

U.S. Department of Labor

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



BRB No. 21-0548 BLA

ROGER MATNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
XMV, INCORPORATED	)	DATE ISSUED: 10/31/2022
	)	
Employer-Petitioner	)	
	)	
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 Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

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

T. Jonathan Cook (Cipriani & Werner, PC), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2020-BLA-05092) rendered on a miner's subsequent claim

filed on November 27, 2018,<sup>1</sup> pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 21.09 years of qualifying coal mine employment and found the evidence established he has a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement,<sup>2</sup> 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.<sup>3</sup> 30 U.S.C. §921(c)(4) (2018). The ALJ 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 therefore erred in invoking the Section 411(c)(4) presumption.<sup>4</sup> Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), 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

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<sup>1</sup> On March 25, 2017, the district director finally denied Claimant's prior claim, filed on April 15, 2016, for failure to establish any element of entitlement. Director's Exhibit 1.

<sup>2</sup> Where a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must also deny the subsequent claim unless she finds that "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)(1); *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 Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

<sup>3</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is 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. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

<sup>4</sup> We affirm, as unchallenged on appeal, the ALJ's determination that Claimant had 21.09 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

accordance with applicable law.<sup>5</sup> 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based upon 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 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). Employer contends the ALJ erred in finding the pulmonary function studies, medical opinions, and the evidence as a whole establish total disability. Employer’s Brief at 17-27.

### **Pulmonary Function Study Evidence**

The ALJ considered five pulmonary function studies conducted on January 24, 2019, October 16, 2019, March 18, 2020, November 12, 2020, and December 16, 2020, all of which were qualifying for total disability.<sup>6</sup> Decision and Order at 12; Director’s Exhibit 11; Claimant’s Exhibits 1, 2; Employer’s Exhibits 1, 5. She determined the October 16, 2019 and November 12, 2020 pulmonary function studies were invalid and gave them no probative weight, but determined the remaining studies were valid and reliable. *Id.* at 13-14. Consequently, she determined the pulmonary function studies support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 15.

Employer argues the ALJ erred in finding the January 24, 2019, March 18, 2020, and December 16, 2020 pulmonary function studies valid. Employer’s Brief at 18-22. Specifically, Employer contends that while Drs. Fino and Rosenberg each reviewed the tracings for the tests, Dr. Nader did not. *Id.* Thus, Employer argues the ALJ erred in

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<sup>5</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 41.

<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).

crediting Dr. Nader's opinion over the opinions of Drs. Fino and Rosenberg. *Id.* We disagree.

When addressing a pulmonary function study conducted in anticipation of litigation, an ALJ must determine whether it is in substantial compliance with the regulatory quality standards.<sup>7</sup> 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). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see also* 20 C.F.R. Part 718, App. B; *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 suspect or unreliable).

Initially, contrary to Employer's arguments, neither Dr. Rosenberg nor Dr. Fino reviewed the December 16, 2020 qualifying pulmonary function study or opined it was invalid.<sup>8</sup> Employer's Brief at 22; Employer's Exhibits 1, 5. Rather, Dr. Nader, who conducted the December 16, 2020 study, opined it met the American Thoracic Society's (ATS's) criteria for acceptability and reproducibility. Claimant's Exhibit 2 at 6. The administering technician also noted Claimant "put forth good effort, cooperation and understanding." *Id.* Because "no other doctor offered an opinion regarding this test," the ALJ permissibly found the December 16, 2020 study valid and reliable. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 14. Consequently, any error the ALJ made in her determination that the January 24, 2019 and March 18, 2020 studies are valid would be harmless. *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).

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<sup>7</sup> An ALJ must consider a reviewing physician's opinion regarding a claimant'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).

<sup>8</sup> Dr. Fino opined the January 24, 2019 and October 16, 2019 pulmonary function studies were invalid, Employer's Exhibit 1, while Dr. Rosenberg opined the January 24, 2019, October 16, 2019, March 18, 2020, and November 12, 2020 pulmonary function studies were invalid. Employer's Exhibit 5.

Nor are we persuaded that the ALJ erred in her consideration of the January 24, 2019 and March 18, 2020 studies. While the ALJ may credit a physician who reviewed the tracings over the physician who conducted the study, she is not required to do so. See *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984).

In this case, Dr. Nader conducted the January 24, 2019 pulmonary function study as part of the Department of Labor (DOL) sponsored complete pulmonary evaluation of Claimant. Director's Exhibit 11. Dr. Nader noted good effort and understanding, and opined the study met ATS criteria for acceptability and reproducibility. *Id.* at 16, 24. The technician who administered the study noted good effort, cooperation, and understanding.<sup>9</sup> *Id.* at 25. Dr. Gaziano subsequently reviewed the study and opined it was acceptable. Director's Exhibit 13. Conversely, Dr. Fino reviewed the study and opined it was invalid. Employer's Exhibit 1 at 9. Dr. Rosenberg opined that it was "not clear based on the testing that [Claimant] inhaled maximally in order to achieve maximal exhalation" and there were no inspiratory curves on the flow-volume curve. Employer's Exhibit 2 at 2. However, he also opined that the "expiratory efforts appeared to be performed with complete efforts." *Id.*

Contrary to Employer's arguments, the ALJ accurately found Dr. Fino offered no basis for his conclusion that the January 24, 2019 study is invalid,<sup>10</sup> and therefore rationally discredited his opinion as conclusory. See *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 441; Decision and Order at 13; Employer's Brief at 22; Employer's Exhibit 1 at 9. The ALJ further permissibly found Dr. Rosenberg's opinion that the study was invalid due to

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<sup>9</sup> The test also included a checklist indicating the technician recorded the results of flow versus volume, volume versus time, the forced expiratory volume in one second, the forced vital capacity, and the FEV1/FVC ratio. Director's Exhibit 11 at 32; Decision and Order at 19. The checklist also reported the patient was able to understand instructions, follow directions, and cooperated, and that three tracings of the flow versus volume and volume versus time were included. *Id.*

<sup>10</sup> Employer states Dr. Fino advised that the January 24, 2019 pulmonary function study was invalid due to premature termination to exhalation, and the lack of reproducibility and abrupt onset to exhalation. Employer's Brief at 19, *citing* Employer's Exhibit 1 at 6. However, this portion of his analysis was confined to the October 16, 2019 pulmonary function study conducted as part of his examination. Employer's Exhibit 1 at 6. Subsequently, after reviewing additional evidence, Dr. Fino summarily concluded that "[t]he spirometry performed at the time of my evaluation was invalid, as was the spirometry from the department of labor examination dated [January 24, 2019]." *Id.* at 9.

inadequate effort unpersuasive in light of his concession that the expiratory efforts appear complete and the contrary opinions of the physician who conducted the test, the technician, and Dr. Gaziano. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 13; Employer’s Exhibit 5 at 2. Because the ALJ considered all of the relevant evidence and set forth her basis for crediting the opinions of Drs. Nader and Gaziano over the contrary opinions of Drs. Fino and Rosenberg, we reject Employer’s argument that the ALJ should have found the opinions of its experts more credible. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (ALJ may rely on the opinion of the physician who administered a ventilatory study over those who reviewed the results); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-149 (1990) (ALJ must provide a rationale to credit consultant’s opinion over physician who observed the test).

Similarly, Dr. Nader conducted the March 18, 2020 pulmonary function study and opined the study met ATS criteria for acceptability and reproducibility. Claimant’s Exhibit 1 at 6. The administering technician noted Claimant “put forth good effort, cooperation, understanding.” *Id.* at 12. While Dr. Rosenberg opined none of the pulmonary function studies were performed with adequate effort, he also opined that Claimant performed with good expiratory effort on the March 18, 2020 study but “there was no inspiratory portion to the flow-volume curves ensuring full inspiration in association with expiration to guarantee that the exhalation was maximal.” Employer’s Exhibit 5 at 3. Noting again that Dr. Nader was present for the March 18, 2020 study, the ALJ found his opinion more persuasive than Dr. Rosenberg’s opinion in light of his statement that he could not determine if the studies were valid and his concession that it appears Claimant’s expiratory efforts were performed with good effort.<sup>11</sup> Decision and Order at 14. Again, because the ALJ considered all of the relevant evidence and set forth her reasons for crediting Dr. Nader’s opinion over Dr. Rosenberg’s, we reject Employer’s argument that the ALJ erred in not crediting Dr. Rosenberg’s opinion because he reviewed the tracings. *Anderson*, 12 BLR at 1-113; *Hunt*, 124 F.3d at 744; *Brinkley*, 14 BLR at 1-149.

Because the ALJ permissibly found the January 24, 2019, March 18, 2020 and December 16, 2020 qualifying pulmonary function studies valid, we affirm the ALJ’s finding that the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 14-15.

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<sup>11</sup> Contrary to Employer’s arguments, the ALJ accurately found Dr. Fino did not consider the validity of this test. Decision and Order at 13; Employer’s Brief at 22.

## Medical Opinions

The ALJ considered the medical opinions of Drs. Nader, Fino and Rosenberg. Decision and Order at 16-21. Dr. Nader opined Claimant has a totally disabling respiratory impairment that would render him unable to perform the exertional requirements of his usual coal mine employment.<sup>12</sup> Director's Exhibit 11 at 17; Claimant's Exhibit 1 at 6; Claimant's Exhibit 2 at 7. Dr. Fino opined that Claimant has no respiratory impairment, citing his opinion that there are no valid pulmonary function studies and the arterial blood gas studies revealed only mild hypoxemia. Employer's Exhibit 1 at 9. Dr. Rosenberg also opined that all of the pulmonary function studies showed inadequate effort, but still acknowledged Claimant "is not definitely disabled from a pulmonary perspective" and "very well may have restriction." Employer's Exhibit 5 at 5.

The ALJ found Dr. Nader's opinion consistent, well-documented and reasoned, and accorded it great weight. Decision and Order at 18. Conversely, she found Dr. Fino's opinion "not well-documented or fully reasoned and accord[ed] it substantially reduced weight." *Id.* at 19. She further found Dr. Rosenberg's opinion equivocal and gave it "limited probative weight." *Id.* at 20. Consequently, the ALJ found the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21.

Employer argues the ALJ erred in her weighing of the medical opinion evidence. Employer's Brief at 24-27. We disagree.

Contrary to Employer's arguments, as discussed above, Dr. Nader relied on valid and qualifying pulmonary function studies dated January 24, 2019, March 18, 2020, and December 16, 2020, to find Claimant totally disabled. Decision and Order at 14-15; Directors' Exhibit 11; Claimant's Exhibit 1, 2. Nor did the non-qualifying blood gas studies contradict Dr. Nader's opinion, as he considered the results of these tests when offering his opinion, and blood gas studies measure a different form of impairment and do not constitute probative evidence outweighing qualifying pulmonary functions studies. *See Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Employer's Brief at 25; Directors' Exhibit 11; Claimant's Exhibit 1, 2. We further reject Employer's argument that Dr. Nader relied on symptoms that are unsupported by Claimant's treatment records, as it does not challenge the ALJ's findings that these records reflect treatment for

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<sup>12</sup> We affirm, as unchallenged on appeal, the ALJ's determination that Claimant's usual coal mine employment was as a "working foreman" and required "substantial lifting and heavy exertion." *Skrack*, 6 BLR at 1-711; Decision and Order at 9.

non-pulmonary conditions and neither support nor contradict a finding of total disability.<sup>13</sup> *Skrack*, 6 BLR at 1-711; Decision and Order at 26. Rather, she permissibly found Dr. Nader provided a well-reasoned, documented, and consistent opinion that was supported by his understanding of the exertional requirements of Claimant's usual coal mine employment, his smoking and medical histories, symptoms, valid objective testing, and physical examinations on three occasions. See *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17 (4th Cir. 2012); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Nader's opinion is well-documented and reasoned. Decision and Order at 18.

Nor is Employer's argument that the ALJ erred in discrediting Drs. Fino's and Rosenberg's opinions persuasive. Employer's Brief at 25-27.

Dr. Fino opined Claimant is not totally disabled as his January 24, 2019 and October 16, 2019 pulmonary function studies were invalid and his arterial blood gas studies demonstrated only mild hypoxemia. Employer's Exhibit 1 at 9. The ALJ found Dr. Fino's opinion not well-reasoned or documented, as it was based on his conclusion that there are no valid pulmonary function studies in the record, contrary to the ALJ's findings. See *Ferguson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 19. Employer does not challenge this finding; therefore it is affirmed. *Skrack*, 6 BLR at 1-711.

Dr. Rosenberg opined Claimant is "not definitely disabled from a pulmonary perspective" and he "very well may have restriction" unrelated to coal dust exposure. Employer's Exhibit 5 at 5. He further opined Claimant's pulmonary function studies require further examination. *Id.* Because Dr. Rosenberg left open the possibility that Claimant may have a totally disabling pulmonary impairment and stated he needed additional analysis of the pulmonary function studies, the ALJ permissibly accorded his opinion limited probative weight as it was equivocal, a finding Employer has not challenged. *Underwood*, 105 F.3d at 949; *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Skrack*, 6 BLR at 1-711; Decision and Order at 21.

Because it is supported by substantial evidence, we affirm the ALJ's determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21. We further affirm her finding that the

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<sup>13</sup> Drs. Dinkar Patel and Haresh Patel treated Claimant at the Tri State Clinic multiple times from September 20, 2012, to December 17, 2019. Employer's Exhibit 6 at 2.



evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 26. Consequently, we affirm the ALJ's determination that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). As Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 34.

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

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge