BRB No. 24-0252 BLA

GARY R. RAMSAY Claimant-Respondent v. CONSOL MINING COMPANY, LLC and CONSOL ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 01/02/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

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) Natalie A. Appetta's Decision and Order Awarding Benefits (2023-BLA-05287) rendered on a claim filed on October 13,

2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has thirty-four 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, she 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). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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).

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 their respiratory or pulmonary impairment, standing alone, prevents them from performing their 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

[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 thirty-four years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 15-16.

qualifying pulmonary function 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 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).

The ALJ found Claimant established total disability based on the medical opinion evidence and in consideration of the evidence as a whole.[5] Decision and Order at 8-20.

Pulmonary Function Studies

The ALJ considered the results of two pulmonary function studies dated November 18, 2021, and August 4, 2022. Decision and Order at 8-10. The November 18, 2021 study produced qualifying values pre-bronchodilator and non-qualifying values post-bronchodilator; the August 4, 2022 study produced non-qualifying values before and after the administration of a bronchodilator. Director's Exhibit 13 at 10; Employer's Exhibit 1 at 12. The ALJ found both studies are valid and gave more weight to the pre-bronchodilator studies than the post-bronchodilator studies. Decision and Order at 10. Because the November 18, 2021 study is qualifying pre-bronchodilator and the August 4, 2022 study is not, she found the results of the pulmonary function studies are in equipoise and do not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer argues the ALJ erred in weighing the validity of the November 18, 2021 pulmonary function study. Employer's Brief at 4-5. We agree.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory 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). In the absence of evidence to the

[4] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values listed 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 the pulmonary function study and arterial blood gas study evidence do not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 8-11.

contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c). If a study does not precisely conform to the quality standards, but is in substantial compliance, it can "constitute evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The technician who administered the November 18, 2021 study indicated Claimant had good effort and cooperation and the results meet the American Thoracic Society (ATS) standards for acceptability and reproducibility. Director's Exhibit 13 at 12. Dr. Gaziano reviewed the study and indicated it is acceptable. Director's Exhibit 15.

Dr. Vuskovitch reviewed the November 18, 2021 study and opined the pre-bronchodilator results are invalid based on the flow volume loops and volume time tracings that showed Claimant "did not put forth the effort required to generate valid" results. Director's Exhibit 22 at 4. He further explained that the "[r]elatively flat first-second configurations of [Claimant's] volume time tracings showed that his initial efforts were not maximum efforts which artificially lowered his FEV1 result" and that he "prematurely terminated his expiratory efforts which artificially lowered his FVC result." *Id.*

Dr. Fino opined that both the November 18, 2021 and August 4, 2022 studies lacked a maximum effort as demonstrated by the flow volume loops and that there "was not a maximum exhalation, so neither of them are technically maximum studies." Employer's Exhibits 1 at 6, 12; 11 at 13. When asked whether the studies are "sufficiently reliable for [him] to opine on this man's pulmonary capacity," Dr. Fino responded that he does not like to rely on studies that are not maximum but that they show "the least that this man could do." Employer's Exhibit 11 at 14. He stated he disagrees with the technician that noted good effort on the November 18, 2021 study because the August 4, 2022 study values were "much higher." *Id.* at 19.

Dr. Zaldivar opined the November 18, 2021 spirometry tracings show fair effort and the forced vital capacity maneuver was performed with "less than maximal" effort. Employer's Exhibit 7 at 2. While he concluded the lung volumes are invalid, he opined the spirometry is valid overall. *Id.* at 4. He further opined the study was "not perfect[,]" due to variability in exhalation, but he also stated that "if they're reproducible, then technically, they're valid" and that the results are sufficient to be used in evaluating total disability because the ATS "says even a test that is invalid is useful because the results are at least as good as measured." Employer's Exhibit 12 at 17-18.

Regarding the November 18, 2021 study, the ALJ observed the technician noted Claimant gave good effort, the study met ATS standards, and Dr. Gaziano validated the study. Decision and Order at 10. The ALJ also acknowledged Dr. Vuskovich opined the

pre-bronchodilator results "lacked the requisite effort to generate valid results such that his FEV1 results were artificially lowered and elaborated further regarding explained [sic] his findings with respect to the test[] results." *Id.* She stated Drs. Fino and Zaldivar found the results lacked maximum effort, but Dr. Zaldivar opined even if the test is invalid, "the results are still useful because the results are at least good as measured, and it [is] expected that with proper effort the results would be even better." *Id.* After summarizing the opinions, the ALJ concluded that because the study meets the ATS standards and was validated by Dr. Gaziano, and because Dr. Zaldivar relied on the ATS guidelines "indicating the usefulness of the results," she would not reduce the weight given to the November 18, 2021 study. *Id.*

The ALJ erred in failing to critically analyze the opinions regarding the validity of the November 18, 2021 study, resolve the conflict in the opinions, or explain her conclusions as the Administrative Procedure Act (APA) requires,[6] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). We therefore vacate her finding that the study is valid. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); 20 C.F.R. §718.204(b); Decision and Order at 10. Consequently, we vacate her finding the pulmonary function study evidence is in equipoise and does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10. We therefore further vacate her finding that Claimant established total disability in consideration of the evidence as a whole and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2).

Medical Opinions

Before considering the medical opinions, the ALJ determined the exertional requirements of Claimant's last coal mine employment and found his work as an assistant mine or shift foreman required heavy labor. Decision and Order at 5. As it is unchallenged, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ considered the opinions of Drs. Posin, Fino, and Zaldivar. Decision and Order at 12-20. Dr. Posin opined Claimant is totally disabled based on the November 18, 2021 pulmonary function study. Director's Exhibit 17. Dr. Fino opined both that Claimant is not disabled and that he would not be able to perform his usual coal mine employment

[6] The Administrative Procedure Act provides 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).

based on his spirometry values. Employer's Exhibits 1 at 9; 11 at 15. Dr. Zaldivar opined Claimant has a mild restrictive impairment but he is not totally disabled based on the pulmonary function and blood gas studies. Employer's Exhibits 7 at 4-5; 12 at 14-16. The ALJ found all three medical opinions are credible, but she found Dr. Zaldivar's opinion is outweighed by the opinions of Drs. Posin and Fino that Claimant is disabled. Decision and Order at 17-20. Thus the ALJ found the medical opinion evidence supports a finding of total disability.

Because we have vacated the ALJ's finding concerning the validity of the November 18, 2021 pulmonary function study, we must vacate her crediting of Dr. Posin's opinion.[7] Decision and Order at 19-20. Consequently, we vacate her weighing of the medical opinions and her finding that they support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 20.

In the interest of judicial economy, we also address Employer's argument that the ALJ erred in finding Dr. Fino's opinion supports a finding of total disability. Employer's Brief at 6-7.

Dr. Fino noted Claimant's job as an assistant shift foreman required 5% very heavy labor, 5% heavy labor, 70% moderate labor, and 20% light labor. Employer's Exhibit 11 at 8. At his deposition, Dr. Fino testified that "if [thirty] to [forty] percent of [Claimant's] job was a combination of heavy and very heavy manual labor, I don't think he could do it." *Id*. at 21. Dr. Fino also stated that, after reviewing all of the objective studies and considering whether Claimant would be able to return to his last job in the coal industry, "[he] believe[s] that [Claimant's] spirometry values would prevent him to do it – to do that." *Id*. at 15.

A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in a physician's report sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which

[7] To the extent Employer argues the ALJ must find Dr. Posin's opinion is not credible because he did not review the August 4, 2022 pulmonary function study, we disagree. Employer's Brief at 5-6. An ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner and objective test results. *See Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion*.") (emphasis added); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may infer total disability by comparing physician's impairment rating and any physical limitations due to that impairment with the exertional requirements of the miner's usual coal mine work). Furthermore, a miner cannot perform his usual coal mine work if he cannot perform the heaviest or hardest parts of that work. *See Eagle v. Armco Inc.*, 943 F.2d 409, 512-13 (4th Cir. 1991); 20 C.F.R. §718.204(b)(1).

As discussed above, the ALJ found Claimant's last coal mine job required heavy exertion and Employer did not challenge that finding on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5. Thus, contrary to Employer's argument and our dissenting colleague, the ALJ permissibly found Dr. Fino's statement that Claimant could not perform heavy labor more than thirty percent of the time supports a finding of total disability. *See Balsavage*, 295 F.3d at 396; *Scott*, 60 F.3d at 1141; *Eagle*, 943 F.2d at 512-13; Decision and Order at 18-19.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. In weighing the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), the ALJ must first address the evidence regarding the validity or reliability of the pulmonary function studies.[8] As discussed, she must address all relevant evidence, including the opinions of Drs. Gaziano, Vuskovich, Fino, and Zaldivar to the extent they address the reliability of the studies and must resolve any conflicts in the evidence. In rendering her findings on remand, the ALJ must explain the bases for her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

The ALJ must also reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). She must take into consideration her findings regarding the pulmonary function studies and the exertional requirements of Claimant's usual coal mine work when weighing the opinions. *See Kertesz*, 788 F.2d at 163; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to the miner's work capabilities); *Budash*, 9 BLR at 1-51-52. She must determine whether the opinions of Drs.

[8] In addition to addressing the validity of the November 18, 2021 pulmonary function study, the ALJ should address the evidence regarding the validity of the August 4, 2022 study as well. Employer's Exhibits 1 at 6, 12; 7 at 4; 12 at 22.

Posin, Fino, and Zaldivar are reasoned and documented, explaining the weight she accords each opinion based on her consideration of the physicians' comparative credentials, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Balsavage*, 295 F.3d at 396.

If the ALJ determines total disability is demonstrated by the pulmonary function studies or medical opinions, she must reweigh the evidence as a whole and determine whether Claimant has established total disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2). If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption, and the ALJ must address whether Employer has rebutted it. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. 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 for further consideration consistent with this opinion.

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 finding that Dr. Fino's medical opinion supports finding total disability at 20 C.F.R. §718.204(b)(2)(iv). As Employer argues, the ALJ failed to resolve the conflict as to the validity of the pulmonary function study evidence and to consider the entirety of Dr. Fino's testimony as to whether Claimant is disabled. Employer's Brief at 6-7.

With regard to whether Claimant is totally disabled, Dr. Fino noted Claimant's job duties as including five percent very heavy labor (lifting or carrying over 100 pounds), five percent heavy labor (fifty to 100 pounds), seventy percent moderate labor (twenty-five to

fifty pounds), and twenty percent light labor (less than twenty-five pounds). Employer's Exhibit 11 at 8. Dr. Fino stated he believed Claimant would be unable to perform a job requiring thirty to forty percent heavy and very heavy manual labor. *Id*. at 15-16, 21. However, he also stated that "based on what [Claimant] described as his last [coal mine] job to me . . . he could return to his last job." *Id*. at 15-16.

The ALJ found that Claimant's work as an assistant shift foreman required heavy labor based upon job duties including carrying or lifting between forty and 100 pounds, and lifting over 100 pounds twice a day with the assistance of another person. Decision and Order at 5. These exertional requirements appear to also fit Dr. Fino's description of Claimant's last coal mine job. To the extent Dr. Fino opined that Claimant could return to the job, his opinion weighs against finding total disability. *See* 20 C.F.R. §718.204(b)(2)(iv). The ALJ erred by failing to consider this aspect of his opinion and summarily determining that his opinion supports finding total disability. *See* 30 U.S.C. §923(b) (an ALJ must consider all relevant evidence); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact-finder's failure to discuss relevant evidence requires remand); Decision and Order at 19.

Because the ALJ failed to consider the entirety of Dr. Fino's testimony in finding his opinion supports total disability and explain her determination, I would vacate her finding and instruct the ALJ to consider the entirety of his opinion, clarify her determination as to the exertion required for Claimant's job,[9] and fully explain her determination as to disability.

In all other respects, I concur in the majority opinion.

JUDITH S. BOGGS
Administrative Appeals Judge

[9] Dr. Fino described very heavy labor as lifting or carrying over 100 pounds, heavy labor as lifting or carrying fifty to 100 pounds, moderate labor as lifting or carrying twenty-five to fifty pounds, and light labor as less than twenty-five pounds. Employer's Exhibit 11 at 8. The Office of Administrative Law Judges website contains the Dictionary of Occupational Titles definitions for exertional requirements and lists "Heavy Work" as "exerting [fifty] to 100 pounds of force occasionally, and/or [twenty-five] to [fifty] pounds of force frequently, and/or [ten to twenty] pounds constantly to move objects"; it lists "Very Heavy Work" as "exerting in excess of 100 pounds occasionally, and/or in excess of [fifty] pounds frequently, and/or in excess of [twenty] pounds constantly to move objects . . . ." https://www.dol.gov/agencies/oalj/PUBLIC/DOT/REFERENCES/DOTAPPC (viewed

12/27/2024, 11:37 a.m.). Except for stating that Claimant helped lift over 100 pounds twice a day, the ALJ did not make findings as to the frequency of Claimant's carrying and lifting efforts, nor did she explain how she analyzed Dr. Fino's testimony against her finding of heavy labor to determine Dr. Fino's opinion supports a finding of total disability.