**U.S. Department of Labor**

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

BRB No. 21-0408 BLA

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| JAMES HUNT | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| LINN BRANCH COAL INCORPORATED, formerly known as DRY FORK ENERGY INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | DATE ISSUED: 5/31/2022 |
| A/G CASUALTY COMPANY, c/o CHARTIS | ) | |
| | ) | |
| 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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2015-BLA-05797) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established nineteen years of underground coal mine employment 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, 30 U.S.C. §921(c)(4) (2018).[1] Finally, he 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.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 (1965).

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. 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

[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); *see* 20 C.F.R. §718.305.

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

[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); Decision and Order at 2; Director's Exhibits 3, 7; Hearing Tr. at 8-9.

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 pulmonary function studies, medical opinions, and evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 19, 21. Employer argues the ALJ erred in weighing the pulmonary function study and medical opinion evidence. Employer's Brief at 10-16 (unpaginated). We disagree.

**Pulmonary Function Studies**

The ALJ weighed seven pulmonary function studies dated August 11, 2009, January 25, 2013, April 23, 2013, September 10, 2013, September 26, 2014, September 30, 2016, and March 10, 2017. Decision and Order at 7-8, 19; Director's Exhibits 10-12; Claimant's Exhibits 6, 7, 27; Employer's Exhibits 1, 2. He found the August 11, 2009, January 25, 2013, April 23, 2013, September 10, 2013, September 26, 2014, and March 10, 2017 studies produced qualifying[5] results for total disability before and, if conducted as part of the test, after the administration of bronchodilators. Decision and Order at 7-8, 19. Conversely, he found the September 30, 2016 study produced non-qualifying results. *Id.* Because six of the seven pulmonary function studies produced qualifying values, he found the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 19.

Employer argues the ALJ erred in weighing the March 10, 2017 pulmonary function study. Employer's Brief at 11-14 (unpaginated). Specifically, Employer asserts the ALJ should have found this study unreliable. *Id.* We disagree.

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

[5] A "qualifying" pulmonary function study or blood gas study yields values 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 values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

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. §§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 conducted as part of a miner's treatment). An ALJ must nevertheless determine if a miner's treatment 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).

Claimant performed the March 10, 2017 study as part of his medical treatment at Pikeville Medical Center. Claimant's Exhibit 27; *see* Decision and Order at 16; Employer's Exhibit 8 at 6-7; Claimant's Evidence Form. Thus the quality standards are not applicable to this study. *Stowers*, 24 BLR at 1-92.

The ALJ evaluated Dr. Rosenberg's opinion with respect to the March 10, 2017 study's reliability. Decision and Order at 20. Dr. Rosenberg opined he could not "validate" the study based on the Department of Labor quality standards because it included only one trial and one tracing. Employer's Exhibit 8 at 8-9, 17; *see* Employer's Exhibit 6. The ALJ found Dr. Rosenberg only discussed the quality standards and did not "suggest that the study was unreliable" based on "poor effort or performance, or other circumstances that affected the results of the study." Decision and Order at 20. As the quality standards are not applicable to this treatment study and the ALJ permissibly found Dr. Rosenberg did

[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).

not adequately explain why the study is unreliable, the ALJ rationally found his opinion insufficient to invalidate it. *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); *Stowers*, 24 BLR at 1-92; Decision and Order at 20.

In addition, the ALJ noted the technician who conducted the March 10, 2017 study stated Claimant demonstrated good effort and understanding. Decision and Order at 20; *see* Claimant's Exhibit 27 at 3. Based on the foregoing, he permissibly found the March 10, 2017 study reliable. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Stowers*, 24 BLR at 1-92; *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); Decision and Order at 20.

Employer also argues the ALJ should have assigned controlling weight to the September 30, 2016 non-qualifying study because it is the "most recent, valid, and thus most probative evidence" of Claimant's pulmonary impairment. Employer's Brief at 13-14 (unpaginated). At the outset, we note the March 10, 2017 qualifying study is the most recent study of record, and we have affirmed the ALJ's finding that it is reliable, as discussed above. Thus we first reject Employer's argument on this basis.

Further, the ALJ was not required to credit the September 30, 2016 non-qualifying study over the prior qualifying studies. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held it is irrational to credit evidence solely because of recency where the miner's condition improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the court reasoned a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. Because the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id.* But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply" because one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id.* Thus, the ALJ correctly did not find the September 30, 2016 study more probative based only on recency where the miner's condition improved. *See Woodward*, 991 F.2d at 319-20; *Adkins*, 958 F.2d at 51-52; Decision and Order at 7-8, 19. We therefore reject Employer's argument that the ALJ should have found the September 30, 2016 non-qualifying study more probative solely because it was taken more recently than the other qualifying studies.

Having found the March 10, 2017 study qualitatively valid and the majority of studies of record qualifying, the ALJ permissibly found the pulmonary function study

evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); *Woodward*, 991 F.2d at 319-20; Decision and Order at 19.

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on a preponderance of the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 19.

**Medical Opinions**

The ALJ considered the medical opinions of Drs. Baker, Kraman, Rasmussen, Rosenberg, and Tuteur. Decision and Order at 8-15, 19-21; Director's Exhibits 10, 11; Claimant's Exhibits 11-13; Employer's Exhibits 1, 6, 8. He found Drs. Kraman, Rasmussen, and Tuteur opined Claimant is totally disabled by a respiratory or pulmonary impairment and their opinions are credible. Decision and Order at 19-21. Employer does not challenge this finding; thus we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ also considered the contrary opinions of Drs. Baker and Rosenberg. Employer's Exhibits 1, 6, 8. Both doctors opined Claimant is not totally disabled because the September 30, 2016 pulmonary function study produced non-qualifying results. *Id*. However, both doctors conceded the study was not completely normal, as Dr. Baker opined it evidences a mild obstructive impairment and Dr. Rosenberg opined it reveals a mild FEV1 reduction. *Id*.

A physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005). Contrary to Employer's argument, the ALJ permissibly discredited the opinions of Drs. Baker and Rosenberg because they did not adequately explain why Claimant's mild impairment would or would not prevent him from performing his usual coal mine employment, which required heavy labor.[7] *Napier*, 301 F.3d at 713-14; *Cornett*, 227 F.3d at 587; Decision and Order at 19-21.

[7] Dr. Baker opined Claimant would be able to return to his previous coal mine work but did not explain his opinion beyond the fact that the September 30, 2016 study did not have qualifying values. Employer's Exhibit 1. Dr. Rosenberg also based his opinion on the fact that the study did not have qualifying values, while elaborating that if valid, the March 10, 2017 test had qualifying values and "if there are validated tests after [September

The ALJ also permissibly discredited both doctors' opinions because they did not address Claimant's use of supplemental oxygen or the other qualifying pulmonary function studies when determining whether Claimant is totally disabled. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 19-21. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) based on the medical opinion evidence.

We further affirm the ALJ's determination that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 19, 21. Thus, we affirm his determination that 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 21. Additionally, because Employer does not challenge the ALJ's finding it failed to rebut the Section 411(c)(4) presumption, we affirm that determination. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27-28. We therefore affirm the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

2016] that show disability, consistent with disability, then he's disabled." Employer's Exhibit 8 at 13-16.