BRB No. 23-0438 BLA

GILBERT H. DANIELS Claimant-Respondent v. JEWELL RIDGE MINING CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 01/13/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2019-BLA-05456) rendered on a subsequent claim filed on August 14, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

[1] Claimant filed a prior claim in 1973 that an ALJ ultimately denied on June 15, 1999, because Claimant failed to establish total disability. Director's Exhibit 1. Claimant also filed claims in 2001, 2003, 2005, 2006, 2009, 2012, 2014, and 2015. Director's

The ALJ found Claimant established 15.42 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 rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). Finally, he found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and therefore erred in finding he invoked the Section 411(c)(4) presumption. It further argues that he erred in finding Employer failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed 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

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Exhibits 2-9. Because he withdrew each of these claims, they are considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[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); *see* 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant failed to establish total disability in his prior claim, he had to submit new evidence establishing total disability to obtain review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 1.

[4] We affirm, as unchallenged, the ALJ's finding of 15.42 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-13.

accordance with applicable law.[5] 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 considered 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 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 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 and medical opinion evidence.[6] Decision and Order at 24-31.

Pulmonary Function Studies

The ALJ considered five new pulmonary function studies conducted on December 20, 2017, July 24, 2018, July 26, 2018, September 11, 2019, and March 11, 2021. Director's Exhibit 22, 25-26; Claimant's Exhibit 1; Employer's Exhibit 2. The December 20, 2017 and July 24, 2018 pulmonary function studies produced qualifying[7] values before the administration of a bronchodilator, and post-bronchodilator studies were not administered. Director's Exhibits 22, 25. The July 26, 2018 and September 11, 2019 pulmonary function studies produced non-qualifying values pre-bronchodilator, and post-bronchodilator studies were not administered. Director's Exhibit 26; Claimant's Exhibit

[5] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21-24; Director's Exhibits 14, 16, 17.

[6] The ALJ accurately determined that the arterial blood gas studies did not establish 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 22-23.

[7] A "qualifying" pulmonary function study yields results that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

1. The March 11, 2021 pulmonary function study produced qualifying values both pre-bronchodilator and post-bronchodilator. Employer's Exhibit 2.

The ALJ found the December 20, 2017, July 24, 2018, September 11, 2019 pulmonary function studies are valid and reliable for determining total disability. Decision and Order at 17-20. However, he found the July 26, 2018 and March 11, 2021 pulmonary function studies are invalid and unreliable for determining total disability. *Id.* at 20-22. The ALJ gave equal weight to the three pulmonary function studies he found are reliable. *Id.* at 22. Thus, as two of the three reliable studies were qualifying, the ALJ found that the weight of the pulmonary function study evidence supports a finding of total disability. Decision and Order at 22.

Employer argues the ALJ erred in finding the December 20, 2017 and July 24, 2018 pulmonary function studies valid and reliable. Employer's Brief at 5-6. Specifically, it argues the ALJ erred in discrediting Drs. McSharry's and Sargent's opinions concerning the validity of these tests, substituting his opinion for those of the medical professionals. Employer's Brief at 8-10. We disagree.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[8] 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). 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. 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). The ALJ must then, in his role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable).

Dr. Sargent opined the December 20, 2017 and July 24, 2018 pulmonary function studies were unreliable as they fail to conform to the quality standards because of a lack of

[8] An ALJ must consider a reviewing physician's opinion regarding a claimant's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

full inhalation. Employer's Exhibits 2 at 2; 4 at 14-15. However, the technician who administered the December 20, 2017 study noted good effort, cooperation, and understanding, and Drs. Nader, Michos, and McSharry opined the study was valid. Director's Exhibits 21, 22, 26; Employer's Exhibit 3 at 17, 29. Similarly, the technician who administered the July 24, 2018 pulmonary function study noted good effort, cooperation, and understanding, while Dr. Raj signed-off on the test and Dr. McSharry opined the study was valid. Director's Exhibits 25 at 4, 6; 26 at 4; Employer's Exhibit 3 at 17-28.

The ALJ permissibly found that, although Dr. Sargent opined that the December 20, 2017 and July 24, 2018 pulmonary function studies failed to conform to the quality standards because of a lack of full inhalation, he failed to adequately explain why the lack of full inhalation rendered the test unreliable. *See Orek*, 10 BLR at 1-54. Further, the ALJ permissibly found Dr. Sargent's opinion to be outweighed by the opinions of the other reviewing physicians, as well as the findings of the technicians who administered these tests. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Orek*, 10 BLR at 1-54-55; *Vivian*, 7 BLR at 1-361; Decision and Order at 18-20. Thus, we affirm the ALJ's determination that the December 20, 2017 and July 24, 2018 pulmonary function studies are valid and reliable for determining total disability.[9] Decision and Order at 18-20.

Nor are we persuaded by Employer's argument that the ALJ did not adequately explain how the December 20, 2017 and July 24, 2018 studies were reliable given that the most recent valid pulmonary function study was non-qualifying. Employer's Brief at 9-10. As the ALJ noted, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held it irrational to credit evidence solely because of recency where it shows the miner's condition has improved. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-50-52 (2023); Decision

[9] Although Drs. McSharry and Sargent generally opined that the qualifying pulmonary function studies demonstrate normal values when accounting for Claimant's age, they did not provide their calculations, offer a basis for their conclusions, or state that the studies would be deemed non-qualifying. Employer's Exhibits 3 at 20-22; 4 at 18. Consequently, the ALJ permissibly found their opinions unpersuasive. *K. J. M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008) (pulmonary function studies conducted on a miner more than seventy-one years old must be treated as qualifying if the values would be qualifying for a seventy-one-year-old, unless the party opposing entitlement submits medical evidence that establishes the qualifying values for a seventy-one-year-old miner are not indicative of disability in an older miner); Decision and Order at 16.

and Order at 22. Rather, the ALJ permissibly declined to credit the study based solely on the recency of the test and instead accorded equal weight to each of the valid studies, and he permissibly found that the weight of the valid pulmonary function studies establishes total disability. *Adkins*, 958 F.2d at 51-52; *Thorn*, 3 F.3d at 719; *Kincaid*, 26 BLR at 1-50-52; Decision and Order at 22.

Medical Opinions

The ALJ also found Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). Specifically, he found Dr. Nader's opinion that Claimant has a totally disabling respiratory or pulmonary impairment well-reasoned and documented and entitled to great weight. Decision and Order at 24-26; Director's Exhibits 22, 27; Claimant's Exhibit 2. He accorded Drs. McSharry's and Sargent's contrary opinions diminished weight because he found their explanations unpersuasive and contrary to the objective testing results and his own findings. Decision and Order at 26-31; Director's Exhibit 26; Employer's Exhibits 2-4.

Employer argues the ALJ erred in crediting Dr. Nader's opinion and discrediting the opinions of Drs. McSharry and Sargent. Employer's Brief at 11-14. We disagree.

Contrary to Employer's arguments, the ALJ was not required to accord less weight to Dr. Nader's opinion because he reviewed less evidence. Employer's Brief at 12. Rather, an ALJ may credit a physician who did not review all of a miner's medical records when that doctor's opinion is otherwise reasoned, documented, and based on an examination of the miner and objective test results. 20 C.F.R. §718.202(a)(4); *Smith v. Kelly's Creek Resources*, 26 BLR 1-15, 1-28 (2023); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion). In this case, Dr. Nader examined Claimant on December 20, 2017, Director's Exhibit 22, and on September 11, 2019, Claimant's Exhibit 1. He initially opined Claimant was totally disabled based on the December 20, 2017 qualifying pulmonary function study, in addition to his respiratory symptoms and evidence of hypoxemia at rest. Director's Exhibit 22 at 4. Moreover, even though the September 11, 2019 pulmonary function study did not produce qualifying values, Dr. Nader still believed Claimant to be disabled from performing his usual coal mine employment as his test results were affected by his use of inhalers and the start of his treatment for chronic obstructive pulmonary disease. Claimant Exhibit 1 at 3. The ALJ permissibly found Dr. Nader's opinion reasoned and documented as he identified the data he relied upon, that data supported his findings, and he adequately explained his conclusions. *See Mays*, 176 F.3d at 756; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 25-

26. Moreover, contrary to Employer's arguments, the ALJ also explicitly considered Dr. Nader's opinion that the results of the September 11, 2019 study were likely higher due to Claimant's treatment for his pulmonary disease, and permissibly found it persuasive as the proper inquiry at total disability is whether Claimant is able to perform his usual coal mine work, not whether he is able to perform that work with the use of medication. 20 C.F.R. §718.204(b)(2); *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); *see Akers*, 131 F.3d at 441; Decision and Order at 25-26; Employer's Brief at 12.

The ALJ further permissibly discredited Drs. McSharry's and Sargent's opinions. Dr. McSharry opined that "there is no evidence of respiratory impairment," as Claimant's "pulmonary function tests and arterial blood gas tests are normal." Director's Exhibit 26 at 8. He reiterated this opinion when testifying that "there is no evidence of a chronic lung disease" as Claimant's July 26, 2018 and September 11, 2019 pulmonary function studies were normal. Employer's Exhibit 3 at 21-22. Similarly, Dr. Sargent concluded Claimant is not disabled, opining that the December 20, 2017, July 24, 2018, and March 11, 2021 qualifying pulmonary function studies are invalid and the July 26, 2018 and September 11, 2019 non-qualifying studies were the most reliable as they showed the best effort. Employer's Exhibits 2 at 2; 4 at 12-20.

The ALJ found that Dr. McSharry extensively relied on the July 26, 2018 pulmonary function study, which the ALJ found invalid, to come to his conclusions. Decision and Order at 28. Similarly, the ALJ found Dr. Sargent relied significantly on the July 26, 2018 pulmonary function study and on his opinion that the December 20, 2017 and July 24, 2018 pulmonary studies were invalid, contrary to the ALJ's findings. *Id.* at 29. The ALJ permissibly found both of their opinions unpersuasive as the physicians relied upon findings contrary to those of the ALJ and to his determination concerning the weight of the objective testing. *See Akers*, 131 F.3d at 441 (ALJ may discount opinion that contradicts his findings); Decision and Order at 28-29. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence. Decision and Order at 24-31; 20 C.F.R. §718.204(b)(2)(iv).

We further affirm the ALJ's finding that the evidence as a whole establishes total disability, as it is supported by substantial evidence. 20 C.F.R. §718.204(b)(2); Decision and Order at 31. Thus, we affirm his determinations that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309; Decision and Order at 31-32.

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,[10] 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 rebut the presumption by either method.[11]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered Drs. McSharry's and Sargent's opinions that Claimant does not have legal pneumoconiosis. Decision and Order at 32-36. Dr. McSharry opined Claimant does not have a lung disease or impairment because the pulmonary function studies were "normal" and "don't indicate the presence of [an] obstructive or restrictive" defect. Director's Exhibit 26, Employer's Exhibit 3. Dr. Sargent opined that Claimant is "not suffering from legal pneumoconiosis, because he does not suffer from a chronic respiratory disease or pulmonary impairment." Decision and Order at 34; Employer's Exhibits 2, 4. The ALJ found their opinions unpersuasive and accorded them little weight. Decision and Order at 33-36. He therefore found Employer failed to rebut the presumption. *Id.*

Employer argues the ALJ failed to provide sufficient reasoning for discrediting the opinions of Drs. McSharry and Sargent. Employer's Brief at 36-37. We disagree.

[10] "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).

[11] The ALJ declined to address whether Employer disproved clinical pneumoconiosis because he found it failed to disprove legal pneumoconiosis. Decision and Order at 37.

The ALJ accurately determined that Dr. McSharry, in excluding a diagnosis of legal pneumoconiosis, in part relied on his opinion that Claimant's pulmonary function studies were normal and thus reflected no impairment. Decision and Order at 33; Employer's Exhibit 3 at 21-22. The ALJ permissibly found his opinion not adequately explained as the physician found the December 20, 2017 and July 24, 2018 qualifying pulmonary function studies valid and he characterized the July 24, 2018 study as showing "severe" obstruction. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 33; Director's Exhibit 26; Employer's Exhibit 3. Further, the ALJ accurately noted that Dr. McSharry cited to the negative x-rays in support of his opinion that Claimant does not have legal pneumoconiosis and permissibly discredited his opinion as inconsistent with the regulations stating that legal pneumoconiosis may be diagnosed "notwithstanding a negative [x]-ray." 20 C.F.R. §718.202(a)(4); *see* 20 C.F.R. §718.202(b); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 33-34; Director's Exhibit 26 at 2.

Similarly, the ALJ accurately found that Dr. Sargent relied on his opinion that Claimant does not have an impairment to exclude a diagnosis of legal pneumoconiosis. Decision and Order at 35-36; Employer's Exhibit 4 at 20-22. He permissibly found Dr. Sargent's opinion inadequately reasoned because he relied on the December 20, 2017 and July 24, 2018 pulmonary function studies, which the ALJ determined to be invalid, to conclude that Claimant has no impairment. *See Akers*, 131 F.3d at 441; Decision and Order at 35-36.

Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's finding that Employer failed to disprove legal pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer failed to establish "no part of [Claimant's] 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)(ii); *see* Decision and Order at 37-38. As Employer

[12] Employer contests the ALJ's weighing of Dr. Nader's opinion, but the ALJ declined to weigh Dr. Nader's opinion as it did not support Employer's burden in rebutting the presumption of legal pneumoconiosis. Employer's Brief at 18-19; Decision and Order at 36-37. Thus, any error in the ALJ's findings regarding Dr. Nader's opinion are harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

does not separately challenge this finding, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because Employer did not rebut the Section 411(c)(4) presumption, we affirm the award of benefits.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge