**U.S. Department of Labor**

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

BRB No. 23-0324 BLA

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| PHILLIP SCOTT | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| LONG BRANCH ENERGY | ) | |
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| and | ) | |
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| WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND | ) | DATE ISSUED: 06/05/2024 |
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| Employer/Carrier-Petitioners | ) | |
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| 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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2021-BLA-05112) rendered on a claim filed on December 10, 2019, 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 underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he 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 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. In a letter dated July 31, 2023, the Director, Office of Workers' Compensation Programs, declined to file a brief but in a footnote opposed Employer's argument that the ALJ erred in using the "later is better" rationale to weigh the arterial blood gas study evidence.

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).

[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); 20 C.F.R. §718.305.

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

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West

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

To invoke the Section 411(c)(4) presumption, a 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 his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work.[4] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[5] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the blood gas studies, medical opinions, and the evidence as a whole.[6] Decision and Order at 16-19; 20 C.F.R. §718.204(b)(2)(ii), (iv).

**Blood Gas Studies**

The ALJ considered three blood gas studies dated January 3, 2020, March 24, 2021, and October 21, 2021. Decision and Order at 10, 17-18. The January 3, 2020 study produced qualifying values at rest and non-qualifying values with exercise. Director's

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Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 14.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's usual coal mine work was as a roof bolter and shuttle car operator, and that it required heavy manual labor. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6.

[5] 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).

[6] The ALJ found Claimant did not establish total disability based on the pulmonary function studies and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 16-17.

Exhibit 20 at 25. The March 24, 2021 study produced non-qualifying values at rest and with exercise. Employer's Exhibit 1 at 13. The October 21, 2021 study produced qualifying values at rest and did not include an exercise study. Claimant's Exhibit 3 at 37. The ALJ gave the most weight to the qualifying October 21, 2021 study based on its recency and found that, when the three studies were considered together, the weight of the blood gas study evidence supports a finding of total disability. Decision and Order at 18.

Employer argues the ALJ erred in crediting the October 21, 2021 study on the basis of recency because "only six months" separate it from the March 24, 2021 study. Employer's Brief at 4-5. We disagree.

The ALJ observed that, although the March 24, 2021 study was non-qualifying, Dr. Zaldivar opined he "detected a minimal level of hypoxemia at rest, which was unchanged upon exercise." Decision and Order at 18; Employer's Exhibit 1 at 3. Next, the ALJ found the "moderately reduced PaO2" seen on the qualifying October 21, 2021 study demonstrates a decline in Claimant's condition since the March 24, 2021 study. Decision and Order at 18; Claimant's Exhibit 3 at 37. He thus concluded the October 21, 2021 study is the most probative of Claimant's current condition and supports a finding of total disability. Decision and Order at 18.

As the Director correctly points out, the Fourth Circuit explained in *Adkins* that, because pneumoconiosis is a latent and progressive disease, the "later is better" rationale has logical force only when the later result shows a deterioration in the miner's condition, but it did not set forth a specific amount of time that must elapse between results. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); Director's July 31, 2023 Letter at 1 n.1. Thus, contrary to Employer's contention, the ALJ permissibly relied on the October 21, 2021 study as more probative based on its indication of Claimant's current condition worsening. *See Adkins*, 958 F.2d 51-52; *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 12 n.14 (Nov. 17, 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"); Decision and Order at 18.

Additionally, to the extent Employer argues the ALJ erred by not giving more weight to the exercise blood gas studies than the resting blood gas studies, we disagree. Employer's Brief at 4-5. While the ALJ may give greater weight to exercise study results, he is not required to do so. 20 C.F.R. §718.105(a) (gas exchange impairment may manifest "either at rest or during exercise"); *see Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (it is within the ALJ's discretion to find a particular study more probative than another study). We consider Employer's argument to be a request to reweigh the evidence,

which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As it is supported by substantial evidence, we affirm the ALJ's finding the arterial blood gas study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii).

**Medical Opinions**

The ALJ next considered the medical opinions of Drs. Ajjarapu, Agarwal, and Zaldivar. Decision and Order at 10-12, 18-19. Drs. Ajjarapu and Agarwal opined Claimant is totally disabled based on his arterial blood gas study results and the exertional requirements of his usual coal mine employment. Director's Exhibit 20 at 7-8; Claimant's Exhibit 3 at 18. In contrast, Dr. Zaldivar opined Claimant is not totally disabled because his March 24, 2021 pulmonary function study and arterial blood gas study results are not qualifying. Employer's Exhibit 1 at 5.

The ALJ found the opinions of Drs. Ajjarapu and Agarwal are well-reasoned and documented because they are consistent with the weight of the qualifying blood gas study evidence and are based on "a clear understanding of Claimant's job duties." Decision and Order at 19. He found Dr. Zaldivar's opinion is not well-reasoned or documented. *Id.* Thus, he concluded the medical opinion evidence supports a finding of total disability. *Id.*

Employer argues the ALJ erred in discrediting Dr. Zaldivar's opinion. Employer's Brief at 7. We disagree.

Dr. Zaldivar noted Claimant's last job was working as a roof bolter and shuttle car operator where he was required to lift 150 to 200 pounds daily and carry as much as 200 pounds. Employer's Exhibit 1 at 2. He opined Claimant has mild restriction of forced vital capacity on pulmonary function testing, air trapping, mild diffusion abnormality, and mild resting hypoxemia. *Id.* at 2-5. As Dr. Zaldivar doubted the reliability of the qualifying January 3, 2020 blood gas study results, he based his opinion that Claimant is not disabled on the non-qualifying blood gas and pulmonary function study results he conducted during his exam on March 24, 2021. Employer's Exhibit 1 at 2-5.

The ALJ permissibly discredited Dr. Zaldivar's opinion because he acknowledged Claimant has multiple pulmonary impairments but did not adequately explain his opinion that Claimant would be able to perform heavy manual labor with those impairments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 19. Further, we discern no error in the ALJ's finding that Dr. Zaldivar's opinion is less credible because he did not have the opportunity to review the October 21, 2021 blood gas study which

contradicts the non-qualifying study he relied on, and which the ALJ found is most probative of Claimant's current condition.[7] *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 19.

Finally, Employer asserts the ALJ erred in crediting the opinions of Drs. Ajjarapu and Agarwal because they did not adequately explain why Claimant is disabled despite the non-qualifying objective testing. Employer's Brief at 6. We disagree.

Dr. Ajjarapu discussed the January 3, 2020 blood gas study conducted as part of her exam, and opined the resting study results showed severe pulmonary impairment and that the exercise study was "terminated due to extreme shortness of breath." Director's Exhibit 20 at 8. She noted the exertional requirements of Claimant's usual coal mine employment as a roof bolter, stating that his job was "very strenuous" and that he "had to lift [sixty pounds] often and sometimes even heavier objects." *Id.* "Based on the overall objective data," she concluded that "[Claimant] has [a] severe pulmonary impairment and he [does not] have the pulmonary capacity to do his previous coal mine employment." *Id.* Similarly, Dr. Agarwal discussed Claimant's job duties and opined his October 21, 2021 resting blood gas study result demonstrated he would be unable to perform the heavy manual labor his usual coal mine employment required. Claimant's Exhibit 3 at 15, 17-18.

Contrary to Employer's contention, the ALJ permissibly credited the opinions of Drs. Ajjarapu and Agarwal because they are based on the blood gas study results and an understanding of Claimant's exertional requirements.[8] *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 19.

[7] Employer also argues it was error to discredit Dr. Zaldivar for this reason and not discredit Drs. Ajjarapu and Agarwal for the same reason because they did not review "any other testing of record." Employer's Brief at 6-7. However, the same logic does not apply to the opinions of Drs. Ajjarapu and Agarwal as they are consistent with the weight of the blood gas study evidence. Director's Exhibit 20; Claimant's Exhibit 3.

[8] Employer asserts the ALJ overlooked an inconsistency in Dr. Ajjarapu's opinion because she stated in her narrative report that the pulmonary function study she conducted during her exam demonstrated a severe impairment, but on the study itself she noted only a moderate impairment. Employer's Brief at 6; Director's Exhibit 20 at 7, 25. Because Dr. Ajjarapu did not rely on the pulmonary function study results in opining Claimant is totally disabled, we need not address Employer's argument. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Moreover, as the opinions of Drs. Ajjarapu and Agarwal that Claimant is totally disabled are consistent with the ALJ's finding the blood gas study evidence supports a finding of total disability, their opinions do not constitute contrary probative evidence at 20 C.F.R. §718.204(b)(2). Director's Exhibit 20; Claimant's Exhibit 3. Dr. Zaldivar's opinion is insufficient to outweigh the qualifying blood gas study evidence because he based his opinion on the March 24, 2021 blood gas and pulmonary function studies without reviewing the qualifying October 21, 2021 blood gas study, which the ALJ found is most probative of Claimant's current condition and, as discussed above, establishes total disability at 20 C.F.R. §718.204(b)(2)(ii). As there is no contrary probative evidence to outweigh the qualifying blood gas study evidence, Claimant has established total disability at 20 C.F.R. §718.204(b)(2)(ii) regardless of the weight afforded to the opinions of Drs. Ajjarapu and Agarwal.

Because it is supported by substantial evidence, we affirm the ALJ's finding the medical opinion evidence supports a finding of total disability and that the record as a whole establishes total disability. *Rafferty*, 9 BLR at 1-232; 20 C.F.R. §718.204(b)(2); Decision and Order at 19. Thus we affirm the ALJ's finding Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 19. Finally, as Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it and the award of benefits. 20 C.F.R. §718.305(d)(1); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge