



BRB No. 21-0143 BLA

STEPHANIE AROTIN (o/b/o )  
DONALD C. LOWMASTER, deceased) )

Claimant-Petitioner )

v. )

TANOMA MINING COMPANY, )  
INCORPORATED )

and )

AMERICAN MINING INSURANCE )  
COMPANY )

DATE ISSUED: 4/27/2022

Employer/Carrier- )  
Respondents )

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

Party-in-Interest )

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta,  
Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long),  
Ebensburg, Pennsylvania, for Claimant.

Sean B. Epstein (Thomas, Thomas & Hafer, LLP), Pittsburgh, Pennsylvania,  
for Employer and its Carrier.

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

PER CURIAM:

The Miner<sup>1</sup> appealed Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2019-BLA-05756) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on February 12, 2018.<sup>2</sup>

The ALJ credited the Miner with 28.15 years of underground coal mine employment, but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore concluded he could not invoke the 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), or establish entitlement under 20 C.F.R. Part 718. She therefore denied benefits.

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<sup>1</sup> On December 20, 2021, the Miner's counsel filed a letter informing the Benefits Review Board that he died on December 14, 2021, his wife died on December 10, 2021, and his children are pursuing the miner's claim on his behalf. Counsel requested all correspondence be forwarded to Stephanie Arotin. By Order dated January 14, 2022, the Board updated the caption to reflect the Miner is now deceased and advised the parties that service of all future correspondence will be made on Ms. Arotin. *Lowmaster v. Tanoma Mining Co., Inc.*, BRB No. 21-0143 BLA (Jan. 14, 2022) (unpub.) (Order). As Ms. Arotin is pursuing this claim on behalf of the Miner's children, she is now considered the Claimant in this case.

<sup>2</sup> The Miner withdrew his initial claim, filed on April 16, 2013. Director's Exhibit 35. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

<sup>3</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had 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.

On appeal, Claimant argues the ALJ erred in finding the evidence insufficient to establish total disability.<sup>4</sup> Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not 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.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and 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, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work.<sup>6</sup> 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 the pulmonary function studies, arterial blood gas studies, and medical opinions do not establish total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and

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<sup>4</sup> We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had 28.15 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7; Hearing Tr. at 32.

<sup>6</sup> The ALJ found the Miner's usual coal mine employment was working as a section foreman, which required heavy labor. Decision and Order at 6. As this finding is not challenged, we affirm it. *See Skrack*, 6 BLR at 1-711.

Order at 10-11, 19. Therefore, she found Claimant did not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 19.

Claimant argues the ALJ erred in weighing the medical opinions.<sup>7</sup> Claimant's Brief at 6-8. Claimant's argument has merit, in part.

The ALJ considered the opinions of Drs. Pickerill, Basheda, and Fino. Decision and Order at 17-19. She found Drs. Pickerill and Basheda opined the Miner was totally disabled by a respiratory or pulmonary impairment, whereas Dr. Fino opined he was not. *Id.* The ALJ assigned "full weight" to Dr. Fino's opinion because she found it is reasoned and documented.<sup>8</sup> *Id.* at 18-19. She assigned "little weight" to Dr. Basheda's opinion because he relied on pulmonary function testing that she found to be invalid.<sup>9</sup> *Id.* at 18. Finally, she found Dr. Pickerill's opinion unpersuasive and entitled to "little weight." *Id.* at 17-18.

Claimant argues the ALJ erred in discrediting Dr. Basheda's opinion. Claimant's Brief at 7. Dr. Basheda opined the Miner had a totally disabling severe pulmonary impairment based, in part, on a November 1, 2018 pulmonary function study. Employer's Exhibit 1 at 7-8, 19. He determined the study is valid, explaining "[t]he pre-bronchodilator spirometry [showed] the better effort" than post-bronchodilator testing. Employer's Exhibit 1 at 7. He noted "[t]here was concavity of the expiratory loop" and "[t]he volume-time curve demonstrated a forced expiratory time of at least [eight] seconds with plateauing." *Id.* But he further stated that "[t]here was no acceptable reproducibility with a [pre-bronchodilator] FEV1 and FVC." *Id.* In contrast, Dr. Fino assessed the study as invalid due to "submaximal effort" from the Miner. Employer's Exhibit 2 at 11. He testified the Miner "did not give a maximal exhalation" and "stopped breathing air out of his lungs after about one and one-half to two seconds." Employer's Exhibit 3 at 17.

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<sup>7</sup> We affirm, as unchallenged, the ALJ's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 5, 9-11.

<sup>8</sup> Although the ALJ found Dr. Fino's opinion entitled to "full weight," she nonetheless assigned it "somewhat reduced" weight because he considered evidence from a prior withdrawn claim that was not admitted in this claim. Decision and Order at 18-19. She still found his opinion outweighed the opinions of Drs. Basheda and Pickerill. *Id.*

<sup>9</sup> The ALJ also assigned "reduced weight" to Dr. Basheda's opinion because he also considered evidence outside of the record. Decision and Order at 18.

The ALJ found Dr. Fino's opinion credible and sufficient to invalidate the study because he "pointed to evidence in support of his finding and explained why the [November 1, 2018 pulmonary function study]<sup>10</sup> is invalid." Decision and Order at 10. She discredited Dr. Basheda's opinion because he provided "little explanation" to support his opinion that the study is valid. *Id.* Thus the ALJ found the November 1, 2018 study invalid. See *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). Having found the November 1, 2018 study invalid, the ALJ discredited Dr. Basheda's opinion because he relied on the invalid study. See *Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18.

Claimant generally argues Dr. Fino's opinion with respect to the validity of the November 1, 2018 study is conclusory and the ALJ erred in discrediting Dr. Basheda's opinion. Claimant's Brief at 10. Claimant's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus we affirm the ALJ's rejection of Dr. Basheda's opinion.

Claimant next argues the ALJ erred in finding Dr. Fino's opinion is contrary to Drs. Pickerill's and Basheda's opinions, asserting his opinion supports a finding of total disability. Claimant's Brief at 7-8. This argument has merit.

In his initial report, Dr. Fino opined the Miner had no respiratory impairment because the November 1, 2018 and June 25, 2020 pulmonary function studies are invalid. Employer's Exhibit 2. In his deposition, however, Dr. Fino conceded Dr. Pickerill's May 2, 2018 pulmonary function study is valid. Employer's Exhibit 3 at 17-18. He testified this study demonstrates "low FVC and [] low FEV1" values consistent with "a restrictive-type abnormality." *Id.* at 17-18, 21. Because the June 25, 2020 lung volume testing was normal,<sup>11</sup> Dr. Fino concluded the restrictive impairment was not caused by a "disease of the lungs causing disability," but rather was an impairment caused by the "secondary effect on the lungs by the heart." *Id.* at 21, 23-24. He specifically explained the Miner's medical

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<sup>10</sup> The ALJ listed the date of the pulmonary function study as November 18, 2018. Decision and Order at 10. This appears to be a typographical error based on the context of the language in her decision. *Id.* She previously referred to the November 1, 2018 pulmonary function study twice in the same paragraph. *Id.*

<sup>11</sup> As Dr. Pickerill's May 2, 2018 pulmonary function study did not include lung volume testing, Dr. Fino relied on the lung volume testing from the June 25, 2020 study performed at his examination of the Miner. Decision and Order at 21.

records are consistent with pleural effusions and heart failure, both of which can restrict the expansion of the lungs. *Id.* at 19, 21, 24. During cross-examination, he was asked if Dr. Pickerill's examination of the Miner is consistent with "abnormal arterial blood gas [testing], abnormal oxygen saturation test[ing,] and abnormal pulmonary function test[ing]," such that the Miner was "disabled from a pulmonary standpoint," and Dr. Fino responded "the answer would be yes to all of those." *Id.* at 30-31. He opined the abnormal blood gas testing would also be due to a "heart problem." *Id.* at 31-32.

The ALJ found Dr. Fino's opinion contrary to the opinions of Drs. Basheda and Pickerill. Decision and Order at 18-19. She specifically determined "Dr. Fino considered the objective test results and [the Miner's] medical and work histories," and he persuasively "explained how these factors support his finding that [the Miner did] not have a totally disabling pulmonary or respiratory disability." *Id.* at 19.

The ALJ mischaracterized Dr. Fino's opinion when finding the doctor excluded total disability. Decision and Order at 19. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). Dr. Fino opined the Miner was totally disabled based on a restrictive lung impairment evidenced by reduced FVC and FEV values on pulmonary function testing and abnormal arterial blood gas testing, but he attributed those reduced values to the Miner's heart condition and pleural effusions. Employer's Exhibits 2, 3. Thus Dr. Fino's opinion constitutes a diagnosis of total disability and the ALJ erred in finding otherwise.

We also agree with Claimant's argument that the ALJ erred in discrediting Dr. Pickerill's opinion. Claimant's Brief at 6.

Dr. Pickerill examined the Miner and conducted objective testing on May 2, 2018, including a pulmonary function study and an arterial blood gas study. Director's Exhibit 13. He noted both studies were "abnormal": the pulmonary function study showed "combined moderate restrictive [and] obstructive defects," while the arterial blood gas study showed a "decreased pH of 58 at rest." *Id.* He also accurately recognized the Miner's last coal mine job was working as a section foreman. *Id.* Based on the Miner's abnormal objective test results and his job as a section foreman, Dr. Pickerill opined the Miner was totally disabled from a pulmonary impairment. *Id.*

The ALJ first discredited Dr. Pickerill's opinion because she found the pulmonary function testing that he relied on did not qualify for total disability.<sup>12</sup> Decision and Order at 17. This was error. Contrary to the ALJ's finding, the regulations specifically provide that despite non-qualifying pulmonary function studies or blood gas studies, total disability may be established if a physician, exercising reasoned medical judgment based on medically acceptable diagnostic techniques, concludes a miner's respiratory or pulmonary condition prevented him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Thus, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. See *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *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"). Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. See *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); see also *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

The ALJ also discredited Dr. Pickerill's opinion because he did not explain how the non-qualifying pulmonary function testing supports a finding of total disability, noting that Dr. Pickerill "did not explain why [the testing] was abnormal." Decision and Order at 17. This finding is also erroneous.

Contrary to the ALJ's finding, Dr. Pickerill supported his opinion that the May 2, 2018 pulmonary function study was "abnormal" by citing to the results of the study. Director's Exhibit 13. He recognized it produced an FEV1 value of 1.40 and an FVC value of 1.93 before bronchodilation, and an FEV1 value of 1.42 and an FVC value of 1.93 after bronchodilation. *Id.* In addition, he noted the Miner's cooperation and understanding were "good," the "[f]low volume tracings confirm the obstructive defects," and there was "[d]ecreased oxygen saturation of [nine-two percent] on room air." *Id.* In light of these results, Dr. Pickerill opined the study demonstrated the presence of "combined moderate restrictive [and] obstructive defects." *Id.* The interpretation of medical evidence is for medical experts, not the ALJ. See *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Thus the ALJ further erred by failing to consider Dr. Pickerill's basis for interpreting the pulmonary function testing as "abnormal." Director's Exhibit 13; see *Sea "B" Mining Co.*

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<sup>12</sup> A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. "Non-qualifying" studies yield results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

*v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (if the ALJ misconstrues relevant evidence, the case must be remanded for reevaluation of the issue to which the evidence is relevant); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Finally, the ALJ acknowledged Dr. Pickerill based his opinion, in part, on a May 2, 2018 arterial blood gas study that is qualifying for total disability. Decision and Order at 18. She found the doctor “did not explain the relevance of this or how it supported his finding of total disability.” *Id.* This finding is also erroneous. An arterial blood gas study that reflects the qualifying values listed in Appendix C of Part 718 supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii). Moreover, a physician can render a reasoned and documented opinion regarding total disability based on his own examination of a miner, objective test results, or both. 20 C.F.R. §718.204(b)(2)(iv); *see Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Thus the ALJ erred in requiring Dr. Pickerill to further explain why a qualifying arterial blood gas study supports his opinion that the Miner was totally disabled when the regulations provide that a qualifying study supports a finding of total disability. For these reasons, we vacate the ALJ's finding that Dr. Pickerill's opinion is inadequately explained.

Based on the foregoing errors, we vacate the ALJ's conclusion that Claimant failed to establish total disability based on the medical opinion evidence and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); *see Rafferty*, 9 BLR at 1-232. Because we vacate the ALJ's finding that Claimant failed to establish total disability, we also vacate her finding that Claimant failed to invoke the Section 411(c)(4) presumption. Consequently, we also vacate the ALJ's denial of benefits and remand the case for further consideration.

On remand, the ALJ must reconsider whether the opinions of Drs. Fino and Pickerill credibly establish that the Miner was totally disabled at 20 C.F.R. §718.204(b)(2)(iv). She must take into consideration their credentials, the explanations for their conclusion, the documentation underlying their medical judgment, and the sophistication of, and bases for, their diagnosis, and she must explain the bases for her credibility determinations in accordance with the Administrative Procedure Act.<sup>13</sup> *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). She must

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<sup>13</sup> The Administrative Procedure Act requires that every adjudicatory decision include “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).



weigh all the relevant evidence together, like and unlike, to determine whether the Miner had a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant fails to establish total disability, benefits are precluded and the ALJ may reinstate her denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). If the ALJ finds the evidence establishes total disability, Claimant will thereby invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4). The ALJ must then consider whether Employer can rebut the presumption. 20 C.F.R. §718.305(d)(1); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge