U.S. Department of Labor

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

BRB No. 22-0158 BLA

RENDELL N. BARTLEBAUGH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 9/29/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2019-BLA-05335) rendered on a claim filed on December 21, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case is before the Benefits Review Board for the second time.

The Board previously vacated the ALJ's award of benefits because he failed to adequately explain his determination that the medical opinion evidence supports a finding of total disability. *Bartlebaugh v. Eighty-Four Mining Co.*, BRB No. 20-0225 BLA, slip op. at 4-5 (Apr. 29, 2021) (unpub.). Therefore, the Board remanded the case for the ALJ to reconsider whether Claimant established total disability to 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);[1] and, if the presumption was invoked, whether Employer rebutted it.[2] 20 C.F.R. §§718.202(a), 718.204(b)-(c), 718.305.

On remand, the ALJ again found Claimant established total disability and 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 finding Claimant established total disability and invoked the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

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] 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); 20 C.F.R. §718.305.

[2] The Board affirmed the ALJ's finding that Claimant established 30.5 years of underground coal mine employment. *Bartlebaugh v. Eighty-Four Mining Co.*, BRB No. 20-0225 BLA, slip op. at 2 n. 2 (Apr. 29, 2021) (unpub.).

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

A miner is totally disabled if his pulmonary or respiratory impairment, 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 consider all relevant evidence and weigh the evidence supporting 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).

The ALJ found the pulmonary function and blood gas studies non-qualifying and no evidence of cor pulmonale with right-sided heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 17-19.

The ALJ also considered the medical opinions of Drs. Zlupko, Basheda, and Rosenberg regarding whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20-22.

Dr. Zlupko examined Claimant on behalf of the Department of Labor on February 28, 2018. Director's Exhibit 14. He diagnosed a mild obstructive impairment and opined Claimant would be unable to perform his last coal mining job as a roof bolter. *Id.* at 3-4.

Dr. Basheda examined Claimant on July 23, 2019. Employer's Exhibit 2. The arterial blood gas study performed during his examination was normal.[4] *Id.* at 26. However, he opined pulse oximetry testing after a six-minute walk on a treadmill demonstrated exercise-induced oxygen desaturation such that Claimant would qualify for oxygen therapy and would be unable to perform his last coal mining work as a roof bolter,

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

[4] Dr. Basheda noted the January 19, 2018 and March 30, 2019 blood gas studies showed no oxygen impairment with exercise. Employer's Exhibit 2 at 7-8, 11; *see* Director's Exhibit 14; Claimant's Exhibit 3.

which he indicated required Claimant to lift and carry up to more than fifty pounds. *Id.* at 1, 26. Dr. Basheda indicated during his deposition that if Claimant were his patient, he would retest him to determine whether his oxygen desaturation may be caused by cardiovascular disease. *Id.* at 19, 29-30. He maintained his opinion, however, that Claimant's oxygen desaturation renders him totally disabled from performing his last coal mining job as a roof bolter. *Id.*

Dr. Rosenberg diagnosed a variable obstructive impairment, in the form of intermittent mild obstructive lung disease, that improves with bronchodilators. Employer's Exhibit 7 at 13-17, 25. He opined Claimant could perform his last coal mining job as a roof bolter, which he indicated required Claimant to lift and carry up to forty pounds. Employer's Exhibit 4 at 1, 5. He stated that if Dr. Basheda's pulse oximetry testing was valid and the oxygen desaturation seen during this testing were accurate, Claimant would be totally disabled.[5] Employer's Exhibit 7 at 28-29. He indicated, however, that he would not rely on pulse oximetry testing to assess disability because there are "two sets of blood gases that either stay[ed] constant with exercise or went up with exercise."[6] *Id.* at 29. Thus, based on the pulmonary function and blood gas studies, he opined Claimant is not totally disabled. *Id.* at 23-24.

The ALJ found Dr. Zlupko's opinion neither reasoned nor documented because although the physician opined Claimant was unable to perform his last "coal mine employment as a roof bolter," Director's Exhibit 14 at 3-4, he did not specifically address the exertional requirements of the job. Decision and Order at 21-22. He credited Dr. Basheda's total disability opinion as well-reasoned and documented but found Dr. Rosenberg's opinion equivocal because he opined Claimant could perform his previous coal mining job, while also conceding Dr. Basheda's pulse oximetry testing, if valid and accurate, would suggest a totally disabling impairment. *Id.* The ALJ further discredited Dr. Rosenberg's opinion because the physician "had not reviewed the objective medical testing available to Dr. Basheda," and which Dr. Basheda relied upon in opining Claimant is totally disabled. *Id.* Thus, crediting Dr. Basheda's opinion over those of Drs. Zlupko

[5] At his deposition, Dr. Rosenberg conceded he had not reviewed Dr. Basheda's report containing the July 23, 2019 pulse oximetry testing. *See* Employer's Exhibit 7 at 25-26.

[6] Dr. Rosenberg testified at his deposition that multiple factors may artificially lower pulse oximetry test results. Employer's Exhibit 7 at 28-2. Because pulse oximetry results are difficult to verify, he indicated he preferred to get confirmation from blood gas testing of pulse oximetry results, and that he probably would not rely on pulse oximetry alone in assessing total disability. *Id.*

and Rosenberg, the ALJ found the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.*

We initially reject Employer's contention that the ALJ mischaracterized Dr. Basheda's opinion as diagnosing a totally disabling pulmonary impairment. Employer's Brief at 7. The Board previously affirmed the ALJ's determination that Dr. Basheda's opinion supports a finding of total disability and further noted, contrary to Employer's assertion, that Dr. Basheda "neither invalidated the July 2019 [pulse] oximetry nor stated that its results are unreliable." *Bartlebaugh*, BRB No. 20-0225 BLA, slip op. at 4; Employer's Brief at 7. Because Employer has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984).

Nor do we agree with Employer's assertion that the ALJ erred in crediting Dr. Basheda's opinion over the opinion of Dr. Rosenberg. Employer's Brief at 8-9. The ALJ permissibly found Dr. Rosenberg's opinion less probative because his conclusion that Claimant is not disabled is undermined by his own concession that the oxygen desaturation on Dr. Basheda's pulse oximetry testing is disabling if the test is valid; and, despite appearing to question whether that testing is reliable, Dr. Rosenberg did not actually "review[ ] the objective medical testing" on which Dr. Basheda based his total disability opinion.[7] *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Stark v.*

[7] Our dissenting colleague refers to the ALJ's finding as "nonsensical," *infra* p.11, but otherwise simply engages in an impermissible reweighing of the ALJ's credibility determinations. Our colleague believes the ALJ erred in finding Dr. Rosenberg did not "review" Dr. Basheda's pulse oximetry testing because, she alleges, he was "presented" with the test at his deposition. But to suggest Dr. Rosenberg "reviewed" or was "presented" with Dr. Basheda's test obfuscates the record. Dr. Rosenberg was asked a series of questions pertaining to whether pulse oximetry testing that resulted in a drop in oxygen saturation from ninety-seven to eighty-eight percent after a six-minute walk would constitute a disabling impairment as Dr. Basheda found. Employer's Exhibit 7 at 27-29. But for that one data point, there is no indication he was presented with a copy of Dr. Basheda's actual testing or any of the other data included therein. In fact, he testified that he had not seen Dr. Basheda's report and ultimately concluded that if Dr. Basheda's test "truly was a valid measurement that was down to [eighty-eight] percent," it would constitute a disabling impairment. *Id*. at 26, 29. Thus, although he generally questioned reliance on pulse oximetry testing because such testing is commonly "not validated," *id*. at 28, he neither reviewed Dr. Basheda's actual testing nor offered any indication as to whether he believed Dr. Basheda's test was, in fact, invalid. The ALJ, in turn, permissibly rejected his opinion as to the probative value of Dr. Basheda's pulse oximetry testing and,

Director, OWCP, 9 BLR 1-36, 1-37 (ALJ may assign less weight to physician's opinion that reflects an incomplete picture of a miner's health); Decision and Order at 22. Thus, contrary to Employer's argument, the ALJ complied with the Board's remand instructions to reweigh the opinions of Drs. Basheda and Rosenberg and resolve the dispute as to whether Claimant is disabled based on Dr. Basheda's pulse oximetry testing. *See Bartlebaugh*, BRB No. 20-0225, slip op. at 6.

We thus affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv) and Claimant established total disability based on the record as a whole. *See* 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 22. We therefore also affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 7.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[8] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in

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given his admission that the test, if valid, would be disabling, rejected his underlying opinion that Claimant is capable of returning to his previous coal mine work. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 395 (3d Cir. 2002) ("Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (citation omitted). Far from being nonsensical or contradictory as our colleague alleges, it is difficult to envision a credibility determination falling more squarely within the ALJ's authority as the trier-of-fact. *Id.* ("If substantial evidence exists, we must affirm the ALJ's interpretation of the evidence even if we might have interpreted the evidence differently in the first instance.") (citation omitted).

[8] "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).

[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.[9]

Employer relies on the opinions of Drs. Basheda and Rosenberg that Claimant does not have legal pneumoconiosis. Employer's Exhibits 2, 4, 7. Dr. Basheda diagnosed chronic obstructive pulmonary disease (COPD) caused by smoking tobacco and unrelated to coal mine dust exposure. Employer's Exhibit 2 at 26. Dr. Rosenberg diagnosed emphysema and asthma unrelated to coal mine dust exposure. Employer's Exhibit 7 at 17-22. The ALJ discredited both opinions, stating that, "[u]nfortunately for the opinions of Drs. Basheda and Rosenberg, the [p]reamble to the [2001 r]egulations links COPD – including emphysema and asthma – to coal mine dust exposure." Decision and Order at 15 (citing 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000)).

Employer asserts the ALJ erred in discrediting Drs. Basheda's and Rosenberg's opinions based on the preamble to the revised regulations and erred in failing to consider their specific explanations for why Claimant's asthma is not legal pneumoconiosis. Employer's Brief at 9-11. We agree with respect to Dr. Basheda, but not Dr. Rosenberg.

Dr. Rosenberg expressly opined coal mine dust exposure cannot cause asthma and can only aggravate asthma during the time a miner is working in the mines and directly exposed to coal mine dust. Employer's Exhibit 7 at 19-20. As Employer concedes, however, the preamble "indicates that asthma and emphysema may be linked to COPD," and COPD may constitute legal pneumoconiosis if it is caused or aggravated by coal mine dust exposure. Employer's Brief at 10 (emphasis removed) (referencing 65 Fed. Reg at 79,938). Specifically, the preamble cites several medical studies "linking" coal mine dust exposure and the development of obstructive lung disease including, among other things, that coal miners are at a greater risk for "developing COPD," which includes asthma. 65 Fed. Reg at 79,943. Because Dr. Rosenberg denied that coal mine dust exposure can cause asthma, the ALJ permissibly discredited his opinion as inconsistent with the Department of Labor's recognition that asthma may constitute legal pneumoconiosis if is significantly related to or substantially aggravated by coal mine dust exposure.[10] *See Helen*

[9] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 14.

[10] In addition, Dr. Rosenberg testified he could not exclude coal mine dust exposure as a cause or contributor to Claimant's emphysema. Employer's Exhibit 7 at 20-23. Dr. Rosenberg's opinion thus cannot disprove legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii), and any error in discrediting his opinion as inconsistent with the

Mining Co. v. Elliott, 859 F.3d 226, 239-40 (3d Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); 65 Fed. Reg. at 79,937-39. Thus, we affirm the ALJ's discrediting of Dr. Rosenberg's opinion.

That same rationale, however, does not apply to Dr. Basheda's opinion because unlike Dr. Rosenberg, Dr. Basheda does not appear to have outright denied the possibility that asthma can be caused by coal mine dust exposure.[11] Rather, Dr. Basheda opined Claimant's COPD is unrelated to coal mine dust exposure because his objective testing demonstrated a "variable airway obstruction" with "acute bronchodilator response." Employer's Exhibit 2 at 22-26. In rejecting his opinion simply because the preamble acknowledges that coal mine dust exposure can cause obstructive impairments, including COPD, emphysema, and asthma, the ALJ failed to properly consider Dr. Basheda's rationale and whether he provided a reasoned and documented opinion as to whether coal mine dust exposure significantly contributed to, or substantially aggravated, Claimant's obstructive lung disease. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Because the ALJ did not adequately address Dr. Basheda's specific rationale for his opinion on legal pneumoconiosis and explain the weight he accorded it, his findings do not satisfy the requirements of the Administrative Procedure Act (APA).[12] *See Wojtowicz*, 12 BLR at 1-165; *see also McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998

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preamble to the 2001 regulations is therefore harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] To conclude otherwise would be to impermissibly hold that all COPD *must* be attributable to coal mine dust inhalation. Decision and Order at 15; Employer's Brief at 10-11. While the scientific evidence in the preamble "links" the connection between obstructive impairments and coal mine dust exposure, whether a particular miner's COPD or asthma is actually due to coal mine dust exposure must be determined on a case-by-case basis, in light of the ALJ's consideration of the evidence. *See* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012).

[12] The Administrative Procedure Act requires the ALJ to set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

(1984) (fact finder's failure to discuss relevant evidence requires remand). We therefore vacate the ALJ's determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

The ALJ also found Employer failed to establish that no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 21-23. The ALJ discredited Drs. Basheda's and Rosenberg's opinions on disability causation because they did not diagnose legal pneumoconiosis or total disability. Decision and Order at 24. Since we have vacated the ALJ's findings on legal pneumoconiosis, we also vacate his determination that Employer did not establish Claimant's respiratory disability is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we vacate the award of benefits.

On remand, the ALJ must reconsider whether Employer disproved the existence of legal pneumoconiosis by affirmatively establishing Claimant does 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). In doing so, he must fully address Dr. Basheda's opinion for why Claimant's COPD, emphysema, and asthma do not constitute legal pneumoconiosis.

In evaluating Dr. Basheda's opinion on remand, the ALJ should address his explanations for his diagnoses, the documentation underlying his medical judgments, and the sophistication of, and bases for, his conclusions. *See Balsavage*, 295 F.3d at 396-97; *Kertesz*, 788 F.2d at 163; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Further, he must consider all the relevant evidence in reaching his determinations. *See McCune*, 6 BLR at 1-998; Director's Exhibit 14; Employer's Exhibits 2, 6. He must also set forth his findings in detail, including the underlying rationale for his decision as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

If the ALJ finds Employer has disproved the existence of legal pneumoconiosis, Employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and he need not reach the issue of disability causation. However, if Employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the ALJ must determine whether Employer has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that "no part of [Claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's finding that Claimant established a totally disabling impairment and thus invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2018). As Employer correctly asserts, the ALJ failed to follow the Board's remand instructions. Employer's Brief at 9.

The ALJ discredited Dr. Rosenberg's opinion because he conceded the pulse oximetry testing "may" be consistent with a disabling impairment and was thus equivocal and because Dr. Rosenberg "had not reviewed the objective medical testing available to Dr. Basheda." Decision and Order at 22 (citing Employer's Exhibit 7 at 28-29). Neither rationale is supported by substantial evidence. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997).

Contrary to the ALJ's finding, Dr. Rosenberg clearly considered the pulse oximetry testing when it was presented to him at his deposition. Employer's Exhibit 7 at 28-29. Indeed, it is nonsensical to discredit him on the basis that he conceded the testing "may" demonstrate total disability while also discrediting him for not reviewing that testing. Faulting him for failing to consider the medical evidence is thus failing to consider his

deposition testimony, and the ALJ's finding that Dr. Rosenberg failed to consider the medical evidence available to Dr. Basheda is thus not supported by substantial evidence. *See Soubik*, 366 F.3d at 234; *Mancia*, 130 F.3d at 584.

Likewise, although Dr. Rosenberg conceded the pulse oximetry testing "may" demonstrate total disability, he conditioned that concession on that testing being reliable and expressly opined he would not rely on pulse oximetry testing to establish disability unless it was verified by an arterial blood gas study. Employer's Exhibit 7 at 28-29. Dr. Rosenberg went on to assert that neither of the blood gas studies in the record support the pulse oximetry testing and stated that he would not change his opinion that Claimant is not disabled in light of the pulse oximetry testing absent a new blood gas study confirming a change in Claimant's status. *Id.* The ALJ's conclusion that Dr. Rosenberg's opinion is equivocal is thus not supported by substantial evidence because, although he noted the pulse oximetry testing could be consistent with disability, he disputed whether that testing could be relied upon to establish disability in the first place. *See Soubik*, 366 F.3d at 234; *Mancia*, 130 F.3d at 584; Decision and Order at 22; Employer's Exhibit 7 at 28-29.

The Board instructed the ALJ to not only reconsider Drs. Rosenberg's and Basheda's opinion in light of the pulse oximetry testing but to further resolve the conflict between their opinions regarding whether that testing was reliable in the first place. *Bartlebaugh v. Eighty-Four Mining Co.*, BRB No. 20-0225 BLA, slip op. at 6 (Apr. 29, 2021) (unpub.). The ALJ's failure to resolve the discrepancy between these opinions regarding the reliability of the pulse oximetry testing undermines his discrediting of Dr. Rosenberg's opinion. I would thus vacate the ALJ's finding that the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv) and remand once again with instructions to resolve the discrepancy in the medical opinions regarding whether the pulse oximetry testing is reliable, and only after resolving this discrepancy would I instruct the ALJ to reconsider Drs. Rosenberg's and Basheda's opinions and weigh

them against Dr. Zlupko's diagnosis of total disability. Further, I would decline to address Employer's contentions regarding rebuttal of the Section 411(c)(4) presumption as premature.

JUDITH S. BOGGS
Administrative Appeals Judge