



BRB No. 21-0077 BLA

JIMMY W. MONK)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	
and)	DATE ISSUED: 01/27/2022
)	
CONSOL ENERGY, INCORPORATED)	
)	
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 Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits (2017-BLA-05173) rendered on a claim filed on July 30, 2015, pursuant to Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 31.27 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore 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 failed to rebut the presumption and awarded benefits.

On appeal, Employer contends the ALJ erred in finding Claimant established total disability.² Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, declined to file a 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'Keefe 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).

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 established 31.27 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.

³ We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 32.

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 Claimant established total disability based on the pulmonary function studies, medical opinion evidence, and the evidence as a whole.⁴ Decision and Order at 16, 28, 30.

The ALJ considered five pulmonary function studies administered on February 28, 2015, August 22, 2015,⁵ December 22, 2016, February 3, 2017, and February 12, 2018. Decision and Order at 8-9. The February 28, 2015 study produced non-qualifying values, while the remaining studies all produced qualifying values.⁶ Decision and Order at 8-9; Director's Exhibits 12-13;⁷ Claimant's Exhibits 1-2; Employer's Exhibit 1. The ALJ found the December 22, 2016, February 3, 2017, and February 12, 2018 studies invalid. Decision and Order at 15. Considering the remaining studies conducted on February 28, 2015 and August 22, 2015, he gave more weight to the more recent, qualifying study and thus found the pulmonary function studies established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 16.

⁴ The ALJ found the arterial blood gas studies did not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 17.

⁵ In various instances throughout the ALJ's Decision and Order, as well as in the parties' briefs, the pulmonary function study Dr. Agarwal administered is identified as having been performed on October 22, 2015. As noted on the ALJ's summary of the pulmonary function studies, however, Dr. Agarwal administered this study on August 22, 2015. Decision and Order at 8; Director's Exhibit 29. The record contains no other pulmonary function studies Dr. Agarwal administered. Any error in identifying the date this study was performed is therefore harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984)

⁶ A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

⁷ The citations to the Director's Exhibits in the ALJ's Decision and Order do not correspond with those in the record before us. The ALJ cites the exhibits containing the February 28, 2015 and August 22, 2015 pulmonary function studies as Director's Exhibits 13 and 12, respectively, while they appear in the record before us as Director's Exhibits 32 and 29.

Employer argues the ALJ erred in finding Dr. Agarwal's August 22, 2015 pulmonary function study valid.⁸ Employer's Brief at 4-8. We disagree.

When weighing pulmonary function studies, the ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, the ALJ must determine whether it constitutes credible evidence of Claimant's pulmonary function. 20 C.F.R. §718.101(b); *see Orek v. Director, OWCP*, 10 BLR 1-511, 1-54-5 (1987). The ALJ must then, in his role as fact-finder, determine the probative weight to assign the study. *See Orek*, 10 BLR at 1-54-5.

In evaluating the validity of the qualifying August 22, 2015 pulmonary function study, the ALJ considered the opinions of Drs. Agarwal and Michos that the study is valid and those of Drs. Castle, Fino, and McSharry that it is not. Decision and Order at 10-14; Director's Exhibits 12-14;⁹ Employer's Exhibits 1, 4. Crediting the opinions of Drs. Agarwal and Michos over those of Drs. Castle, Fino, and McSharry,¹⁰ the ALJ found the August 22 study valid. Decision and Order at 12-14.

Employer contends the ALJ's evaluation of August 22, 2015 pulmonary function study's validity does not satisfy the requirements of the Administrative Procedures Act (APA)¹¹ because he did not explain whether he credited or discredited Dr. Castle's opinion that the study was invalid. Employer's Brief at 5-7. We disagree.

⁸ The parties do not challenge the ALJ's findings regarding the validity of the remaining pulmonary function studies; thus, they are affirmed. *See Skrack*, 6 BLR at 1-711.

⁹ Appearing in the record before us as Director's Exhibits 29, 31, 33, and 34.

¹⁰ Employer does not challenge the ALJ's discrediting of Drs. Fino's and McSharry's opinions that the August 22, 2015 pulmonary function study is invalid or his crediting of Dr. Agarwal's opinion that the study is valid. Decision and Order at 12. These credibility findings are thus affirmed. *See Skrack*, 6 BLR at 1-711.

¹¹ The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and reasons or basis therefor, on all 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).

Dr. Castle opined “only fair effort” was seen in the flow volume loops and volume time curve on the August 22, 2015 pulmonary function study and there was “some hesitation at the onset of exhalation as seen in the post-bronchodilator study.” Director’s Exhibit 13 (before us as Director’s Exhibit 31) at 8. He concluded the “study is invalid for accurate interpretation The most that can be stated is that his true function is at least as good as that represented and possibly even better.” *Id.* at 9. Dr. Agarwal responded to Dr. Castle’s critique, indicating that the “very similar” flow volume loops and flow time curves in multiple trials suggested consistency in effort which was “at least fair” and meets the criteria for acceptability and reproducibility. Director’s Exhibit 12 at 5.¹² He further indicated the start of the test was “good” and opined the “slight variability” during exhalation “should not affect the FEV1 and FVC significantly.” *Id.* at 6. He thus concluded the results are valid and “can’t be ignored.” *Id.*

Contrary to Employer’s argument, the ALJ permissibly and specifically explained that Dr. Agarwal “credibly responded to concerns raised by” Dr. Castle, and he thus found the evidence supporting the validity of the August 22, 2015 study outweighed the contrary evidence. *See Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied as long as the reviewing court can discern what the ALJ did and why he did it); *Keener*, 23 BLR at 1-237; *Orek*, 10 BLR at 1-54-55; Decision and Order at 12. Because we can discern what the ALJ did and why, the duty of explanation under the APA is satisfied. *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316 (4th Cir. 2012). In addition, the ALJ correctly observed Dr. Castle “did not suggest that better performance of this study would have yielded non-qualifying results.” Decision and Order at 10-11; Director’s Exhibit 13 (before us as Director’s Exhibit 31). Thus, Employer has not demonstrated how the alleged defect rendered the study unreliable. *See Orek v. Director, OWCP*, 10 BLR 1-511, 1-54 (1987) (party alleging an objective study is invalid has a “two-part obligation:” specify how the study fails to conform to the standards and “demonstrate how this defect or omission renders the study unreliable”).

Because it is supported by substantial evidence, we affirm the ALJ’s finding that the August 22, 2015 pulmonary function study Dr. Agarwal administered is valid and supports total disability.¹³ Decision and Order at 14. Further, because Employer does not

¹² Appearing in the record before us as Director’s Exhibit 34.

¹³ We need not address Employer’s argument that the ALJ erred in crediting Dr. Michos’s “checkmark validation.” Employer’s Brief at 7-8. The ALJ did not rely solely on Dr. Michos’s report to find the pulmonary function study valid but rather found it “buttressed” Dr. Agarwal’s credited opinion. Decision and Order at 16. Thus, even assuming the ALJ erred in crediting Dr. Michos’s report, Employer has failed to

otherwise challenge the ALJ's weighing of the pulmonary function studies, we affirm his finding that the pulmonary function studies establish total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 16.

Employer next argues the ALJ erred in finding the medical opinion evidence establishes total disability. Employer's Brief at 8. But its sole allegation is that the ALJ's conclusion that the pulmonary function study evidence establishes total disability undermines his evaluation of the medical opinions.¹⁴ *Id.* Because we have affirmed the ALJ's finding that the pulmonary function studies establish total disability, we reject Employer's argument. We thus affirm the ALJ's finding that the medical opinions establish total disability at 20 C.F.R. §718.204(b)(2)(iv) as supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We further affirm the ALJ's determination that Claimant established total disability and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b); Decision and Order at 30-31. Moreover, because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm the award of benefits. *Skrack*, 6 BLR at 1-711; Decision and Order at 37-38.

demonstrate how it would have made any difference in the outcome. *See Shineski v. Sanders*, 556 U.S. 396, 413 (2009).

¹⁴ The ALJ discounted Drs. Fino's and McSharry's opinions that Claimant is not totally disabled because they relied in part on their conclusion that none of the qualifying pulmonary function studies are valid. Decision and Order at 28. The ALJ credited the opinion of Dr. Agarwal that Claimant is totally disabled based on the most recent, qualifying pulmonary function testing. *Id.* at 27. While giving Dr. Green's opinion reduced weight due to his reliance on invalid pulmonary function studies, the ALJ provided his opinion some weight given his consideration of Claimant's symptoms and physical limitations. *Id.* at 28.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge