U.S. Department of Labor

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

BRB No. 23-0151 BLA

CATHERINE L. BAKER (Widow of LEO H. BAKER) Claimant-Respondent v. BARNES & TUCKER COMPANY c/o SMART CASUALTY CLAIMS Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/05/2024 DECISION and ORDER

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

Deanna Lyn Istik (Gilliland Vanasdale Sinatra Istik Law Firm, LLC), Cranberry Township, Pennsylvania, for Claimant.[1]

Ralph J. Trofino, Esquire, Johnstown, Pennsylvania, for Employer.

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

BUZZARD and JONES, Administrative Appeals Judges:

[1] Claimant was represented by Lynda D. Glagola, Lungs at Work, McMurray, Pennsylvania, when she filed her response brief, but subsequently Ms. Istik filed her notice of appearance on Claimant's behalf.

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2022-BLA-05091) rendered on a survivor's claim[2] filed on March 17, 2021 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with nineteen years of employment in underground coal mines or surface coal mines in conditions substantially similar to those in an underground mine. He found the pulmonary function and arterial blood gas testing does 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)(i)-(iii). In addition, he found Claimant did not establish total disability through the medical opinion evidence because Dr. Swedarsky did not adequately address the issue and Dr. Go's diagnosis of total disability is in equipoise with Dr. Celko's contrary opinion. 20 C.F.R. §718.204(b)(2)(iv).

Although Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), the ALJ considered lay testimony from Claimant's brother, William Patrick, regarding the Miner's breathing problems. The ALJ found Mr. Patrick's testimony supports a finding of total disability. Therefore, he found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Dr. Swedarsky did not address the issue of total disability. It also argues he erred in finding Mr. Patrick's lay testimony sufficient to establish total disability. It thus contends the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption. Employer also asserts he erred in finding the presumption unrebutted.[4] Claimant responds in support of the award of benefits, but also

[2] Claimant is the widow of the Miner, who died on February 12, 2020. Director's Exhibit 10.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established nineteen 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.

argues the ALJ erred in finding the medical opinion evidence in equipoise.[5] The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965).

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

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Medical Opinions

In addressing whether the medical opinions support total disability, the ALJ weighed the opinions of Drs. Celko, Go, and Swedarsky. Decision and Order at 19-21.

We initially reject Employer's argument that the ALJ erred in finding Dr. Swedarsky did not adequately render an opinion on total disability. Employer's Brief at 3-4. Dr. Swedarsky provided an opinion in two reports dated August 22, 2022 and November

[5] Claimant's argument in her response brief is in support of another method by which the ALJ could reach the same result and award benefits. Claimant's Response Brief at 7 n.1. Therefore, this argument is properly before the Board, and no cross-appeal is required. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner 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.

18, 2022. Employer's Exhibits 7, 9. He reviewed the Miner's medical, employment, and smoking histories; pulmonary function studies; Dr. Celko's February 5, 2019 report; Dr. Go's May 21, 2021 report; treatment records; and the autopsy slides. *Id*. With respect to the Miner's respiratory condition, he observed Dr. Celko examined the Miner and administered pulmonary function testing during two separate evaluations in 2012 and 2019, and that Dr. Celko found him not disabled each time. Employer's Exhibit 7 at 5-7. Dr. Swedarsky further noted the Miner had moderate to severe emphysema and his lung diffusion testing was "moderately reduced." Employer's Exhibits 7 at 52-53; 9 at 5.

Because Dr. Swedarsky did not explain whether the Miner was totally disabled by the moderately reduced diffusion impairment and emphysema he observed, and only generally concluded "there are no pathological findings that would contradict Dr. Celko's determination," the ALJ permissibly found the doctor did not adequately address the issue of total disability.[7] *See Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002) (explaining substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order at 21.

We agree with Claimant's arguments, however, that the ALJ erred in considering the opinions of Drs. Go and Celko. Claimant's Response Brief at 7 n.1; *see* Director's Exhibit 11; Claimant's Exhibit 6; Employer's Exhibit 6.

Dr. Go noted the Miner worked as a laborer, pumper, and scoop operator. Director's Exhibit 11 at 1. He stated the Miner's tasks included roof bolting, rock dusting, unloading supplies, running the scoop, and setting timbers. *Id*. He stated that, in the last year of the Miner's work, he ran the scoop outside; moved "coal around"; lifted, by himself, fifty-pound bags of rock dust, twenty-pound plates, twenty-five to thirty-pound posts, and fifty-pound roof bolts; and lifted, with assistance, heavy steel rails weighing two-hundred to three-hundred pounds. *Id*. After summarizing the results of the pulmonary function studies, he opined the December 3, 2018 study evidenced a mild obstructive defect and a moderate reduction in diffusion capacity. *Id*. at 4. He concluded the reduction in diffusion capacity meets the American Medical Association Class 3 pulmonary impairment criteria. *Id*. at 7. He opined the Miner could not perform his usual coal mine employment because

[7] Because the ALJ permissibly found Dr. Swedarsky did not adequately address whether the Miner could perform his usual coal mine employment given the physician's own diagnosis of moderate to severe emphysema and moderately reduced diffusion testing, we reject our concurring colleague's assessment that the ALJ either did not "give consideration" to Dr. Swedarsky's opinion or must reweigh that opinion on remand. *See infra* at 10-11.

this level of impairment would prevent him from lifting fifty-pound bags of rock dust, roof bolts, or heavy steel rails as required by his usual coal mine employment. *Id*.

Dr. Celko set forth the same characterization of the Miner's usual coal mine employment as Dr. Go. Employer's Exhibit 6 at 11 (unpaginated). He stated the December 3, 2018 pulmonary function study is consistent with a mild obstructive impairment and a severely reduced diffusing capacity of the lungs for carbon monoxide (DLCO). *Id*. at 7. He also opined the Miner had chronic bronchitis and simple pneumoconiosis. *Id*. He concluded, however, the Miner was not totally disabled from his usual coal mine employment. *Id*. at 8.

After noting Dr. Go diagnosed total disability and Dr. Celko did not, the ALJ stated, "[w]hile Dr. Go's qualifications are provided and Dr. Celko's are not, Dr. Celko had the opportunity to actually examine the [M]iner while Dr. Go did not." Decision and Order at 21. He then found their opinions "are at best in equipoise." *Id*.

The ALJ made no determination as to whether the medical opinions of Drs. Go and Celko are reasoned and documented. Decision and Order at 21. Thus he erred by failing to critically analyze the physicians' opinions, render any findings as to whether their opinions are reasoned and documented, or otherwise explain, as the Administrative Procedure Act[8] (APA) requires, why he found both opinions credible and merit equal weight. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354-56 (3d Cir. 1997); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016) (ALJ must conduct an appropriate analysis of the evidence to support his conclusions and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

While it is Claimant's burden to establish total disability, the ALJ's stated bases for finding the evidence in equipoise were erroneous. He acknowledged Dr. Go's credentials are in the record and Dr. Celko's are not in the record, but that Dr. Celko examined the Miner and Dr. Go did not. Decision and Order at 21. While the qualifications of the respective medical experts may be relevant to resolving conflicts in the evidence, the ALJ must consider the entirety of the doctors' opinions, including the underlying rationales for

[8] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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).

reaching their conclusions. *See Balsavage*, 295 F.3d at 397 (error for an ALJ to defer to a medical opinion based on superior credentials without considering whether doctor's underlying rationale was persuasive); *Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-18-19 (2003) (qualifications alone do not provide a basis for giving greater weight to a particular physician's opinion; that opinion must also be adequately reasoned and documented).

Further, an ALJ cannot discredit a medical opinion solely because the physician did not examine the miner but must consider the reliability and reasoning underlying the opinion. *Evosevich v. Consol. Coal Co.*, 789 F.2d 1021, 1028 (3d Cir. 1986) (non-examining physician's opinion may "have probative worth supporting substantial evidence"); *Collins v. J & L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999) (ALJ erred in rejecting medical report solely because the physician did not examine the miner).

Finally, the mere presence of conflicting medical opinions is not a valid basis to conclude Claimant failed to meet her burden to establish total disability. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). The ALJ has a duty to resolve any conflicts in the evidence and explain his basis for doing so. *Witmer*, 111 F.3d at 354-56; *Addison*, 831 F.3d at 256-57; *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010). Thus we vacate the ALJ's finding that the medical opinions do not support total disability.[9] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21.

Lay Testimony

Employer argues the ALJ erred in finding that the lay testimony establishes total disability. Employer's Brief at 5-7. We agree.

The regulation at 20 C.F.R. §718.305(b)(4)[10] provides instructions on the consideration of lay testimony:

[9] The ALJ referenced that the pulmonary function and arterial blood gas testing is non-qualifying when discussing the medical opinions. Decision and Order at 21. To the extent the ALJ intended to discredit Dr. Go's opinion as conflicting with his finding that the objective testing is non-qualifying, this is error. A physician may conclude a miner is totally disabled even if the objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); 20 C.F.R. §718.204(b)(2)(iv).

[10] In discussing the lay testimony, the ALJ erroneously considered 20 C.F.R. §718.204(d)(2), which applies to cases "filed on or after January 1, 1982, *but prior to June*

> In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

20 C.F.R. §718.305(b)(4).

The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held under an analogous provision at 20 C.F.R. §727.203(a)(5) that a finding of total disability based solely on lay evidence is available "where the available medical evidence is insufficient to establish total disability or lack thereof[.]" *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 289 (3d Cir. 1988). Thus, an ALJ can rely solely upon lay testimony in the case of a deceased miner only if the medical evidence neither could establish nor refute total disability. *Id.*; *see also Hillibush v. U.S. Dep't of Lab.*, 853 F.2d 197, 203 (3d Cir. 1988) (surviving spouse "may rely on lay affidavits alone if [the medical] evidence is by itself insufficient to establish" total disability); *Mancia v. Director, OWCP*, 130 F.3d 579, 588 (3d Cir. 1997) (ALJ may not "ignore uncontradicted relevant lay testimony where it corroborates the medical testimony of a treating physician and is consistent with the medical records").

The ALJ noted Claimant's brother, William Patrick, "testified at the hearing about the [M]iner's breathing problems."[11] Decision and Order at 21, *citing* Hearing Tr. at 17.

30, 1982 . . . ." (emphasis added). This case was filed after June 30, 1982. The regulations further provide that 20 C.F.R. §718.204(d) does not apply when considering the applicability of the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(iii). The Department of Labor explained it promulgated separate lay evidence rules for 20 C.F.R. §718.305 because the rules in 20 C.F.R. §718.204(d) were "incomplete for purposes of implementing the Section 411(c)(4) presumption" in survivors' claims. 77 Fed. Reg. 19,456, 19,461-62 (Mar. 30, 2012). Because we must remand this case for reconsideration of the relevant evidence on the issue of total disability, we instruct the ALJ to apply the lay evidence rules at 20 C.F.R. §718.305(b)(4).

[11] Mr. Patrick testified that, although he did not work with the Miner, he had conversations with the Miner about his job. Hearing Tr. at 14-15. He indicated that when they first met the Miner was a general laborer working at the face of the mine. *Id.* He stated the Miner later worked as a roof bolter and pumper, where his duties included "maintaining [the] surface -- or the water buildup[,] of any entry in the mines, especially

He then summarily found that, because "this is a survivor's case, Claimant's brother's testimony is sufficient to prove a total pulmonary disability in the [M]iner." *Id.* (citations omitted). The ALJ's summary finding does not satisfy the explanatory requirements of the APA and does not establish that the requisite circumstances exist for reliance solely upon the lay testimony. *See Wojtowicz,* 12 BLR at 1-165.

Thus we vacate this finding and his finding that Claimant established total disability. Because we have vacated the ALJ's finding of total disability, we also vacate his finding that Claimant invoked the Section 411(c)(4) presumption.

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

In the interest of judicial efficiency, we address the ALJ's findings on rebuttal. Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[12] or that "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to rebut the presumption by either method.

Employer does not challenge the ALJ's determination that it failed to establish the Miner had neither legal nor clinical pneumoconiosis; thus we affirm it. 20 C.F.R. §718.305(d)(2)(i)(A), (B); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-15. Hence, we affirm the ALJ's determination that Employer

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around the conveyor belt system and air intake and return system." *Id.* Discussing the Miner's last year of employment, Mr. Patrick testified the Miner was as a scoop operator where he "did work a little bit outside where the supplies were loaded." *Id.* He also testified that prior to his death, the Miner had problems with his stamina and "his wind, his breathing." *Id.* at 17. He stated the Miner "would get frustrated because . . . what he used to do he [could not] do because he would get winded." *Id.* Mr. Patrick indicated the Miner would "take it easy" because he did not want to "affect his heart anymore." *Id.* Mr. Patrick also helped the Miner with chores around the house. *Id.*

[12] "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).

failed to rebut the presumption that the Miner had pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

The ALJ next considered whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(ii). The ALJ found Dr. Celko did not address the issue of death causation and Dr. Go opined the Miner's death was due, in part, to pneumoconiosis. Decision and Order at 23-24. Thus he found their opinions do not assist Employer. *Id*. Although Dr. Swedarsky opined the Miner's death was unrelated to pneumoconiosis, Employer's Exhibits 7, 9, the ALJ found Dr. Swedarsky's opinion on the issue of death causation inadequately reasoned and based on generalities and thus not credible. *See Balsavage*, 295 F.3d at 396; Decision and Order at 23-24. Employer does not challenge these findings. Thus we affirm them. *Skrack*, 6 BLR at 1-711.

Employer states the ALJ erred in failing "to mention the Miner's medical treatment records . . . in his discussion of the evidence on" the issue of death causation. Employer's Brief at 8 (citation omitted). As Employer has failed to identify the treatment records that support its burden of establishing no part of the Miner's death was due to pneumoconiosis, or to proffer an argument as to how these records support its burden to establish rebuttal, we decline to address this argument.[13] *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Thus we affirm the ALJ's finding that Employer failed to establish that no part of the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 21-24.

Remand Instructions

On remand, the ALJ must first reconsider whether the medical opinions of Drs. Go and Celko establish total disability. 20 C.F.R. §718.204(b)(2)(iv). He should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163. If he finds the medical opinions support total disability, he should address whether Claimant established total disability when considering the record as a whole. *Rafferty*, 9 BLR at 1-232; 20 C.F.R. §718.204(b)(2). The ALJ must set forth his findings and conclusions with

[13] Because Employer's extremely limited argument does not set forth any basis to overturn the ALJ's rebuttal findings, we reject our concurring colleague's assertion that it is premature to consider (and reject) that argument. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("in the first instance and on appeal," the principle of party presentation dictates that courts "rely on the parties to frame the issues for decision").

adequate explanation, as the APA requires. If he determines the medical evidence is insufficient to establish or refute total disability, he may consider whether Mr. Patrick's lay testimony by itself establishes total disability. 20 C.F.R. §718.305(b)(4); *Koppenhaver*, 864 F.2d at 289. If the ALJ finds Claimant established total disability, she will have invoked the Section 411(c)(4) presumption. As we have affirmed his finding Employer has not rebutted the presumption, the ALJ may reinstate the award of benefits.

If the ALJ finds the evidence does not establish total disability, Claimant will not have invoked the Section 411(c)(4) presumption. The ALJ must then address if Claimant has established the Miner had pneumoconiosis arising out of coal mine employment and that the Miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). The ALJ must fully explain all of his findings in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the majority's holding that the ALJ erred by failing to critically analyze the medical opinions of Drs. Go and Celko and render findings as to whether their opinions

are reasoned and documented. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354-56 (3d Cir. 1997); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989); Decision and Order at 21. In addition, I agree with my colleagues that the ALJ's finding-- that the lay testimony of Claimant's brother, William Patrick, establishes total disability-- neither satisfies the explanatory requirements of the APA nor establishes the requisite circumstances for reliance solely upon lay testimony. 20 C.F.R. §718.305(b)(4); *see Koppenhaver v. Director, OWCP*, 864 F.2d 287, 289 (3d Cir. 1988); *Wojtowicz*, 12 BLR at 1-165. Thus, I agree that we must remand this case for the reasons stated.

However, in addition, I would require the ALJ to give consideration to Dr. Swedarsky's pathology report when determining whether Claimant is totally disabled. Dr. Swedarsky discussed the extent of the Miner's emphysema and other pulmonary and respiratory-related conditions, cited scientific research bearing on total disability, and opined that the pathological evidence does not contradict Dr. Celko's finding that the Miner was not totally disabled. Employer's Exhibits 7, 9. Because Dr. Swedarsky's opinion is relevant evidence on the issue of total disability, I would hold that the ALJ erred by disregarding it when evaluating whether the Miner was totally disabled. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 382 (7th Cir. 1987) (ALJ must consider all relevant evidence, cannot substitute his expertise for that of a qualified physician, and, absent countervailing clinical evidence or a valid legal basis for doing so, cannot simply disregard the medical conclusions of a qualified physician); *Director, OWCP v. Siwiec*, 894 F.2d 635, 639 (3d Cir. 1990).

Further, because I agree with my colleagues in vacating the ALJ's finding of total disability, I also agree with vacating his finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits. 30 U.S.C. §921(c)(4). Because the ALJ's examination of the medical opinions relevant to total disability on remand may affect his credibility determinations regarding the medical evidence relevant to rebuttal I would decline to address, as premature, Employer's arguments that the ALJ erred in finding the presumption unrebutted. *See* Employer's Brief at 8. Accordingly, I would vacate the

ALJ's total disability determination and award of benefits, and remand for further proceedings in accordance with the foregoing.

JUDITH S. BOGGS
Administrative Appeals Judge