

U.S. Department of Labor

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



BRB No. 22-0461 BLA

CHARLES M. SKIDMORE)

Claimant-Petitioner)

v.)

BLUFF SPUR COAL CORPORATION, c/o)

ANR, INCORPORATED)

and)

DATE ISSUED: 7/13/2023

AIG CASUALTY COMPANY/CHARTIS)

Employer/Carrier-)

Respondents)

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)

STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William P. Farley,
Administrative Law Judge, United States Department of Labor.

Charles M. Skidmore, Dryden, Virginia.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,¹ Administrative Law Judge (ALJ) William P. Farley's Decision and Order Denying Benefits (2019-BLA-05979) rendered on a claim filed on June 1, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 19.52 years of underground coal mine employment, but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant could 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 Because Claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718,³ the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁴

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

¹ Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but she does not represent Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

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 Because the record contains no evidence that Claimant has complicated pneumoconiosis, we affirm the ALJ's finding that he cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 14-15.

⁴ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 19.52 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6, 14.

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

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). 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 qualifying⁶ pulmonary function studies or 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 failed to establish total disability by any method. 20 C.F.R. §718.204(b)(2); Decision and Order at 15-17.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated July 19, 2017, April 26, 2018, and February 23, 2021.⁷ Decision and Order at 8, 15. The July 19, 2017 and April

⁵ The Board 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 Tr. at 12.

⁶ A “qualifying” pulmonary function study or arterial 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).

⁷ The July 19, 2017, April 26, 2018, and February 23, 2021 pulmonary function studies were administered when Claimant was 65, 66, and 69 years old, respectively. Director’s Exhibits 11, 15; Employer’s Exhibit 4. Because the ALJ found all the pulmonary function studies reported varying heights for Claimant of 68.0 inches, 68.5 inches, and 70.0 inches, he permissibly calculated an average height of 68.83 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8. He then used the closest greater table height set forth at Appendix B of 20 C.F.R. Part 718

26, 2018 studies Dr. Ajarapu and Dr. Sargent conducted, respectively, produced non-qualifying results both before and after the administration of a bronchodilator. Director's Exhibits 11, 15. The February 23, 2021 study Dr. McSharry conducted produced non-qualifying results pre-bronchodilator, and qualifying results post-bronchodilator. Employer's Exhibit 4. The ALJ noted Dr. McSharry stated "Claimant 'was unable to produce Acceptable and Reproducible Spirometry data'" on the February 23, 2021 study, and Dr. Sargent found the post-bronchodilator results of the study invalid because it showed no reproducibility and "very poor effort." Decision and Order at 15; Employer's Exhibits 4, 5 at 18. Thus, the ALJ found the post-bronchodilator results of the study invalid. Decision and Order at 15. He further found "all" the valid studies produced non-qualifying values, and therefore the preponderance of the pulmonary function study evidence does not establish total disability. *Id.*

Contrary to the ALJ's finding, the treatment records Claimant submitted contain an April 2, 2018 pulmonary function study producing qualifying pre-bronchodilator results and non-qualifying post-bronchodilator results.⁸ Claimant's Exhibit 6 at 6. Although Claimant did not identify this study as his affirmative evidence, the ALJ admitted the study into the record as part of his treatment records. Hearing Tr. at 7-8. Thus the ALJ erred in failing to consider all of the pulmonary function studies in the record. Claimant's Exhibit 6 at 6. While the ALJ is not required to accept evidence that he determines is not credible, he must consider and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We therefore vacate his finding that the pulmonary function studies do not establish total disability and remand the case for further consideration.⁹ 20 C.F.R. §718.204(b)(2)(i).

of 68.9 inches for determining the qualifying or non-qualifying nature of the studies. Decision and Order at 8.

⁸ The April 2, 2018 treatment pulmonary function study, which was conducted when Claimant was 66 years old, produced an FEV₁ value of 1.79 and an FVC value of 2.40 pre-bronchodilator, and the study produced an FEV₁ value of 2.07 and an FVC value of 2.88 post-bronchodilator. Claimant's Exhibit 6 at 6. An FEV₁ value of 1.87 and an FVC value of 2.40 are qualifying values for a male who is sixty-six years old and 68.9 inches tall. 20 C.F.R. Part 718, Appendix B; Decision and Order at 7. Consequently, the study produced FEV₁ and FVC values pre-bronchodilator that are equal to or less than the values appearing in the tables set forth in Appendix B for Claimant's age and height. *See* 20 C.F.R. Part 718, Appendix B; Claimant's Exhibit 6 at 6.

⁹ Further, Employer submitted treatment record pulmonary function studies at Employer's Exhibits 1 and 2 which the ALJ excluded in his Decision and Order as in excess

Arterial Blood Gas Studies

The ALJ considered four arterial blood gas studies dated July 19, 2017, November 9, 2017, April 26, 2018, and February 23, 2021. Decision and Order at 9, 16. The July 19, 2017 and April 26, 2018 studies produced non-qualifying results at rest and during exercise, Director's Exhibits 11, 15, and the February 23, 2021 study produced non-qualifying results at rest.¹⁰ Employer's Exhibit 4. The November 9, 2017 study produced qualifying results at rest and no exercise study was conducted. Director's Exhibit 12. Because only the November 9, 2017 resting study produced qualifying results while the other three resting studies and the two exercise studies produced non-qualifying results, the ALJ found the arterial blood gas study evidence does not establish total disability. Decision and Order at 16. As this finding is supported by substantial evidence, it is affirmed. 20 C.F.R. §718.204(b)(2)(ii); *see Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 310 (4th Cir. 2012).

Cor Pulmonale

The ALJ accurately found there is no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure, and therefore he cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 16.

Medical Opinions

Before weighing the medical opinions, the ALJ determined the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 6-7. A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time, *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of a respiratory inability to do his usual coal mine work. *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984). The ALJ correctly observed Claimant testified that his last coal mine job as a "scoop operator" required him to "lift, tug, and pull fifty-pound rock dust bags," and to "rock dust and lift and pull 250-pound cables." Decision and Order

of the evidentiary limitations. Decision and Order at 13. As Employer correctly argues, the ALJ erred in issuing this evidentiary ruling in his Decision and Order without providing it an opportunity to address the admissibility of its evidence. *L.P. [Preston] v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc); Employer's Brief at 3 n.2. On remand, the ALJ should consider whether these studies are admissible as treatment record evidence.

¹⁰ Dr. McSharry conducted an exercise study in addition to the resting study on February 23, 2021, but he was unable to obtain results. Employer's Exhibit 4 at 15.

at 6; Hearing Tr. at 12-13. He also correctly observed Claimant's Description of Coal Mine Work form noted his "job involved lifting twenty-five pounds fifteen to twenty times a day and carrying seventy-five pounds fifty feet once a day." Decision and Order at 6-7; Director's Exhibit 4. As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant's usual coal mine work as a "scoop operator" required medium to heavy exertional levels. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 7.

The ALJ then weighed the opinions of Drs. Ajjarapu, Sargent, and McSharry. Decision and Order at 10-12, 16. Dr. Ajjarapu initially opined Claimant is totally disabled, Director's Exhibit 11, but after a review of Dr. Sargent's non-qualifying testing obtained nine months after her examination, she opined Claimant is not totally disabled. Director's Exhibit 16.

Dr. Sargent opined Claimant has a mild restrictive impairment and moderate hypoxemia based on his mild resting and exercise-induced arterial blood gas abnormalities. Director's Exhibit 15; Employer's Exhibit 5 at 16-17. He also opined Claimant's obstructive sleep apnea, diabetes, and possible pulmonary hypertension may "in total" be disabling, but his impairment is due to his obesity and not his coal mine dust exposure. Director's Exhibit 15; Employer's Exhibit 5 at 16-17. Ultimately, he concluded Claimant is not suffering from a disabling respiratory impairment and has the respiratory capacity to return to his last job. Director's Exhibit 15; Employer's Exhibit 5 at 19, 22-23.

Dr. McSharry noted Claimant's pulmonary function studies show a mildly reduced FEV₁ and FVC, a mild restrictive airflow limitation without bronchodilator responsiveness, and a diffusion pattern suggesting an element of restriction consistent with obesity. Employer's Exhibit 4. In addition, he stated Claimant's blood gas studies show mild hypoxemia. *Id.* Further, he stated Claimant has severe shortness of breath with "some amount of cough and sputum production and variable wheezing." *Id.* He opined Claimant is "probably disabled due to his marked obesity and exercise intolerance," and that his obesity has an "impact on the lungs and on lung testing." *Id.* He further opined Claimant "has the pulmonary capacity to perform his last job in coal mining as that job was explained to [him]" and that "[t]his is despite the fact [sic] the presence of some abnormalities in lung function demonstrated as a result of his obesity." *Id.* He concluded Claimant does not have a "pulmonary disability from occupational coal dust exposure." *Id.*

The ALJ found that none of the physicians opined Claimant is totally disabled from a pulmonary standpoint and thus the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 16.

While the ALJ rationally found Dr. Ajjarapu opined Claimant is not totally disabled from a pulmonary or respiratory impairment, he did not satisfy the explanatory requirements of the Administrative Procedure Act (APA)¹¹ as he failed to adequately explain how he analyzed Dr. Sargent's and Dr. McSharry's opinions, taking into account that total respiratory or pulmonary disability and disability causation are separate issues. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See* 20 C.F.R. §718.204(b), (c); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984).

The ALJ concluded "Drs. Ajjarapu, Sargent and McSharry all opined that Claimant is not totally disabled from [a] pulmonary impairment." Decision and Order at 16. But in summarizing Drs. Sargent's and McSharry's opinions relevant to total disability, the ALJ included their opinions that Claimant's respiratory impairment is caused by his obesity and not his coal mine dust exposure. *Id.* at 11-12. Thus we are unable to discern the basis for the ALJ's determination that Claimant is not totally disabled from a pulmonary or respiratory impairment. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 16.

Moreover, in determining whether a miner is totally disabled, the ALJ must compare the exertional requirements of the miner's usual coal mine work with a physician's description of the miner's pulmonary impairment and physical limitations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991). Although the ALJ described Claimant's last job in the mines as a scoop operator and determined his usual coal mine work required medium to heavy exertional levels, he failed to compare those requirements with the physicians' assessments to determine whether their opinions support a finding of total respiratory disability. *Id.*; *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (medical opinion may support a finding of total disability if it provides sufficient

¹¹ The Administrative Procedure Act, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

information from which the ALJ can reasonably conclude that a miner is unable to do his last coal mine job); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability); Decision and Order at 6-7, 16.

Further, the ALJ's weighing of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i) may affect his weighing of the medical opinions.

We therefore vacate the ALJ's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand for further consideration of all the evidence in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165; *see also Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation is satisfied if the reviewing court can discern what the ALJ did and why he did it); Decision and Order at 16. Further, we vacate his finding that the evidence overall does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 16-17. In addition, we therefore vacate his finding that Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and the denial of benefits. Consequently, we remand the case for further consideration.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant has established total disability based on a preponderance of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i). He must consider the relevant treatment pulmonary function studies and undertake a quantitative and qualitative analysis of the conflicting results in rendering his findings of fact. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *see also Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence"); 20 C.F.R. §718.204(b)(2)(i); Claimant's Exhibit 6.

He must also reconsider the medical opinion evidence, taking into consideration his findings regarding the pulmonary function studies and comparing the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. *See Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *Cornett*, 227 F.3d at 578; 20 C.F.R. §718.204(b)(2)(iv). In rendering his credibility findings, he must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments,

and the sophistication of and bases for their diagnoses.¹² See *Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) .

In reaching his credibility determinations, the ALJ must set forth his findings in detail and explain his rationale in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165. If the ALJ determines total disability is demonstrated by the pulmonary function studies or medical opinions, or both, he must weigh all the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); see *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability on remand, he will have invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); see 20 C.F.R. §718.305. The ALJ must then determine whether Employer has rebutted the presumption. See 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. See *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

¹² The ALJ should also consider Claimant's treatment records reporting dyspnea which gets worse with exertion, coughing, wheezing, bibasilar crackles, chronic respiratory failure, chronic obstructive pulmonary disease, chronic bronchitis, moderate to severe restrictive lung disease with significant bronchodilator response, and that he is on two liters of supplemental oxygen daily to treat sleep apnea. Claimant's Exhibits 4-7. Further, the treatment records report Claimant is disabled due to his dyspnea and fatigue. *Id.*

Accordingly, the ALJ's Decision and Order Denying 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

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge