



BRB No. 24-0051 BLA

EVA G. MOLLETT  
(Widow of JAMES R. MOLLETT)

Claimant-Respondent

v.

CONSOL OF KENTUCKY,  
INCORPORATED

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR

Party-in-Interest

**NOT-PUBLISHED**

DATE ISSUED: 06/05/2025

**DECISION and ORDER**

Appeal of the Decision and Order Awarding Benefits in a Survivor's Claim of Willow Eden Fort, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson, Kentucky, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

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

BOGGS and JONES, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Willow Eden Fort's Decision and Order Awarding Benefits in a Survivor's Claim (2021-BLA-05996) rendered on a survivor's claim filed on August 7, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 29.89 years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant<sup>1</sup> invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.<sup>2</sup> 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 thus invoked the Section 411(c)(4) presumption. It also argues she erred in finding it did not rebut the presumption.<sup>3</sup> Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefit 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.<sup>4</sup> 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, 361-62 (1965).

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<sup>1</sup> Claimant is the surviving spouse of the Miner, who died on June 13, 2020. Director's Exhibit 10.

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

<sup>3</sup> We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 29.89 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); Decision and Order at 6.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 29; Hearing Transcript at 16.

### **Invocation of the Section 411(c)(4) Presumption: Total Disability**

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(iii). A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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 the relevant evidence supporting a finding of 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 and the evidence as a whole.<sup>5</sup> 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10, 13-14.

Employer contends the ALJ erred in finding the pulmonary function study evidence supports a finding of total disability and in discrediting the opinions of its doctors that Claimant is not disabled. Employer's Brief at 4-14.

### **Pulmonary Function Studies**

The ALJ considered the results of three pulmonary function studies dated January 18, 2006, August 16, 2006, and May 24, 2020. Decision and Order at 7-10; Director's Exhibit 11; Employer's Exhibits 5 at 8; 6 at 32. The January 18, 2006 and August 16, 2006 studies produced non-qualifying<sup>6</sup> values both before and after administration of bronchodilators. Employer's Exhibit 5 at 7. The May 24, 2020 study produced qualifying values. Director's Exhibit 11. The ALJ stated the January 18, 2006 pre-bronchodilator pulmonary function study produced values that were "very close to qualifying." Decision and Order at 10 (referencing 20 C.F.R. §718.204(b)(2)(i); Employer's Exhibit 5 at 8). She found the August 16, 2006 study is invalid and, due to its age, entitled to little probative weight, whereas she found the May 24, 2020 study "reliable and probative of whether the

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<sup>5</sup> The ALJ found Claimant did not establish total disability based on the arterial blood gas studies or medical opinions, and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 7, 11, 13.

<sup>6</sup> 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).

Miner was totally disabled.”<sup>7</sup> Decision and Order at 8-10. Giving “the most probative weight” to the May 24, 2020 study since it “was taken fourteen years after” the 2006 studies, she found Claimant established total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 10.

Employer argues the ALJ erred in finding the August 16, 2006 pulmonary function study is invalid. Employer’s Brief at 4-6. We agree.

The technician who administered the August 16, 2006 study left a notation in the comments field stating, “after multiple attempts, spirometry data is not acceptable.” Employer’s Exhibit 6 at 24 (formatting omitted). Dr. Rasmussen reviewed this study and indicated that, while the Miner put forth multiple efforts, he ultimately provided “[f]air effort” and “fair cooperation.” Employer’s Exhibit 6 at 3, 24. Drs. Spagnolo and Zaldivar likewise opined the August 16, 2006 study is valid. Employer’s Exhibits 13 at 20-21; 14 at 20.

The ALJ addressed the technician’s comments and noted the report of the August 16, 2006 study indicates the Miner put forth “fair effort.” Decision and Order at 8 (citing Employer’s Exhibit 6 at 24). She did not, however, address Dr. Rasmussen’s comments that the Miner demonstrated “fair cooperation” or that it was his comments that indicate “[f]air effort.” Employer’s Exhibit 6 at 3, 24. She likewise did not address the validity opinions of Drs. Spagnolo and Zaldivar. Employer’s Exhibits 13 at 20-21; 14 at 20. Thus, we are unable to affirm the ALJ’s determination because she did not address all the relevant evidence. *See Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir. 1984) (finding which does not encompass discussion of contrary evidence does not warrant affirmance); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (factfinder’s failure to discuss relevant evidence requires remand).

Employer further argues the ALJ erred in finding the May 24, 2020 pulmonary function studies are reliable. Employer’s Brief at 6-14. Employer’s arguments have merit.

When considering pulmonary function study evidence, an ALJ must determine whether the studies 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). Compliance with the quality standards at 20 C.F.R. Part 718, Appendix B, “shall be presumed” unless there is “evidence to the contrary.” 20 C.F.R. §718.103(c). If a study does not precisely conform to the quality

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<sup>7</sup> The ALJ did not specifically address whether the January 18, 2006 pulmonary function study is valid.

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 her 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).

However, the quality standards do not apply to pulmonary function studies conducted as part of a miner’s treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S. [Stowers] v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards “apply only to evidence developed in connection with a claim for benefits” and not to testing included as part of a miner’s treatment). An ALJ must still determine if treatment record pulmonary function studies are “sufficiently reliable” to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). In considering whether treatment record pulmonary function studies are sufficiently reliable, the ALJ must consider whether objective evidence obtained during a period of acute illness reliably establishes total respiratory disability. *See* 20 C.F.R. Part 718, Appendix B (pulmonary function studies should “not be performed during or soon after an acute respiratory illness”).

The Miner was hospitalized in May 2020 due to kidney disease, coronary artery disease, and heart failure, for which he underwent cardiac catheterization on May 24, 2020 and coronary artery bypass surgery the following day. Employer’s Exhibit 7 at 20, 132-34. Prior to these procedures, as part of his pre-operative evaluation, the Miner underwent pulmonary function testing on May 24, 2020. *Id.* at 126. The technician who administered the testing noted the Miner “demonstrated good effort and understanding,” and that he “generated a good effort.” *Id.* Drs. Spagnolo and Zaldivar opined, however, that this study was performed for the purposes of determining whether the Miner could undergo surgery, that it reflects the Miner’s condition during an acute illness, and that it therefore cannot be relied upon to determine whether the Miner was totally disabled.<sup>8</sup> Employer’s Exhibits 9

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<sup>8</sup> Dr. Spagnolo stated the May 24, 2020 pulmonary function study was “really done just to be sure [the Miner] could tolerate surgery” and opined the Miner was “extremely weak and not taking deep breaths very well,” noting excessive variation, hesitancy, and coughing during the trials. Employer’s Exhibit 13 at 21-22, 32-33. Dr. Zaldivar similarly opined the study was performed to determine whether “surgery might be feasible” but that it cannot be relied upon to determine whether the Miner was totally disabled. Employer’s Exhibit 14 at 17-19. He further asserted the study was “very poorly performed” based on the flow volume loops and volume time tracings, noting only one of each had been submitted even though there were two trials. Employer’s Exhibit 12 at 4.

at 13-14; 12 at 4, 6; 13 at 21-23, 32-34; 14 at 16-20. Dr. Spagnolo further explained the reduced values seen on this study were caused by “fluid in [the Miner’s] lungs due to congestive heart failure secondary to his acute heart attack.” Employer’s Exhibit 9 at 13.

The ALJ acknowledged Drs. Spagnolo and Zaldivar opined the Miner performed the May 24, 2020 study while he was hospitalized and awaiting coronary bypass surgery, and that it is thus is unreliable for purposes of establishing whether he was totally disabled. Decision and Order at 9-10. She cited the Board’s holdings in *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985), for the premise that an ALJ may credit the “first-hand observations and notations of the technician who administered the [study]” over the opinion of a reviewing physician.<sup>9</sup> Decision and Order at 9. She thus discredited Drs. Spagnolo’s and Zaldivar’s opinions because “they did not explain why [she] should afford [them] more weight than the technician” who administered the study. *Id.* The ALJ further discredited their reliability opinions because the admonition against administering a pulmonary function study during or soon after a period of acute illness is found in the regulatory quality standards, which do not apply to pulmonary function studies contained in treatment records. *Id.* at 10. Moreover, she stated, even if the quality standards did apply to the May 24, 2020 study, they indicate only that pulmonary function testing should “not be performed during or soon after an acute respiratory illness,” but the “Miner was hospitalized for renal failure and cardiac disease, not for an acute respiratory illness.” *Id.* (quoting 20 C.F.R. Part 718, Appendix B). Thus, she found the May 24, 2020 pulmonary function study “reliable and probative of whether the Miner was totally disabled.” *Id.*

Employer contends the ALJ erroneously credited the comments of the technician who administered the May 24, 2020 study over the opinions of Drs. Spagnolo and Zaldivar, “who explained that the [M]iner was not in a baseline condition when those tests were done due to the circumstances requiring his hospitalization.” Employer’s Brief at 4, 6-14. We agree.

Although Drs. Spagnolo and Zaldivar did not specifically address the technician’s statements that the Miner “demonstrated good effort and understanding,” Director’s Exhibit 11 at 1, they did provide rationale explaining their conclusions that the Miner did

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<sup>9</sup> We note the ALJ did not accurately characterize the Board’s holding in *Revnack*. The Board stated in *Revnack*, a case involving a claim arising under 20 C.F.R. Part 727, that the ALJ must consider a reviewing *doctor’s* opinion that a pulmonary function study is unreliable when determining whether total disability is established and the interim presumption has been invoked pursuant to 20 C.F.R. §727.203(a)(2). *Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). It does not address the weight to which an administering technician’s comments are entitled.

not put forth sufficient effort to generate valid results, as the ALJ acknowledges. Decision and Order at 9; Employer's Exhibits 9 at 13-14; 12 at 4, 6; 13 at 21-23, 32-34; 14 at 16-20. A reviewing physician may challenge the validity of a pulmonary function study based on his or her examination of the tracings, and the ALJ thus erred by crediting the technician's statements over the physicians' opinions on the basis that the physicians did not address the technician's statements. *See* 65 Fed. Reg. at 79,927 ("A party may challenge another party's [pulmonary function] study by submitting expert opinion evidence demonstrating the study is unreliable or invalid."); *Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 885 (7th Cir. 1992); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *see also Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985) (consulting physician's opinion regarding the reliability of the pulmonary function studies may constitute substantial evidence for the rejection of qualifying studies).

We further agree with Employer's assertion that the ALJ erred in discrediting Drs. Spagnolo's and Zaldivar's reliability opinions on the basis that the Miner was hospitalized for renal and cardiac failure rather than an acute respiratory illness, and that the admonition against relying on testing performed during or soon after an acute respiratory illness is thus inapplicable. Employer's Brief at 7-12; *see* Decision and Order at 9-10. Drs. Spagnolo and Zaldivar both explained the Miner's acute cardiac condition rendered the pulmonary study reliable only for the purposes of determining whether he could tolerate surgery. Employer's Exhibits 12 at 6; 13 at 21-22; 14 at 18-19. Dr. Spagnolo also explained that, while the underlying conditions may have been cardiac and renal in nature, the Miner's "congestive heart failure, secondary to his acute heart attack," resulted in the acute respiratory condition of "fluid in his lungs." Employer's Exhibit 9 at 13. In rejecting Drs. Spagnolo's and Zaldivar's reliability opinions on the basis that the regulatory quality standards do not specifically state a pulmonary function study should not be conducted during an acute cardiac illness, the ALJ improperly substituted her medical judgment for that of a medical expert. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984).

Because the ALJ did not provide valid rationale for discrediting Drs. Spagnolo's and Zaldivar's reliability opinions, we must vacate her findings with regard to the reliability of the May 24, 2020 pulmonary function study. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 9-10. Notably, however, we are not passing judgment on whether these studies are valid. Rather, the ALJ must consider the reliability of this study and render her own credibility findings. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989) (it is the ALJ's responsibility to evaluate physicians' opinions).

Because we vacate the ALJ's findings regarding the reliability of the May 24, 2020 pulmonary function study, we must also vacate her finding that the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i).

### **Medical Opinion Evidence**

The ALJ next considered the medical opinions of Drs. Spagnolo and Zaldivar that the Miner was not totally disabled prior to his death. Decision and Order at 11-13; Employer's Exhibit's 9 at 14; 12 at 6-7; 13 at 23-24; 14 at 22-23. The ALJ discredited both opinions, noting, among other reasons, that both physicians' opinions are inconsistent with her finding that the pulmonary function study evidence establishes total disability. Decision and Order at 12-13. Thus, she determined the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(iv). *Id.* at 13.

Because the ALJ's error with respect to the pulmonary function studies may have affected her weighing of the medical opinion evidence, we must vacate her finding that the medical opinion evidence supports a finding of total disability 20 C.F.R. §718.204(b)(2)(iv), and that the evidence overall establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 32. Thus, we vacate her finding that Claimant invoked the Section 411(c)(4) presumption and vacate the award of benefits.

### **Remand Instructions**

On remand, the ALJ must reconsider whether Claimant can establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death and thereby invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(iii). In doing so, she must reconsider the validity of the August 16, 2006 pulmonary function study and must determine whether the May 24, 2020 pulmonary function study is reliable for purposes of establishing whether the Miner was totally disabled. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *Stowers*, 24 BLR at 1-92. The ALJ must address all relevant evidence and resolve any conflict in the evidence. *Rowe*, 710 F.2d at 254-55. She must then determine whether the preponderance of the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i).

The ALJ must also reweigh the medical opinions, taking into consideration her findings regarding the pulmonary function studies and other evidence of record. In weighing the medical opinions, she must consider the qualifications of the respective physicians, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Rowe*, 710 F.2d at 255. She must further reconsider the evidence as a whole to reach a determination as to



whether the Miner was totally disabled. *See* 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.<sup>10</sup>

If Claimant establishes total disability, she will have invoked the Section 411(c)(4) presumption, and the ALJ must reconsider whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). If Claimant is unable to establish total disability, the ALJ must address whether Claimant has established the Miner had pneumoconiosis arising out of coal mine employment and that the Miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). As the burdens of proof on remand may shift, we decline to address the issues of disease and death causation.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits in a Survivor's Claim and remand the case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues that remand is required to assess the reliability of the May 24, 2020 pulmonary function study. But I would hold error, if any, in finding the August 16, 2006 pulmonary function study unreliable is harmless. Assuming both studies are valid and reliable, the ALJ did not err in giving the "most probative weight to the 2020 study" because it "was taken fourteen years after" the 2006 studies, given the regulations recognize pneumoconiosis as a progressive disease. Decision and Order at 10; *see*

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<sup>10</sup> Our concurring colleague overlooks the broad discretion afforded to the ALJ in analyzing and weighing the evidence on remand.

*Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-53 n.14 (2023) (“[A] factfinder may, consistent with the progressive nature of pneumoconiosis, credit newer evidence showing a deterioration in a miner’s condition over older evidence based on chronological order if enough time has passed for the disease to have progressed.”); *see also Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1167 (6th Cir. 1997) (“Recent evidence is particularly important in black lung cases, where because of the progressive nature of pneumoconiosis, more recent evidence is often afforded more weight.”). And, regardless, Employer has not challenged that rationale. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The reliability of the May 24, 2020 study alone thus controls the outcome: if it is reliable, it trumps the August 16, 2006 study; if it is unreliable, then there are no valid or reliable studies, and Claimant cannot meet her burden to establish total disability under 20 C.F.R. §718.204(b)(2)(i).

JONATHAN ROLFE  
Administrative Appeals Judge