronchodilation and aggressive treatment. Director's Exhibits 15, 24; Employer's Exhibits 3-8. Consistent with the Board's remand instructions, the ALJ considered the physicians' opinions and resolved the conflict in the evidence by permissibly crediting Drs. Istanbouly's and Zaldivar's explanations and discrediting Dr. Selby's. *See Stalcup v*, 477 F.3d at 484; *Poole*, 897 F.2d at 895; Decision and Order on Remand at 4-5; *Boren*, 20-0037 BLA, slip op. at 4-6.

We thus affirm the ALJ's medical opinion findings as supported by substantial evidence. *See Stalcup v*, 477 F.3d at 484; *Poole*, 897 F.2d at 895; *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). As those medical opinion findings are unrelated to, and unaffected by, either the ALJ's initial finding that the pulmonary function studies are in

equipoise, *see supra* note 5, or his subsequent finding that the studies support total disability, we affirm his overall determination that Claimant established total disability.[8] *Killman*, 415 F.3d at 721-22 (claimant can establish total disability despite non-qualifying objective tests); *Cornett*, 227 F.3d at 577 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

[8] Our dissenting colleague suggests the ALJ's reweighing of the pulmonary function studies "may have" affected his weighing of the medical opinions on total disability – but she does not identify any basis to conclude it had any effect, let alone an effect that would warrant yet another remand after nine years of litigation. As explained, all three medical experts considered and based their opinions on the two valid pulmonary function studies of record, and the ALJ complied with the Board's remand instructions by resolving the conflict between Drs. Istanbouly and Zaldivar, who diagnosed total disability, and Dr. Selby, who did not. Our colleague instead attempts to undermine the ALJ's findings by going to great lengths to reweigh the evidence, well outside the scope of the Board's review authority. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a). But in doing so, our colleague fails to identify any error in the ALJ's reasons for crediting Drs. Istanbouly and Zaldivar, or any error in his rationale for discrediting Dr. Selby.

And while the dissenting opinion takes issue with the ALJ's statement that Dr. Selby diagnosed "no impairment," our colleague provides no explanation as to how that finding was in error or how it affected the ALJ's reasons for discrediting Dr. Selby's opinion. Dr. Selby initially diagnosed "no definite impairment" and then, in a subsequent opinion, concluded the Miner was not disabled because his pulmonary function would be "normal" if he received "aggressive" treatment. Employer's Exhibits 3-5. In either case, Dr. Selby's statements that any alleged impairment was not "definite" or would be "normal" if treated constitute substantial evidence supporting the ALJ's conclusion that Dr. Selby diagnosed "no impairment" and no total disability. Indeed, Dr. Selby's language plainly speaks for itself, and we disagree with our colleague's subjective assertion the ALJ mischaracterized it. But even if our colleague believes Dr. Selby's opinion could have been interpreted differently, the Board is not permitted to substitute our own inferences for those of the ALJ. Our colleague's own inference ultimately has no bearing on the fact that the ALJ considered Dr. Selby's rationale for finding the Miner not disabled and, within his discretion as factfinder, permissibly concluded the physician's opinion is unexplained, unreasoned, and ultimately less persuasive than the opinions of Drs. Istanbouly and Zaldivar, given that his diagnosis of no total disability was based on the Miner's need for aggressive treatment of his lung disease.

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

Once the Section 411(c)(4) presumption is invoked, the burden shifts to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[9] 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). The ALJ found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relied on the opinions of Drs. Selby and Zaldivar, who opined that the Miner did not have legal pneumoconiosis, but had asthma, unrelated to his coal mine dust exposure. Employer's Exhibits 3-8. The ALJ found neither physician's opinion to be well-reasoned and therefore determined Employer did not rebut legal pneumoconiosis. Decision and Order on Remand at 7-9.

Employer asserts the ALJ erred in his weighing of the medical evidence. Employer's Brief at 22-36. We disagree.

Dr. Selby opined the Miner had asthma unrelated to coal mine dust exposure, based on his opinion that coal mine dust would not have caused the disease given the severity of the disease and the fact that it developed so many years after the Miner ceased coal mine employment. Employer's Exhibits 3-6. The ALJ permissibly discredited Dr. Selby's reasoning as contrary to the regulations recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine

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

dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); Decision and Order on Remand at 7-8. Moreover, the ALJ found that even if he were to assume the Miner had asthma, Dr. Selby did not explain or address whether coal mine dust could have aggravated his condition, beyond a conclusory statement that asthma is not caused by coal dust. Decision and Order on Remand at 7-8. Thus, the ALJ permissibly found the physician failed to adequately explain how coal mine dust did not aggravate the Miner's condition. *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127 (9th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013).

Similarly, while Dr. Zaldivar also opined that the Miner's asthma was not caused by coal dust, the ALJ permissibly found he did not explain why the Miner's coal dust exposure could not have aggravated his asthma. *See Beeler*, 521 F.3d at 726; *Kennard*, 790 F.3d at 668; *Opp*, 746 F.3d at 1127; *Cochran*, 718 F.3d at 324; Decision and Order on Remand at 8. The ALJ further permissibly found Dr. Zaldivar's opinion undermined because he indicated that obstruction due to coal mine dust would not be present given the lack of changes on the Miner's x-rays, contrary to the regulations and principles underlying the Act which provide that coal mine dust can produce disabling chronic obstructive disease in the absence of clinical pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726; Decision and Order on Remand at 8.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Burns*, 855 F.2d at 501. Employer's arguments on rebuttal amount to a request for the Board to reweigh the evidence, which we are not empowered to do. *Poole*, 897 F.2d at 895; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). Because the ALJ permissibly discredited the opinions of Drs. Selby and Zaldivar, we affirm his determination that Employer failed to prove the Miner did not have legal pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i)(1); Decision and Order on Remand at

[10] Because Employer bears the burden of proof on rebuttal and we affirm the ALJ's rejection of its experts' opinions, we need not address Employer's arguments concerning the ALJ's weighing of Dr. Istanbouly's opinion that the Miner had legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 37-40.

14. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] 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)(ii). The ALJ permissibly found that the same reasons for discrediting Drs. Selby's and Zaldivar's opinions that the Miner did not suffer from legal pneumoconiosis also undercut their opinions that the Miner's disabling obstruction is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); Decision and Order on Remand at 9. Thus, we affirm the ALJ's finding that Employer failed to rebut disability causation and failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1). We therefore affirm the award of benefits.

[11] We agree the ALJ provided conflicting findings regarding Employer's rebuttal of clinical pneumoconiosis. Employer's Brief at 20-21; Decision and Order on Remand at 7, 9. However, we need not address this error, as Employer is required to disprove both legal pneumoconiosis and clinical pneumoconiosis to rebut the presumption. 20 C.F.R. §718.305(d)(1)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, dissenting:

I respectfully dissent form the majority's decision to affirm the ALJ's denial of benefits.

I am persuaded by Employer's argument that the ALJ was precluded from reconsidering the pulmonary function study evidence as the Board previously affirmed the ALJ's finding that the pulmonary function study evidence does not support total disability. Employer's Brief at 4. A lower tribunal must act in strict compliance with remand instructions from a higher tribunal without altering, amending, or examining them. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014). The mandate rule, as it is known, is a specific application of the "law of the case" doctrine. *Adams*, 746 F.3d at 744. While the doctrine is strong, it can "bend" if compelling circumstances are established such as subsequent factual discoveries or changes in the law. *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005); *Law v. Medco Research, Inc.*, 113 F.3d 781, 783 (7th Cir. 1997).

Here, the Board previously affirmed the ALJ's finding that the pulmonary function studies do not support a finding of total disability as unchallenged by the Claimant on appeal. *Boren*, 20-0037 BLA, slip op. at 3 n.5. Claimant points to no compelling circumstances which would serve as an exception to the mandate rule, but rather argues that any error the ALJ made in considering the pulmonary function studies is harmless. Claimant's Response at 2-6. While Claimant submits in a footnote that she did challenge the ALJ's finding regarding the pulmonary function studies in her appeal, she addressed only the ALJ's consideration of medical opinion evidence and made no specific challenge to the ALJ's weighing of the pulmonary function studies. Claimant's Response at 2 n.1; Claimant's Brief at 7. Accordingly, the ALJ was not free to reconsider the pulmonary function study evidence, and I would reverse the ALJ's finding that the pulmonary function

studies support a finding of total disability as contrary to the Board's prior ruling. *Hudson*, 490 U.S. at 886; *Adams*, 746 F.3d at 744; *Sears, Roebuck & Co.*, 417 F.3d at 796; 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 3.

To the extent the ALJ's errors in reconsidering the pulmonary function testing may have affected his weighing of the medical opinions, I would also vacate the ALJ's determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv).

Moreover, I agree with Employer's argument that the ALJ mischaracterized Dr. Selby's opinion and erred in the analysis of his opinion. Employer's Brief at 11-12. The ALJ found Dr. Selby's opinion not well reasoned because he "seems to acknowledge the qualifying pre-bronchodilator results from 2014 while also claiming that [the] Miner had no respiratory abnormality at all." Decision and Order on Remand at 4-5. He further found his opinion "suspect" in light of the only valid pulmonary function study being qualifying. *Id.* However, as Employer argues, Dr. Selby did not opine that the Miner had no respiratory abnormality; Dr. Selby opined the Miner had completely reversible asthma. Employer's Exhibits 3-6; Employer's Brief at 11-14. Moreover, contrary to the ALJ's finding, the July 6, 2010 pulmonary function study demonstrated non-qualifying values and there is no indication in the record that it is invalid. Employer's Exhibit 10 at 2183.

Finally, the ALJ found Dr. Selby's opinion not well reasoned as he "opined that [the] Miner would have been able to perform his previous coal mining job, provided that [the] Miner received the appropriate treatment." *Id.* While Dr. Selby did opine that he believed the Miner's pulmonary function studies would have been normal if treated with appropriate medications, he did not opine that the Miner would have been able to perform his previous coal mining job with appropriate treatment.[12] Employer's Exhibit 3, 4, 6; Employer's Brief at 12-14. Rather, Dr. Selby specifically stated that even considering the

[12] Dr. Selby initially opined that "[t]here is no definite impairment and if ever proven one cannot say it is permanent when spirometry shows reversibility." Employer's Exhibit 3. He opined that the Miner had asthma that "was very reversible" and "very under treated" and "could have been aggressively treated to the point he likely would have had a normal pulmonary function testing." Employer's Exhibit 4. He further opined that "Of course normal pulmonary function testing is at a level of function that is almost always well above disability standards" and that he was not disabled as his impairment was reversible and "never had the benefit of appropriate and aggressive treatment." *Id.* He opined that the July 6, 2010 pulmonary function study demonstrated a mild impairment, while the September 25, 2014 study showed a severe impairment that reversed to mild with the administration of bronchodilators. Employer's Exhibit 5 at 10-11.

qualifying pre-bronchodilator results of the September 25, 2014 study, the Miner would not have been totally disabled from his usual job as a backhoe operator "sitting in the cab, operating levers, [and] climbing up and down."[13] Employer's Exhibit 5. As the ALJ mischaracterized parts of Dr. Selby's opinion and did not consider his entire opinion, I would vacate his determination that Dr. Selby's opinion is inadequately explained and remand for the ALJ to reconsider. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Because the ALJ failed to consider relevant evidence and make relevant findings, despite the passage of time, I would again vacate his finding that the medical opinion evidence establishes total disability as it does not satisfy the Administrative Procedure Act.[14] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.304(b)(2)(iv); Decision and Order on Remand at 5. Consequently, because it is what the law requires, I would vacate the ALJ's

[13] While all of the physicians relied on the Miner's last employment as a backhoe operator to determine total disability, the ALJ failed to determine the exertional requirements of this job. *See McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (an 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); Director's Exhibits 3, 4, 6, 15.

[14] The Administrative Procedure Act provides that 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).

finding that Claimant established total disability and invoked the Section 411(c)(4) presumption and the award of benefits. 20 C.F.R. §§718.204(b), 718.305.

MELISSA LIN JONES
Administrative Appeals Judge