**U.S. Department of Labor**

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

BRB Nos. 24-0061 BLA
and 24-0061 BLA-A

| | | |
|---|---|---|
| RICHARD W. CROASMUN<br><br>Claimant-Petitioner<br><br>v.<br><br>MEPCO LLC<br><br>and<br><br>BRICKSTREET MUTUAL INSURANCE COMPANY, INC.<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | **NOT-PUBLISHED**<br><br>DATE ISSUED: 01/31/2025<br><br>DECISION and ORDER |

Appeal and Cross-Appeal of the Decision and Order Denying 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.

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

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

PER CURIAM:

Claimant appeals, and Employer cross-appeals, Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2023-BLA-05316) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on November 4, 2021.[1]

The ALJ credited Claimant with thirteen years of coal mine employment, based on the parties' stipulation, and therefore found he did not invoke 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] Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2). However, the ALJ found Claimant failed to establish his totally disabling respiratory impairment is due to legal pneumoconiosis and denied benefits. 20 C.F.R. §718.204(c)(1).

On appeal, Claimant asserts the ALJ erred in finding that he did not establish he is totally disabled due to legal pneumoconiosis.[3] Employer responds, urging affirmance of the denial of benefits. On cross-appeal, Employer asserts the ALJ erred in failing to consider relevant biopsy and pulmonary function study evidence. The Acting Director, Office of Workers' Compensation Programs, has not filed a substantive response in either appeal.

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

[1] Claimant filed two prior claims which he withdrew. Director's Exhibits 1, 2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) 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] We affirm, as unchallenged on appeal, the ALJ's crediting of Claimant with thirteen years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Hearing Transcript at 5-6.

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).

**Claimant's Appeal**

**Entitlement under 20 C.F.R. Part 718**

Without the Section 411(c)(3)[5] or 411(c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment);[6] and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The ALJ found Claimant established legal pneumoconiosis[7] and a totally disabling pulmonary impairment. In considering disability causation, the ALJ found none of the

[4] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 13.

[5] The irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 is not applicable because there is no evidence in the record that Claimant has complicated pneumoconiosis. 30 U.S.C. §921(c)(3).

[6] The ALJ found that Claimant established total disability based on the pulmonary function studies and medical opinions, and in consideration of the evidence as a whole. 20 C.F.R §718.204(b)(2).

[7] Regarding legal pneumoconiosis, Dr. Zlupko diagnosed Claimant with "[c]oal mine dust related [chronic obstructive pulmonary disease] COPD (Legal Pneumoconiosis)." Director's Exhibit 18 at 4. Drs. Fino and Rosenberg diagnosed Claimant with emphysema and COPD but both indicated it was due solely to cigarette smoking. Claimant's Exhibit 1; Employer's Exhibit 9. Dr. Vuskovich indicated that "[c]oal[ ]mine dust exposure was not a substantially contributing cause of any current disabling pulmonary impairment." Employer's Exhibit 3 at 9. The ALJ gave "great weight" to Dr. Zlupko's opinion, finding it well-reasoned as it is supported by the evidence of record and consistent with the preamble, which links COPD to coal dust exposure. Decision and Order at 14. The ALJ gave no weight to the remaining physicians' opinions,

physicians' opinions sufficiently establish that Claimant's pulmonary disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c).

Claimant contends the ALJ erred in finding Dr. Zlupko's opinion is insufficient to establish total disability causation. Claimant's Brief at 6-8 (unpaginated). We agree.

To establish disability causation, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

The ALJ considered four medical opinions. Dr. Zlupko conducted the Department of Labor's (DOL's) complete pulmonary evaluation of Claimant. He diagnosed legal pneumoconiosis, in the form of "coalmine dust related" COPD. Director's Exhibit 18 at 4. On the DOL form, when asked to address the etiology of Claimant's diagnosed respiratory disease, he noted Claimant had thirteen years of coal dust exposure and a forty-two pack-year smoking history and opined both are "significant contributing factors for his legal pneumoconiosis." *Id*. When asked to address the cause of Claimant's respiratory disability, Dr. Zlupko wrote that coal mine dust exposure and smoking are "both contributing factors to his impairment" and he "can not [sic] separate the two." *Id*. In a supplemental report, Dr. Zlupko reiterated that Claimant has a totally disabling respiratory impairment that would preclude the performance of heavy manual labor associated with his previous coal mine job and stated "[h]is smoking history is significant but cannot be separated from the function impairment associated with coal dust exposure." Director's Exhibit 22 at 1.

Dr. Fino did not diagnose legal pneumoconiosis, instead attributing Claimant's COPD and emphysema seen on x-ray solely to smoking. Although Dr. Fino agreed Claimant is totally disabled, he stated that "if the resection of the left upper lobe is taken into consideration," coal dust did not play any role in causing or contributing to the disability. Claimant's Exhibit 1 at 11. Drs. Rosenberg and Vuskovich opined Claimant does not have a totally disabling respiratory or pulmonary impairment, legal

finding that Dr. Fino's opinion was not adequately explained, Dr. Rosenberg's opinion was contrary to court decisions and the regulations, and Dr. Vuskovich's opinion was conclusory. *Id*. at 14-15.

pneumoconiosis, or any respiratory disability caused by legal pneumoconiosis. Employer's Exhibits 3, 9.

The ALJ concluded that if Dr. Zlupko can state that both smoking and legal pneumoconiosis "are significant or substantially contributing factors [to Claimant's disabling COPD], then his assertion that he cannot apportion between the two must be false." Decision and Order at 24. Due to this "inherent contradiction," the ALJ found his opinion not well-reasoned and entitled to no weight. *Id*. The ALJ also gave no weight to the opinions of Drs. Fino, Vuskovich, and Rosenberg because, contrary to the ALJ's finding, they either did not diagnose a totally disabling respiratory impairment or did not diagnose legal pneumoconiosis. *Id*. Therefore, the ALJ found Claimant failed to establish his total disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c)(1); Decision and Order at 24-25.

Contrary to the ALJ's analysis, Dr. Zlupko was not required to apportion the percentages of Claimant's pulmonary impairment caused by coal mine dust exposure and smoking. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003) (physician need not specifically apportion extent to which various causal factors contribute to a respiratory or pulmonary impairment). It was sufficient that he concluded Claimant's coal mine dust exposure significantly contributed to his COPD. *Id*. We, therefore, vacate the ALJ's finding that Claimant did not establish that pneumoconiosis is a substantially contributing cause of his total disability[8] and his denial of benefits. 20 C.F.R. §718.204(c); Decision and Order at 24-25.

**Employer's Cross-Appeal**

Because we have vacated the ALJ's denial of benefits, we address Employer's arguments on cross-appeal[9] that, in reviewing the pulmonary function study evidence when

[8] On cross appeal, Employer contends Dr. Zlupko's legal pneumoconiosis opinion "suffers from the same fault as his causation opinion and should be granted no probative weight." Employer's Brief at 8. However, we reject this argument for the same reason we reject it at total disability causation. *See Gross*, 23 BLR at 1-18.

[9] Employer correctly asserts the ALJ erred in noting there was no biopsy evidence, as the results of a lymph node biopsy of Claimant's lung was performed in conjunction with his diagnosis of cancer and resultant lung resection and that report is in the record. Employer's Brief at 5; *see* Director's Exhibit 26; Employer's Exhibit 5. Nevertheless, as the ALJ found Claimant failed to establish clinical pneumoconiosis and Employer fails to explain how including the biopsy evidence could make a difference in the ALJ's analysis and conclusions, we deem this error harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-

evaluating total disability, the ALJ failed to consider the non-qualifying[10] August 17, 2023 study.[11] Employer's Brief at 5-6; Employer's Exhibit 11. We agree that remand is required.

In weighing the pulmonary function study evidence relevant to total disability at 20 C.F.R. §718.204(b)(2)(i), the ALJ considered three studies conducted on December 20, 2021, June 29, 2022, and July 11, 2023. He gave the most weight to the July 11, 2023 study that had qualifying results pre- and post-bronchodilator[12] on the basis that more weight may be given to more recent studies. Decision and Order at 18; Claimant's Exhibit 3. The August 17, 2023 study, however, does not appear in the ALJ's pulmonary function study summary chart nor does he mention it when discussing his weighing of the pulmonary function study evidence. *See* Decision and Order at 17-18. Because the ALJ failed to consider all relevant evidence, remand is required. *See* 30 U.S.C. §923(b); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Thus, we vacate the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i).

Moreover, because the ALJ's weighing of the pulmonary function studies influenced his weighing of the medical opinions,[13] we must also vacate his finding that

---

1276 (1984); *see also Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding the appellant must explain how the "error to which [it] points could have made any difference").

[10] 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).

[11] On August 9, 2023, Employer filed a Motion for Extension of Evidentiary Deadline to allow Dr. Fino to perform the August 17, 2023 pulmonary function study. The ALJ granted Employer's motion on August 10, 2023. At the hearing, the August 17, 2023 study was admitted into evidence as Employer's Exhibit 11 and Employer designated it as one of its two pulmonary function studies pursuant to 20 C.F.R. §725.414(a)(3)(i). *See* Hearing Transcript at 9; Employer's Evidence Summary Form.

[12] The December 20, 2021 and June 29, 2022 pulmonary function studies had non-qualifying values pre- and post-bronchodilator. Director's Exhibit 18; Claimant's Exhibit 1; Employer's Exhibit 1.

[13] In evaluating the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ credited Drs. Zlupko's and Fino's opinions diagnosing a totally disabling respiratory impairment, as well-reasoned and entitled to "great weight" because they "comport[] with Claimant's qualifying pulmonary function study results." Decision and Order at 22; Director's Exhibit 18, 22; Claimant's Exhibit 1. Similarly, the ALJ gave no weight to the

Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and based on a weighing of the evidence as a whole at 20 C.F.R. §718.204(b)(2). Decision and Order at 22.

**Remand Instructions**

On remand, the ALJ must reconsider whether the pulmonary function study evidence supports the establishment of total disability, taking into account all relevant evidence, including the August 17, 2023 study. 20 C.F.R. §718.204(b)(2)(i). The ALJ must then reconsider the medical opinion evidence to determine whether that evidence supports finding total disability. 20 C.F.R. §718.204(b)(2)(iv). When weighing the medical opinions, the ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). If the pulmonary function study or medical opinion evidence supports finding total disability, the ALJ should then weigh all the relevant evidence together to determine whether Claimant has established total disability.[14] *See* 20 C.F.R. §718.204(b)(2); *see also 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 must set forth his findings in

---

contrary opinions of Drs. Rosenberg and Vuskovich because he found they are contrary to the qualifying study results. Decision and Order at 22; Employer's Exhibits 3, 9.

[14] 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 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2). The ALJ determined Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii) as the blood gas study results were not qualifying and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 19; Director's Exhibit 18.

detail as the Administrative Procedure Act [15] requires. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If Claimant is unable to establish total disability, benefits are precluded. However, if total disability is established, the ALJ must reconsider whether pneumoconiosis is a substantially contributing cause of Claimant's total disability. 20 C.F.R. §718.204(c); *see Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-256 (2019) (Claimant entitled to benefits as a matter of law where his totally disabling COPD is determined to constitute legal pneumoconiosis).

[15] The Administrative Procedure Act 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).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge