



BRB No. 25-0213 BLA

EVERETT R. HOUNSHELL

Claimant-Respondent

v.

DIAMOND MAY MINING COMPANY c/o
PROGRESS ENERGY COMPANY,
INCORPORATED

Employer-Petitioner

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 06/17/2026

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Everett Hounshell, Jackson, Kentucky.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits on Remand (2019-BLA-05653) rendered on a subsequent claim

filed on July 20, 2016,¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Act). This claim is before the Benefits Review Board for a second time.²

In an April 26, 2023 Decision and Order Denying Benefits, the ALJ found Claimant failed to establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). He further found Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, as there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Thus, as Claimant failed to establish an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.

Pursuant to Claimant's appeal, the Board affirmed the ALJ's finding that the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis does not apply to this case. *Hounshell v. Diamond May Mining Co.*, BRB No. 23-0273 BLA, slip op. at 2 n.3 (Apr. 18, 2024) (unpub.). However, the majority of the panel vacated his finding that Claimant failed to establish total disability. *Id.* at 8. It held the ALJ failed to adequately consider the evidence regarding the validity of certain pulmonary function studies and in weighing this evidence together, which undermined his weighing of the medical opinion evidence. *Id.* at 4-8. Thus, the Board remanded the claim for further consideration. *Id.*

On remand, the ALJ found Claimant established 19.78 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and thus established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and

¹ Claimant filed a previous claim, which the district director denied on September 12, 2014, for failure to establish total disability. Director's Exhibit 1 at 12-14, 109-12. 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 "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 the district director denied Claimant's prior claim for failure to establish total disability, Claimant is required to submit new evidence establishing that element of entitlement to warrant a review of this subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

² We incorporate the procedural history of this case as set forth in *Hounshell v. Diamond May Mining Co.*, BRB No. 23-0273 BLA (Apr. 18, 2024) (unpub.). Administrative Appeals Judge Glenn E. Ulmer is substituted on the panel for Administrative Appeals Judge Judith S. Boggs, who is no longer a member of the Board.

invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).³ He further found Employer failed to rebut the presumption and therefore awarded benefits.⁴

On appeal, Employer contends the ALJ erred in finding Claimant is totally disabled and thus invoked the Section 411(c)(4) presumption.⁵ Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The 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.⁶ 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, 30 U.S.C. §921(c)(4), or establish entitlement under 20 C.F.R. Part 718, Claimant must prove 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.⁷ *See* 20 C.F.R.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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); *see* 20 C.F.R. §718.305.

⁴ At one point in his decision, the ALJ states "none of the presumptions appl[y]." Decision and Order on Remand at 19. However, throughout his analysis of the evidence regarding pneumoconiosis and disability causation, the ALJ indicates it is Employer's burden to rebut the Section 411(c)(4) presumption. *Id.* at 21-22, 24, 29-30. Thus, we consider his earlier indication of no applicable presumptions a scrivener's error.

⁵ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 19.78 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7.

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12; Director's Exhibit 4.

⁷ The ALJ found Claimant's usual coal mine employment was working as a truck driver, which required medium to heavy manual labor. Decision and Order on Remand at

§718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,⁸ 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 study evidence, medical opinion evidence, and the evidence as a whole.⁹ Decision and Order on Remand at 13, 17.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies performed August 11, 2014, April 26, 2016, August 29, 2016, May 10, 2017, and May 10, 2018. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 9-13; Director's Exhibits 12, 20; Claimant's Exhibit 3; Employer's Exhibits 3, 8. The August 11, 2014 study produced qualifying results; bronchodilators were not administered. Director's Exhibit 20. The April 26, 2016 study produced non-qualifying results; the ALJ noted this result was obtained after the use of bronchodilators. Employer's Exhibit 8 at 4, 9; Decision and Order at 9 n.28. The August 29, 2016 study produced qualifying results before the use of a bronchodilator and produced non-qualifying results after. Director's Exhibit 12. The May 10, 2017 study produced qualifying values both before and after the use of a bronchodilator.¹⁰ Claimant's Exhibit 3. Finally, the May 10, 2018 study was non-qualifying both before and after the use of a bronchodilator. Employer's Exhibit 3.

7-8; *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982). Employer does not challenge this finding; thus, we affirm it. *See Skrack*, 6 BLR at 1-711.

⁸ A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields results that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

⁹ The Board previously affirmed the ALJ's finding that the arterial blood gas study evidence does not support a finding of 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); *Hounshell*, BRB No. 23-0273 BLA, slip op. at 3 n.6.

¹⁰ The ALJ reconsidered the pre-bronchodilator values in the May 10, 2017 pulmonary function study on remand, as he had originally overlooked the MVV value, which rendered the study qualifying, contrary to his prior finding. Decision and Order on

The ALJ first addressed the relevant evidence regarding the validity of the qualifying August 11, 2014 and August 29, 2016 studies, and determined both could be relied upon to assess total disability. Decision and Order on Remand at 11-12. He afforded more weight to the pre-bronchodilator results over the post-bronchodilator results, as they reflected Claimant's lung function without medication. *Id.* at 13. As three of the four pre-bronchodilator results were qualifying, the ALJ found the pulmonary function study evidence supports a finding of total disability. *Id.*

Employer contends the ALJ erred in finding the August 11, 2014, and August 29, 2016 pulmonary function studies are valid and reliable to assess Claimant's level of impairment. Employer's Brief at 3-8. We disagree.

When considering pulmonary function study evidence, the 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, App. B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). A study need not precisely conform to the quality standards; if it is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b); *Clinchfield Coal Co. v. Director, OWCP [Vanderpool]*, 164 F.4th 342, 350 (4th Cir. 2026) (claim-developed objective studies need only be in substantial compliance). The ALJ, as the factfinder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). 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). Studies obtained in treatment and not developed in anticipation of litigation are not subject to the quality standards, but the regulations require the ALJ to determine whether a study is sufficiently reliable to support a finding of total disability. *See* 20 C.F.R. §718.101(b); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); *Vanderpool*, 164 F.4th at 349; *J.V.S. [Stowers] v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010).

August 11, 2014 Pulmonary Function Study

As the ALJ indicates and Employer acknowledges, the August 11, 2014 study was obtained during Claimant's medical treatment. Decision and Order on Remand at 10; Employer's Brief at 3; Director's Exhibit 20. Thus, the quality standards do not apply and the ALJ addressed the evidence regarding its reliability. *Vanderpool*, 164 F.4th at 349; *Stowers*, 24 BLR at 1-92; Decision and Order on Remand at 11. The ALJ noted Dr. Vuskovich's explanation that the study was invalid as the tracings demonstrated that Claimant's effort was insufficient and variable. Decision and Order on Remand at 10-11.

Remand at 9-10. Employer does not challenge the ALJ's finding; thus, we affirm it. *See Skrack*, 6 BLR at 1-711.

He also noted the technician who administered the study noted good effort and cooperation and Claimant's treating physicians found the study to be reliable for diagnosing and treating his lung conditions; thus, he found the study "medically acceptable." *Id.* at 11.

Employer contends the ALJ cannot credit the technician's "subjective observation" of effort and cooperation over Dr. Vuskovich's objective explanation that the tracings demonstrate the testing is not acceptable. Employer's Brief at 4-6. Employer's argument appears to erroneously presume that the August 11, 2014 study must comply with the quality standards. Indeed, Employer acknowledges that the testing is "conforming" but emphasizes Dr. Vuskovich's explanations regarding lack of maximum effort and technical acceptability. Employer's Brief at 5-6.

Similarly, Employer's arguments appear to ignore the ALJ's basis for finding the August 11, 2014 study sufficiently reliable to assess total disability. While Employer contends the ALJ "inferred" Claimant was too impaired to generate reproducible results¹¹ and "misconstrued" Dr. Vuskovich's statements regarding the technician's statements,¹² Employer's Brief at 4, these were not the bases the ALJ provided for finding the study reliable. Rather, he correctly explained the quality standards Dr. Vuskovich relied upon to invalidate the study do not apply and permissibly found Claimant's treating physicians' reliance on the study to diagnose and treat Claimant's lung conditions supported a finding that the results are acceptable to assess Claimant's impairment. Decision and Order on Remand at 11; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility). Thus, we affirm the ALJ's finding that the August 11, 2014 study may be relied upon to assess total disability as supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Vanderpool*, 164 F.4th at 349; *Stowers*, 24 BLR at 1-92.

¹¹ While the ALJ did not draw this conclusion, we note Dr. Vuskovich acknowledged Claimant may not have been able to put forth maximum effort due to "some other problem." Employer's Exhibit 18 at 20.

¹² The ALJ correctly noted that Dr. Vuskovich indicated the technician's notations regarding effort are "meaningless" and technicians are "not trained to evaluate the tracings for validity." Decision and Order on Remand at 11; Employer's Exhibit 18 at 14, 18. As the ALJ also correctly noted, the regulations provide that pulmonary function studies are to include a statement regarding the claimant's ability to understand instructions, follow directions, and the degree of cooperation. *Id.* (citing 20 C.F.R. §718.103(b)(5)).

August 29, 2016 Pulmonary Function Study

The ALJ next considered the evidence regarding the validity of the August 29, 2016 study obtained by Dr. Ajjarapu as part of Claimant's Department of Labor-sponsored complete pulmonary evaluation. Decision and Order on Remand at 11-12. Dr. Ajjarapu signed the study, indicating it was conducted in compliance with the regulations and the results are accurate, and continued to rely on the study in her supplemental report after considering Dr. Vuskovich's validation report. Director's Exhibits 12, 26. Dr. Gaziano reviewed the study and noted the vents are "acceptable." Director's Exhibit 14. Dr. Vuskovich challenged the validity of the study. He opined Claimant "often closes his glottis" and the study's curves are irregular, demonstrating less than maximum effort. Employer's Exhibit 18 at 13. Dr. Vuskovich stated Dr. Gaziano's validation was incorrect and indicated it was possible Dr. Gaziano was "fooled" by the incorrect aspect ratio on the equipment used in the testing.¹³ *Id.* at 15-16. The ALJ found Dr. Vuskovich's opinion unpersuasive and that it did not outweigh the first-hand observation of the technician and the validation of the study by the two other physicians. Thus, he found the August 29, 2016 pulmonary function test valid and probative regarding Claimant's disability. Decision and Order on Remand at 12.

Employer argues the ALJ erred in finding the technician was in a "better position to gauge Claimant's effort" than Dr. Vuskovich and failed to explain why Dr. Vuskovich's "uncontradicted" opinion did not render the study invalid. Employer's Brief at 5-7. We hold the ALJ adequately explained his findings.

While we agree that crediting a technician's notation of good effort and cooperation over uncontradicted, credible medical opinion evidence regarding the validity of the pulmonary function study would be erroneous, those are not the circumstances here. *See Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 885 (7th Cir. 1992). Here, the ALJ considered Dr. Vuskovich's opinion that the study was invalid but found it unpersuasive. He correctly noted that Dr. Vuskovich emphasized the need for "maximum" effort,¹⁴ which is not required for a study to be in substantial compliance with the

¹³ Dr. Vuskovich testified the equipment at both Appalachian Family Health Center and St. Charles Respiratory Care, where the April 11, 2014, and August 29, 2016 studies were obtained, is "very unusual" and "not standard." Employer's Exhibit 18 at 11, 16. He indicated this was so because the "aspect ratio" of the volume time tracings are "reversed." *Id.* Thus, he opined a poor effort on the tracing would look like a maximum effort. *Id.*

¹⁴ As the ALJ noted, Dr. Vuskovich also opined "it's likely [Claimant's] initial efforts are maximum efforts, but it's hard to tell from his volume time tracing due to the

regulations. Decision and Order at 12; *see Vanderpool*, 164 F.4th at 350 (cautioning against using Appendix B as an “unduly rigid checklist”); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883, 1-887 (1984). Moreover, contrary to Employer’s argument, the ALJ addressed Dr. Vuskovich’s explanation regarding the incorrect aspect ratio on the equipment used in this testing. Employer’s Brief at 7. He indicated that Dr. Vuskovich’s explanation regarding the aspect ratio being reversed does not render the study invalid and further found Dr. Vuskovich’s statement that Dr. Gaziano was likely “fooled” by the aspect ratio in rendering his opinion to be “pure speculation.” Decision and Order on Remand at 11 n.36, 12. As the ALJ provided adequate bases, supported by substantial evidence, to find Dr. Vuskovich’s validity opinion unpersuasive, we affirm them. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (reviewing authority is required to defer to the ALJ’s assessment of the physician’s credibility).

Further, contrary to Employer’s contention, Dr. Vuskovich’s opinion is not uncontradicted, as both Drs. Gaziano and Ajjarapu opined the testing was valid. Director’s Exhibits 12 at 13; 14. Insofar as the ALJ accorded more weight to the technician’s notations solely based on her “first-hand” observation, any such error is harmless given the ALJ’s finding that Dr. Vuskovich’s opinion was insufficient to outweigh those of the other two physicians who found the study to be valid, including the administering physician. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (“An ALJ may make a reasoned decision to give greater deference to the opinions of the physicians who actually administered the ventilatory studies, as opposed to those of physicians who merely reviewed the results”) (citation modified); *Brinkley*, 972 F.2d at 885; *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985) (An ALJ must “provide a rationale for preferring the opinion of a consulting physician over that of the administering *doctor*.”) (emphasis added). Thus, we affirm the ALJ’s finding that the August 29, 2016 pulmonary function study is valid for purposes of determining Claimant’s level of impairment. *See Banks*, 690 F.3d at 489; Decision and Order on Remand at 12.

As Employer does not otherwise challenge the ALJ’s weighing of the pulmonary function evidence, we affirm the ALJ’s finding that a preponderance of the evidence is qualifying and thus supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 12-13.

wrong aspect ratio.” Decision and Order on Remand at 12 (citing Employer’s Exhibit 18 at 13).

Medical Opinions

The ALJ next considered the opinions of Drs. Ajjarapu, Jarboe, and Tuteur. Decision and Order on Remand at 13-17. Dr. Ajjarapu opined that Claimant is totally disabled from a respiratory or pulmonary impairment while Drs. Jarboe and Tuteur opined that he is not. Director's Exhibits 12, 26; Employer's Exhibits 3-5, 11-13. The ALJ credited Dr. Ajjarapu's opinion as well-reasoned and documented, and consistent with her examination and the evidence she considered. Decision and Order on Remand at 14. He found Drs. Jarboe's and Tuteur's contrary opinions not well-reasoned. *Id.* at 15, 17. Weighing the evidence together, he found the medical opinion evidence supports a finding of total disability. *Id.* at 17.

Employer does not challenge the ALJ's discrediting of Drs. Jarboe's and Tuteur's medical opinions on the issue of total disability; thus, we affirm those findings. Decision and Order on Remand at 15, 17; *see Skrack*, 6 BLR at 1-711. Moreover, Employer does not challenge the ALJ's crediting of Dr. Ajjarapu's opinion beyond its arguments regarding the validity of the qualifying pulmonary function studies, which we have rejected. Employer's Brief at 8-9. Thus, we affirm the ALJ's finding that Dr. Ajjarapu's medical opinion is well-reasoned and supported and that the weight of the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 14, 17. As Employer raises no other arguments regarding the ALJ's weighing of the evidence together to find total disability, we further affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole¹⁵ and thus invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *Id.* at 17; 20 C.F.R. §718.305(b); *Rafferty*, 9 BLR at 1-232.

Finally, as Employer raises no arguments regarding the ALJ's findings that it failed to rebut the Section 411(c)(4) presumption, we affirm the ALJ's findings. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 21-30; 20 C.F.R. §718.305(d).

¹⁵ The ALJ also considered Claimant's treatment records, which recorded symptoms including dyspnea when walking short distances and shortness of breath when doing activities such as tying his shoes. Decision and Order on Remand at 17; Claimant's Exhibits 4, 5; Employer's Exhibits 7, 8. The ALJ found that while these symptoms could indicate disability, they do not address exertional limits; thus, he found this evidence neither supports nor refutes total disability. Decision and Order on Remand at 17.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge