



BRB No. 21-0062 BLA

AARON D. CREECH)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SAPPHIRE COAL COMPANY, c/o)	
UNITED COAL COMPANY, LLC)	
)	
and)	
)	DATE ISSUED: 02/28/2022
BRICKSTREET MUTUAL INSURANCE)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2018-BLA-06293) rendered on a claim filed on April 10, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-three years of coal mine employment, with at least fifteen years taking place in an underground mine, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore 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). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding Claimant established total disability and invoked the presumption.² Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds in support of the award of benefits.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in

¹ Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory 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 twenty-three years of coal mine employment with at least fifteen years in underground mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 4, 7, 35.

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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Constitutionality of the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer’s Brief at 4-5. Employer’s arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the pulmonary function studies and medical opinions.⁴ 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 17-18, 34. Employer argues the ALJ erred in finding Claimant established total

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 4.

⁴ The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 18-19.

disability based on the pulmonary function studies. Employer's Brief at 5-10. We disagree.

The ALJ considered four pulmonary function studies conducted on June 13, 2017, October 19, 2017, February 6, 2019, and February 28, 2019. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11-18; Director's Exhibits 14, 25; Claimant's Exhibit 1; Employer's Exhibit 1. He found all four studies produced qualifying⁵ values for total disability. Decision and Order at 11-12. He further found the June 13, 2017 and February 6, 2019 studies are valid, but the October 19, 2017 and February 28, 2019 studies are invalid. *Id.* at 12-18. Because the record contains two valid and qualifying studies, he found Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 18.

We reject Employer's assertion the ALJ erred in finding June 13, 2017 and February 6, 2019 qualifying studies valid. Employer's Brief at 5-10.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.⁶ 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 contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B. If a study does not precisely conform to the quality 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 quality standards, however, 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.

⁵ 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).

⁶ An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

§§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, however, 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).

June 13, 2017 Study

Drs. Gaziano, Vuskovich, Fino, and Forehand reviewed the June 13, 2017 study performed in anticipation of litigation and addressed its validity. Dr. Gaziano opined the “vents are acceptable.” Director’s Exhibits 18, 19. Dr. Vuskovich opined the “FVC-FEV1 results” are not acceptable. Director’s Exhibit 24 at 2. In his medical report, Dr. Fino set forth the American Thoracic Society (ATS) “reference values and interpretative strategies in pulmonary function testing.” Director’s Exhibit 25 at 5-7. He stated Claimant never made a valid effort on the June 13, 2017 study and thus it is invalid. Director’s Exhibit 25 at 9. After reviewing Dr. Fino’s opinion, Dr. Forehand opined the study is valid as it meets the ATS reliability criteria. Director’s Exhibit 22 at 3. In a second supplemental report, Dr. Fino acknowledged he reviewed Dr. Forehand’s response, but he reiterated that all the studies of record are invalid. Employer’s Exhibit 9.

Contrary to Employer’s argument, the ALJ permissibly discredited the opinions of Drs. Vuskovich and Fino because neither explained “what particular feature of the June 13, 2017 [study] failed to comply with the quality standards[,] led [them] to conclude that a valid effort was not made, [or] how the non-compliance rendered the results unreliable.” Decision and Order at 14; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (party alleging objective study is invalid must “specify in what way the study fails to conform to the quality standards” and “demonstrate how this defect or omission renders the study unreliable”).

Because Employer⁷ has not met its burden to establish the results of the June 13, 2017 study fails to substantially comply with the quality standards, we affirm the ALJ’s

⁷ The ALJ acknowledged that the June 13, 2017 study was accompanied by a “self-identified ‘Unconfirmed Report’” machine print-out that stated “ATS Pre-Criteria” and “ATS Post Criteria” not met due to less than three “acceptable efforts.” Decision and Order at 15, quoting Director’s Exhibit 14 at 10. The ALJ permissibly discredited this evidence because the “origin of these machine printed comments is not clear, whether they are computer generated comments or comments entered by the technician.” *Id.*; see *Jericol*

finding that this study is valid.⁸ *Keener*, 23 BLR at 1-237; *Vivian*, 7 BLR at 1-361; 20 C.F.R. §718.103(c).

February 6, 2019 Study

The ALJ found Claimant performed the February 6, 2019 study as part of his medical treatment with Dr. Alam and not in anticipation of litigation. Decision and Order at 16-17; Claimant’s Exhibit 1. Employer does not challenge this finding; thus we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Based on this finding, the ALJ correctly determined the quality standards are not applicable to the study. *Stowers*, 24 BLR at 1-92; Decision and Order at 16-17. However, he appropriately addressed whether the study is reliable.

The ALJ acknowledged that, in his supplemental report, Dr. Fino indicated this study is not reliable because Claimant did not give “maximum effort.” Decision and Order at 16-17, *quoting* Employer’s Exhibit 9. The ALJ permissibly found Dr. Fino’s opinion unpersuasive because he “did not specify what features of the February 6, 2019 [study] led him to conclude that Claimant did not give maximum effort or on what basis he concluded that the effort given was at not at least adequate to render it a valid study.” Decision and Order at 17; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

The ALJ further noted the study includes a note indicating “[g]ood patient effort [and] cooperation” and “what appears to be Dr. Alam’s initials/signature along with the comment ‘Severe Airflow Obstruction.’” Decision and Order at 16-17, *quoting* Claimant’s Exhibit 1. The ALJ found this study reliable because Dr. Alam reviewed it and “was satisfied that the results were sufficiently valid for treatment purposes” as he “interpreted those results as showing a severe airflow obstruction” that meets disability criteria.⁹

Mining, Inc. v. Napier, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

⁸ The ALJ also credited Dr. Forehand’s opinion with respect to the June 13, 2017 study. Decision and Order at 15-16. As we affirm the ALJ’s discrediting of Employer’s evidence, we need not address its arguments with respect to whether the ALJ erred in crediting Dr. Forehand’s opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984); Employer’s Brief at 6-8.

⁹ The ALJ also stated “the copy” of the February 6, 2019 study “provided to the Tribunal includes some tracings.” Decision and Order at 17. Employer argues the ALJ did not explain what “tracings” are included with the study. Employer’s Brief at 9. Because the ALJ did not find the study reliable based on the presence of tracings, we consider Employer’s allegation of error to be harmless. *Larioni*, 6 BLR at 1-1278.

Decision and Order at 17; 713-14. Other than citing Dr. Fino's opinion the ALJ found unpersuasive, Employer has not set forth how the ALJ erred in accepting the study as reliable. Employer's Brief at 9-10. Consequently, we affirm the ALJ's finding the February 6, 2019 study is reliable. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); Decision and Order at 17.

Thus we affirm the ALJ's finding the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 18.

The ALJ also weighed Dr. Forehand's opinion that Claimant is totally disabled and the opinions of Drs. Fino and Jarboe that he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 31-34. He found Dr. Forehand's opinion reasoned, documented, consistent with the weight of the pulmonary function studies, and supported by the treatment records. *Id.* He found the opinions of Drs. Fino and Jarboe unpersuasive and contrary to the weight of the objective testing. *Id.*

Employer raises no specific arguments regarding the medical opinion evidence other than its contention the pulmonary function studies do not establish total disability, which we have rejected. Employer's Brief at 10. We therefore affirm the ALJ's finding that the medical opinions establish total disability. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 33-34.

We further affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 27. We thus affirm the ALJ's finding Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1). As Employer has not challenged the ALJ's determination that it did not rebut the presumption, we affirm this finding and the award of benefits. *See Skrack*, 6 BLR at 1-711; Decision and Order at 35-47.

Moreover, Employer forfeited its argument that the ALJ violated its due process rights because the copy Claimant sent to Employer did not include any tracings. Employer's Brief at 9. As the Director notes, the copy of this study submitted to the ALJ was exchanged with Employer at the hearing. Director's Brief at 5; Hearing Transcript at 11. Employer failed to object to the admission of this evidence at the hearing or post-hearing. Similarly, Employer raised no arguments to the ALJ related to the reliability of the study other than the conclusory opinions of its experts that the studies are invalid and Claimant failed to provide maximal effort. Consequently, we will not consider those arguments. *See Joseph Forrester Trucking v. Director, OWCP [Davis]*, 937 F.3d 581, 591 (6th Cir. 2021); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 808 (4th Cir. 1998).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge