U.S. Department of Labor

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

BRB No. 24-0420 BLA

LOUIS POLUCK Claimant-Respondent v. ERP COMPLIANT FUELS, LLC and BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED n/k/a ENCOVA MUTUAL INSURANCE GROUP Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 08/06/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits 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.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2023-BLA-05739) rendered on a claim filed on March 8, 2022, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 38.88 years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and thus erred in finding he invoked the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs, has not filed 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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

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

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has 38.88 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 7; Hearing Tr. at 18, 20.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 28.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has 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, prevents him from performing his usual coal mine work or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[4] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based upon the pulmonary function studies and the evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 17-20, 24.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated May 9, 2022, May 25, 2023, and March 7, 2024. Decision and Order at 17-20. The May 9, 2022 and March 7, 2024 studies produced qualifying values pre-bronchodilator and non-qualifying values post-bronchodilator. Director's Exhibit 13 at 15; Employer's Exhibit 2 at 15. The May 25, 2023 study produced non-qualifying values before and after bronchodilators. Employer's Exhibit 1 at 10. The ALJ determined the May 9, 2022 study is valid, but the May 25, 2023 and March 7, 2024 studies are invalid. Decision and Order at 18-20. The ALJ credited the pre-bronchodilator study over the post-bronchodilator study and therefore determined the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 20.

[4] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies or medical opinions, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iv); Decision and Order at 21-24.

Employer argues the ALJ erred in finding the May 9, 2022 pulmonary function study is valid. Employer's Brief at 4-9. Employer's argument has merit.

When considering pulmonary function study evidence, an ALJ must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see also* 20 C.F.R. Part 718, App. B. Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *See Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). If a 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).

Dr. Werntz opined the pre-bronchodilator spirometry meets disability criteria, noting that he did not have the "quality verification" for the study but recognizing "lacking evidence of retesting, it is presumed that the [study] was found to be technically acceptable." Claimant's Exhibit 1 at 2. Dr. Gaziano opined the vents are acceptable and the study is valid. Director's Exhibit 18.

The technician's "Post Test Comments" state Claimant had poor effort, he did not blow hard and fast, and the study did not meet American Thoracic Society standards. Director's Exhibit 13 at 20. Dr. Fino reviewed the May 9, 2022 and May 25, 2023 studies and opined they underestimate Claimant's true lung function because he "never gave a good effort" and stopped exhaling well before seven seconds, and the spirometry is "invalid." Employer's Exhibit 1 at 6, 8-9. He concluded there is "no valid evidence of any respiratory impairment. *Id.* at 9. Finally, Dr. Rosenberg opined the criteria for validity of the study "cannot be assessed completely, but clearly, the post-bronchodilator spirometric values are invalid." Employer's Exhibit 4. He further stated that because there was incomplete inspiration demonstrated on the flow volume curves, "one cannot assure that the exhalation component of the testing was maximal," and Claimant's spirometric values are therefore invalid. *Id.*

The ALJ summarized this evidence. Decision and Order at 18-19. He found the opinions of Drs. Werntz and Fino are insufficient to invalidate the study because they do not specifically state the study is invalid. *Id.* at 19. He further found that Drs. Gaziano and Rosenberg have "roughly equivalent qualifications" and that because they are "diametrically-opposed," their opinions are in equipoise and Employer failed to meet its burden to establish the study is unreliable. *Id.*

We are unable to affirm the ALJ's findings. Regardless of whether Drs. Werntz and Fino specifically opined the study is "invalid," the ALJ is required to determine if the reasoning contained in the physicians' opinions is sufficient to establish the study is unreliable. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Vivian*, 7 BLR at 1-361. Further, while the ALJ permissibly considered the physicians' credentials, he failed to sufficiently weigh the credibility of Dr. Gaziano's and Dr. Rosenberg's comments and explanations, along with their qualifications, prior to finding their opinions are in equipoise. *See Hicks*, 138 F.3d at 530, 533; *Akers*, 131 F.3d at 439-40.

Because the ALJ failed to adequately consider the reasoning contained in the opinions of Drs. Werntz, Gaziano, Fino, and Rosenberg, we must vacate his determination that the May 9, 2022 study is valid. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, we vacate the ALJ's finding that the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 20.

Medical Opinions

The ALJ considered the opinions of Drs. Werntz and Fino. Decision and Order at 22-24. Dr. Werntz acknowledged Claimant's qualifying pulmonary function study, but opined Claimant is capable of performing the duties of his last coal mine employment based on his blood gas study results. Director's Exhibit 13 at 7-8; Claimant's Exhibit 1 at 2. Dr. Fino opined there is no valid objective evidence of any respiratory impairment because Claimant's pulmonary function studies are invalid and his blood gas studies are non-qualifying. Employer's Exhibits 2 at 9; 2 at 11; 16 at 3-4. The ALJ found neither opinion is reasoned because they failed to explain how Claimant could perform his job given his qualifying pulmonary function test results. Decision and Order at 23.

Because the ALJ relied on the pulmonary function studies in weighing the medical opinions and we have vacated the ALJ's finding that the pulmonary function studies support total disability at 20 C.F.R. §718.204(b)(2)(i), we must also vacate his finding that the medical opinions do not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, we must vacate his determination that the evidence as a whole establishes total disability, 20 C.F.R. §718.204(b)(2), and that therefore Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(iii); Decision and Order at 24. Consequently, we decline to address, as premature, Employer's argument that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Employer's Brief at 11-18.

Remand Instructions

On remand, the ALJ must reconsider whether the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Specifically, the ALJ initially must reweigh whether the May 9, 2022 pulmonary function study is valid and reliable. As discussed, he must address all relevant evidence, including the opinions of Drs. Werntz, Gaziano, Fino, and Rosenberg to the extent they address the reliability of the study and must resolve any conflicts in the evidence. In rendering his findings on remand, the ALJ must explain the bases for his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

The ALJ must then reconsider the medical opinion evidence, taking into account his findings regarding the pulmonary function study and arterial blood gas study evidence, and must render findings pursuant to 20 C.F.R. §718.204(b)(2)(iv). He must resolve the conflict in the medical opinion evidence by addressing the physicians' comparative credentials, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. In making his determinations, he must set forth his findings in detail and explain his rationale in accordance with the APA's requirements. *Wojtowicz*, 12 BLR at 1-165. If Claimant establishes total disability based on the pulmonary function study evidence or medical opinion evidence, considered in isolation, the ALJ must then determine whether he has established total disability based on consideration of the evidence as a whole. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability on remand, he will have invoked the Section 411(c)(4) presumption. The ALJ must then consider whether Employer can rebut the presumption. 20 C.F.R. §718.305(d)(1). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ must deny benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Accordingly, the ALJ's Decision and Order Awarding 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.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge