U.S. Department of Labor

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

BRB No. 24-0266 BLA

RONNIE L. WOLFORD Claimant-Respondent v. POCAHONTAS COAL COMPANY, LLC and BRICKSTREET/ENCOVA MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 02/28/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe, Williams & Austin), Norton, Virginia, for Claimant.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits on Remand (2020-BLA-05279) rendered on a claim filed on October 18, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.[1]

In consideration of Employer's previous appeal, the Board rejected Employer's assertions that the ALJ erred in weighing the June 18, 2019 and October 14, 2020 arterial blood gas studies. *Wolford v. Pocahontas Coal Co., LLC*, BRB No. 22-0349 BLA, slip op. at 4 (Sept. 27, 2023) (unpub.). However, the Board vacated the ALJ's finding that Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305, instructing her to reconsider whether Claimant established total disability based on a preponderance of the blood gas studies and whether the medical opinions support the establishment of total disability.[3] 20 C.F.R. §718.204(b)(2) (ii), (iv); *Wolford*, BRB No. 22-0349 BLA, slip op. at 4-7.

On remand, the ALJ determined Claimant established total disability based on both blood gas studies and medical opinions. She thus found Claimant established total disability based on the evidence as a whole and invoked the Section 411(c)(4) presumption. Further finding Employer did not rebut the presumption, the ALJ awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and therefore erred in finding Claimant invoked the Section 411(c)(4) presumption. Consequently, Employer argues the ALJ improperly placed the burden on it to establish

[1] We incorporate the procedural history of this case as set forth in *Wolford v. Pocahontas Coal Co., LLC*, BRB No. 22-0349 BLA (Sept. 27, 2023) (unpub.).

[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.

[3] The Board previously affirmed, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-three years of underground coal mine employment. *Wolford*, BRB No. 22-0349 BLA, slip op. at 2 n.2; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant's total disability is not due to pneumoconiosis. 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 with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls 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 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 and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, arterial blood gas studies,[5] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[6] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp*., 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc).

Arterial Blood Gas Studies

On remand, in compliance with the Board's instructions, the ALJ reconsidered whether the arterial blood gas study evidence supports a finding of total disability at 20

[4] 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); Director's Exhibit 4.

[5] A "qualifying" arterial blood gas study yields results equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[6] In her initial decision, the ALJ found the pulmonary function study evidence does not support a finding of total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 6-7, 9.

C.F.R. §718.204(b)(2)(ii). Decision and Order on Remand at 3-4. The record contains the results of four blood gas studies dated January 31, 2019, June 18, 2019, July 2, 2020, and October 14, 2020. Director's Exhibits 18 at 2, 22 at 7; Claimant's Exhibit 3 at 7; Employer's Exhibit 2 at 16. The January 31, 2019 study produced non-qualifying values at rest and qualifying values during exercise. Director's Exhibit 18 at 2. The June 18, 2019 study produced nonqualifying values at rest; no exercise study was conducted. Director's Exhibit 22 at 7. The July 2, 2020 study produced qualifying values at rest; no exercise study was conducted. Claimant's Exhibit 3 at 7. The October 14, 2020 study produced non-qualifying values at rest and during exercise. Employer's Exhibit 2 at 16.

The ALJ gave greater weight to the exercise studies and ultimately found "Dr. Werchowski's [October 14, 2020] arterial blood gas testing during exercise should be ascribed lesser weight than those obtained by Dr. Habre" on January 31, 2019. Decision and Order on Remand at 4. Therefore, she found the arterial blood gas study evidence supports a finding of total disability. *Id*. at 5.

We initially reject Employer's contention that the ALJ erred by discrediting Dr. Fino's June 18, 2019 non-qualifying resting blood gas study. Employer's Brief at 6 (unpaginated). The Board previously affirmed the ALJ's finding that Dr. Fino's study is entitled to lesser weight because he failed to explain why he did not, in compliance with 20 C.F.R. §718.105(b), conduct an exercise study given the non-qualifying resting study. *Wolford*, BRB No. 22-0349 BLA, slip op. at 4. 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, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer also argues the ALJ improperly gave less weight to Dr. Werchowski's October 14, 2020 exercise study. Employer's Brief at 4-5 (unpaginated). We disagree.

The ALJ accurately noted Dr. Werchowski exercised Claimant for three minutes and twenty-three seconds, whereas Dr. Habre exercised Claimant for five minutes. Decision and Order on Remand at 4; Director's Exhibit 18 at 2; Employer's Exhibit 2. She therefore permissibly gave Dr. Werchowski's study lesser weight because Dr. Habre's study had a "lengthier period of exercise,"[7] which she found was "more indicative of

[7] Employer contends that because there is "no medical opinion of record that challenges the sufficiency or validity of the 10/14/20 [blood gas study]," the ALJ erred in giving less weight to Dr. Werchowski's opinion "based on her own medical assessment of the test." Employer's Brief at 5 (unpaginated). However, the ALJ did not give less weight to Dr. Werchowski's blood gas study on the basis that she found it to be invalid. Rather, as required by her role as fact finder, she permissibly resolved conflicts in the evidence.

Claimant's ability to perform his last coal mine employment."[8] *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (Board "must uphold decisions that rest within the realm of rationality; a reviewing court has no license to set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis"); Decision and Order on Remand at 4.[9]

Because the ALJ complied with the Board's remand instructions and adequately explained the weight she accorded the conflicting evidence and her resolution of the conflict in the evidence, we affirm the ALJ's permissible conclusion that the arterial blood gas study evidence supports a finding of total disability. *See* 20 C.F.R. §718.204(b)(2)(ii); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order on Remand at 5.

Medical Opinions and Weighing the Evidence as a Whole

The ALJ also reconsidered the medical opinion evidence as the Board instructed. Decision and Order on Remand at 5-6; *see Wolford*, BRB No. 22-0349 BLA, slip op. at 6-7. Dr. Habre diagnosed total disability, while Drs. Fino, Agarwal, and Rosenberg did not. Director's Exhibits 18, 22, 25; Claimant's Exhibit 3; Employer's Exhibits 3, 4, 6. The ALJ gave greater weight to Dr. Habre's opinion because it is consistent with her blood gas study findings and discredited the contrary opinions as

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See Harman Mining Co. v. Director, OWCP [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012).

[8] In her initial Decision and Order, the ALJ noted that Claimant testified that his last job working in "general labor" "included running the scoop and moving the belt" and "lift[ing] 35-to-40-pound pieces of structure." Decision and Order at 3; *see* Hearing Transcript at 13-14.

[9] Although our dissenting colleague asserts that the ALJ erred in giving less weight to Dr. Werchowski's October 14, 2020 non-qualifying exercise study because the ALJ did not have a proper or adequate medical basis in the record to support her finding that Dr. Habre's January 31, 2019 exercise study was more strenuous than Dr. Werchowski's study, the ALJ's finding is, again, "within the realm of rationality [and] a reviewing court has no license to set aside an inference merely because it finds an opposite conclusion more reasonable or because it questions the factual basis" of the finding. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999).

inconsistent with those findings. Decision and Order on Remand at 5-6. Thus, she concluded the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 6. Weighing the evidence as a whole at total disability, she found Claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). *Id*.

Employer asserts that "the ALJ's faulty conclusions regarding the [blood gas study] evidence sour her assessment of the medical opinion evidence." Employer's Brief at 6 (unpaginated). However, as we have affirmed the ALJ's weighing of the blood gas studies, we reject this argument. Thus, we also reject Employer's assertion that the ALJ erred in discrediting the opinions of Drs. Fino,[10] Rosenberg, and Agarwal because they relied on Dr. Werchowski's October 14, 2020 blood gas study, which the ALJ determined was entitled to less weight. *See id.* at 6-7.

In addition, we reject Employer's contention that Dr. Fino's opinion was entitled to more weight than Dr. Habre's opinion because he "had more of the evidentiary record available to him." *Id*. at 6-7. While an ALJ may give greater weight to a physician who reviewed more of the relevant information, an ALJ is not required to discredit a physician who did not review all of a miner's medical records if the opinion is otherwise well-reasoned and documented. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Aside from its contentions concerning the weighing of the blood gas studies, Employer has not otherwise challenged the ALJ's determination that Dr. Habre's opinion is reasoned, documented, and sufficient to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), and we therefore affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 5-6.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and

[10] We also reject Employer's contention that the ALJ erred in discrediting Dr. Fino's opinion on total disability because he did not perform an exercise study. Employer's Brief at 6 (unpaginated). As explained above, the Board previously affirmed the ALJ's decision to give less weight to Dr. Fino's June 18, 2019 blood gas study because it was not conducted in compliance with the regulations. Thus, we see no error in her decision to give less weight to his total disability opinion, which relied on this study. *Looney*, 678 F.3d at 316-17.

Order on Remand at 6. We thus affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption that his total disability is due to pneumoconiosis.

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,[11] or "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. Decision and Order on Remand at 7-17.

Employer asserts that because the ALJ erred in finding total disability established, she improperly placed the burden of proof on Employer to rebut the existence of pneumoconiosis and total disability causation. Employer's Brief at 7 (unpaginated). Having affirmed the ALJ's determination that Claimant invoked the presumption, we reject Employer's assertion. *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). As Employer raises no specific challenge to the ALJ's determination that it did not rebut the Section 411(c)(4) presumption, we affirm the ALJ's conclusion that it did not do so and further affirm her determination that Claimant is entitled to benefits. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 7-17; Employer's Brief at 7 (unpaginated).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand.

[11] "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 that is 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).

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's findings that the blood gas study and medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv), and that the evidence as a whole established total disability at 20 C.F.R. §718.204(b)(2). Concerning the blood gas study evidence, I concur with the majority that the Board's prior holding concerning Dr. Fino's June 18, 2019 non-qualifying resting blood gas study constitutes the law of the case. *See supra* at 4. Thus, I concur that his study is entitled to lesser weight. *Wolford*, BRB No. 22-0349 BLA, slip op. at 4; Employer's Brief at 6 (unpaginated).

However, there is merit to Employer's contention that the ALJ erred in giving less weight to Dr. Werchowski's October 14, 2020 non-qualifying exercise study. *See* Employer's Brief at 4-5 (unpaginated). As Employer argues, the ALJ did not have a proper basis for her finding that Dr. Habre's January 31, 2019 exercise study was more strenuous than Dr. Werchowski's study. *Id*.

The Board has long held that interpretation of medical data requires knowledge beyond that of an ALJ. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (interpretation of objective data is a medical determination for which an ALJ cannot substitute his own opinion); *Casella v. Kaiser Steel*, 9 BLR 1-131, 1-135 (1986); *Murphy v. Kocher Coal Co.*, 4 BLR 1-387, 1-390 (1982). Here, based on the duration Claimant was exercised, the ALJ discredited or gave lesser weight to Dr. Werchowski's exercise arterial blood gas than to Dr. Habre's study. *See* Decision and Order on Remand at 4. But, as Employer points out, there are a variety of differences between the two tests beyond their duration. *See* Employer's Brief at 4-6 (unpaginated). For example, Dr. Werchowski exercised Claimant on a bicycle ergometer at 75W and his peak pulse rate was 129, while

Dr. Habre exercised him on a no-grade treadmill at 1.7 miles per hour and his peak pulse rate was 89. Director's Exhibit 18 at 15; Employer's Exhibit 2 at 16. Dr. Werchowski's test ended when Claimant complained of leg fatigue while there is no explanation given for the duration of Dr. Habre's test. *Id*. Thus, there are different pieces of data here (including the type of equipment, the speed or resistance level at which it was set, and Claimant's peak pulse rate, among other possible factors or indicia) that potentially could be relevant to a determination of the strenuousness of the tests and whether one better reflects Claimant's work. Indeed, Employer suggests Dr. Werchowski's test actually is the more strenuous of the two, as demonstrated by Claimant's higher pulse rate during it. Employer's Brief at 5 (unpaginated). Medical knowledge, which the ALJ lacks, is necessary to review the data and other information related to the two tests and arrive at a reasoned and reliable conclusion as to their relative strenuousness. *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993); *Marcum*, 11 BLR at 1-24.

No physician opined that Dr. Werchowski's study was less probative than that of Dr. Habre, or that Dr. Werchowski's study was in any way invalid. Moreover, those physicians who reviewed both tests considered them equally.[12] Thus, when the ALJ made her determination that Dr. Habre's test was more strenuous, and therefore better reflected Claimant's usual coal mine work, she did so based solely on her own judgment, and in disregard of the physicians. Further, there is nothing in the applicable regulations that would support the ALJ's discrediting or giving lesser weight to Dr. Werchowski's study than Dr. Habre's based on its duration.[13] Although the pertinent Department of Labor regulation requires that any report of a blood gas study submitted in connection with a claim specify the duration and type of exercise, it does not set forth any required specific duration or type of exercise for an arterial blood gas test. *See* 20 C.F.R. §718.105(c)(7). Thus, the ALJ erred by interpreting medical data herself to reach her conclusion when medical expertise was required, and there is no appropriate support for her determination.[14]

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[12] Drs. Fino and Rosenberg reviewed both studies. *See* Employer's Exhibits 4, 6. Further, Dr. Agarwal changed his opinion as to whether Claimant had a disabling impairment after reviewing Dr. Werchowski's test results. Employer's Brief at 5 (unpaginated), Employer's Exhibit 14 at 17-20.

[13] It is unclear whether the ALJ discredited Dr. Werchowski's study or gave it lesser weight since she used both terms. *See* Decision and Order on Remand at 4.

[14] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, requires that every adjudicatory decision 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). Even were the ALJ to have had a proper basis for her determination, her explanation, which consisted of

See Milburn Colliery v. Hicks, 138 F.3d 524, 533 (4th Cir. 1998); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Marcum*, 11 BLR at 1-24; *Casella*, 9 BLR at 1-135; *Murphy*, 4 BLR at 1-390.

Additionally, as Employer asserts, in crediting Dr. Agarwal's qualifying resting study, as supportive of Dr. Habre's qualifying exercise study, the ALJ ignored the non-qualifying resting study results on the studies Drs. Habre and Werchowski conducted. Employer's Brief at 6 (unpaginated); *see* Decision and Order on Remand at 5. Accordingly, the ALJ failed to consider all relevant evidence and provide an adequate basis for her conclusion as the law requires. *See* 30 U.S.C. §923(b) (ALJ must address all relevant evidence); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); *Wojtowicz*, 12 BLR at 1-165.

In view of these errors, I would vacate the ALJ's findings and determination regarding the blood gas studies and remand the case for the ALJ to reconsider the blood gas study results at 20 C.F.R. §718.204(b)(2)(ii), taking into account all relevant evidence, weighing it appropriately, and providing explanations and determinations in accordance with the APA. Because her findings concerning the blood gas studies affected her findings as to the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), her invocation of the Section 411(c)(4) presumption, her rebuttal determination, and her ultimate determination of entitlement, those findings should be vacated and reconsidered as well.

JUDITH S. BOGGS
Administrative Appeals Judge

conclusionary statements, is insufficient to satisfy the APA's requirements. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order on Remand at 4.