U.S. Department of Labor

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

BRB No. 22-0426 BLA

DONALD L. HUGHES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ABBOTT ENGINEERING, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 01/05/2024
KENTUCKY EMPLOYERS' MUTUAL INSURANCE COMPANY	)	
	)	
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 John P. Sellers III, Administrative Law Judge, United States Department of Labor.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.[1]

[1] Employer and its Carrier (Employer) were previously represented by Paul E. Jones (Jones & Jones Law Office, PLLC), who filed Employer's Petition for Review and Brief. After briefing, but prior to decision, Jones & Jones moved to withdraw as Employer's

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers III's Decision and Order Awarding Benefits (2019-BLA-05791) rendered on a claim filed February 17, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ first determined Abbott Engineering, Inc. (Abbott) is the responsible operator. He credited Claimant with 35.74 years of qualifying coal mine employment and found he established a totally disabling pulmonary or respiratory impairment, thereby invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 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's work for Abbott constituted coal mine employment and thus in finding Claimant established more than fifteen years of coal mine employment, as well as that Abbott is the responsible operator. It further argues the ALJ erred in finding Claimant is totally disabled and thus invoked the Section 411(c)(4) presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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

counsel and requested an extension of time for all pending deadlines. Shortly thereafter, Lewis and Lewis Law Offices entered its notice of appearance as counsel for Employer. The Benefits Review Board grants Jones & Jones's request to withdraw but denies as moot its request for an extension of time.

[2] 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.

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).

Responsible Operator and Work as a Coal Miner

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[4] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year.[5] 20 C.F.R. §725.495(c).

Employer argues the ALJ erred in finding Abbott is the responsible operator, contending Claimant's work for it as a surveyor does not constitute the work of a miner under the Act.[6] Employer's Brief at 4-8 (unpaginated). We disagree.

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 19.

[4] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[5] Employer does not argue that Abbott Engineering, Inc. (Abbott) employed Claimant for less than one year, that it is financially incapable of assuming liability, or that Claimant was subsequently employed by another coal mine operator for at least one year. 20 C.F.R. §§725.494(a)-(e), 725.495(c).

[6] In its "Issues Presented," Employer also contends Abbott is not the responsible operator because Claimant excluded himself from insurance coverage as part-owner of the

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). The implementing regulation provides "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility; under the function requirement, the work must be integral or necessary to the extraction or preparation of coal. *Forester*, 767 F.3d at 641.

Employer first argues the ALJ erred in finding Claimant's work for Abbott met the situs prong. Employer's Brief at 6 (unpaginated). It acknowledges Claimant worked at or around coal mines "on occasion," but asserts that he was not present every day or for the entirety of his shift, as he was working off-site or providing services outside of the coal mining industry.[7] *Id.* Thus, it contends the ALJ erred in finding Claimant was regularly employed at a coal mine or preparation facility. *Id.* We do not find Employer's argument persuasive.

Initially, Employer has not contested that Claimant may invoke the rebuttable presumption that he is a miner given he worked at or around coal mining sites and thus that it must present evidence that he was not "regularly employed" at such sites. Decision and Order at 5; Employer's Brief at 6 (unpaginated). As the ALJ observed, Claimant estimated that his work at coal mine sites was sixty or eighty percent of his total work for Abbott. Director's Exhibit 33 at 16, 29; Hearing Transcript at 55; Decision and Order at 5. The ALJ noted that while the time spent at coal mine sites varied, Claimant testified that he was at one or more coal mine sites "pretty much" every day. Decision and Order at 5; Hearing Transcript at 37, 44; Director's Exhibit 33 at 40-41. Thus, he found Claimant spent a substantial amount of his work time at coal mine sites and therefore Employer did not

company. Employer's Brief at 3 (unpaginated). Employer has offered no argument to support this assertion; thus, we decline to address the issue as inadequately briefed. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

[7] Claimant testified he provided surveying services to other industries in addition to coal mining, such as natural gas companies and private landowners. Director's Exhibit 33 at 16-17, 29; Hearing Transcript at 28.

submit sufficient evidence to rebut the presumption that he regularly worked at mine sites. Decision and Order at 5-6.

Based on Claimant's uncontradicted testimony, we affirm the ALJ's finding that Claimant spent a significant amount of time at coal mine sites as supported by substantial evidence and therefore Employer did not rebut the presumption under this prong. 20 C.F.R. §725.202(a)(2); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *see also Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 69-71 (4th Cir. 1981), *aff'g sub. nom. Bower v. Amigo Smokeless Coal Co.*, 2 BLR 1-729, 1-736 (1979) (affirming ALJ's finding that a coal sampler who spent eighty-five percent of his work time at coal mine site met situs prong); *Musick v. Norfolk & Western Railway Co.*, 6 BLR 1-862, 1-864 (1984) (claimant who spent only twelve to sixteen days per year at a coal mine site did not meet situs prong); Decision and Order at 5.

Similarly, we reject Employer's argument that Claimant's work for Abbott fails to meet the situs prong because it was not exclusive to the coal mining industry. Employer's Brief at 5-6 (unpaginated). The purpose of the situs test is to determine whether Claimant regularly works in or around coal extraction or preparation facilities, not whether the operator's business is exclusive to the coal mine industry. *See Bower*, 2 BLR at 1-733 ("It is . . . the function of the land, not the function of the employee, which is determinative of whether the situs of the work was a coal mine."). As noted, Employer does not contest that Claimant worked at both underground and strip coal mining sites. Employer's Brief at 6 (unpaginated).

Based on the foregoing, we affirm the ALJ's finding that Claimant's employment with Abbott satisfies the situs requirement. 20 C.F.R. §725.202(a)(2); *see Forester*, 767 F.3d at 641; Decision and Order at 5.

Employer next argues the ALJ erred in finding Claimant's work satisfies the function requirement as it was not integral to the extraction or preparation of coal. Employer's Brief at 6-8 (unpaginated). Specifically, it contends that Claimant's primary duty of weighing coal to determine royalties was not necessary for the operation of the mine, but merely a convenience as the same determination can be made by weighing the coal trucks. *Id.* at 7-8. We disagree.

Initially, as the ALJ found, Employer's argument fails to address "the many other aspects" of Claimant's work in addition to weighing coal. Decision and Order at 7-8; Hearing Transcript at 59-60. Claimant also testified he measured the mines to ensure headings were not running together and to keep the underground mines within projected measurements. Director's Exhibit 33 at 18-19, 66; Hearing Transcript at 49-51. He also located coal seams and determined where to build brattices and place structures to ensure

the safety of the miners. Director's Exhibit 33 at 19; Hearing Transcript at 33-34, 51, 56. At surface mines, he located strip pits to comply with mine regulations and permitting, as well as to avoid encroachment onto neighboring properties. Director's Exhibits 5 at 2; 33 at 22, 26; Hearing Transcript at 51. He also sampled the coal to test its quality. Director's Exhibit 33 at 66; Hearing Transcript at 50.

The ALJ found Claimant's duties while working at coal mines for Abbott, including locating coal seams, ensuring coal was mined in the correct place, making sure mine shafts would not run together and destabilize the mine, keeping track of overburden, and testing the quality of coal are necessary aspects of coal extraction and thus meet the function prong. Decision and Order at 7-8. As Employer has not contested these determinations,[8] we affirm the ALJ's finding that Claimant's employment with Abbott meets the function prong to constitute work as a coal miner, even assuming *arguendo* Claimant's duty weighing coal is not sufficient on its own to do so.[9] 20 C.F.R. §725.202(a)(1); *see Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); *see also Bower*, 2 BLR at 1-738 (laboratory technician collecting coal samples for processing and analysis performs a function that is integral and necessary to the preparation of coal); *Canonico v. Director, OWCP*, 7 BLR 1-547, 1-549-50 (1984) (coal prospecting held necessary to the extraction of coal).

We therefore also affirm the ALJ's conclusion that Claimant worked as a miner for Abbott and thus that Abbott is the properly designated responsible operator. 20 C.F.R. §§725.202, 725.494, 725.495; Decision and Order at 8.

Invocation of Section 411(c)(4) Presumption-

Length of Qualifying Coal Mine Employment

[8] While Employer also argues the ALJ seemed to "ignore" Claimant's testimony that he was not involved with the extraction or preparation of coal, the ALJ fully addressed Claimant's testimony and application, and noted that while Claimant was not directly involved with extracting or preparing the coal, his duties were essential for the continued and safe extraction of coal. Decision and Order at 6-8. Thus, we reject Employer's argument that the ALJ failed to consider the entirety of Claimant's testimony.

[9] The ALJ considered Claimant's testimony that he estimated the tonnage of coal to ensure proper payment and that the payments could also be confirmed by weighing the trucks leaving the mines. Decision and Order at 6, 8; Hearing Transcript at 59-60. However, he noted Claimant also testified both calculation methods are performed to ensure accuracy and correct any discrepancies, which he also found necessary for the extraction of coal. Decision and Order at 8; Hearing Transcript at 49-50, 59-60.

Employer further argues the ALJ erred in crediting Claimant with 35.74 years of coal mine employment because he was not a miner under the Act and, even if he was, "his coal dust exposure was minimal at best." Employer's Brief at 8-9 (unpaginated). Employer's argument is reliant on its contention that Claimant is not a miner under the Act, which we have rejected. Further, while Employer generally contends Claimant's coal dust exposure was "minimal," it has provided no support for its assertion nor has it explained this argument given the ALJ's finding that Claimant was regularly exposed to coal mine dust. Employer's Brief at 8 (unpaginated); Decision and Order at 12. Therefore, we decline to consider the issue as inadequately briefed. *See Cox*, 791 F.2d at 446-47; *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); 20 C.F.R. §802.211(b).

Thus, we affirm the ALJ's findings that Claimant established 35.74 years of qualifying coal mine employment. Decision and Order at 11-12; *see* 20 C.F.R. §718.305(b).

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

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work.[10] *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 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 study evidence, medical opinion evidence, and the evidence as a whole.[11]

The ALJ considered five pulmonary function studies dated December 8, 2016, April 19, 2017, July 12, 2018, August 23, 2018, and September 12, 2018. Decision and Order at 16-27. He found the August 23, 2018 and September 12, 2018 studies invalid and thus did

[10] The ALJ found Claimant's usual coal mine employment as a surveyor required heavy labor. Decision and Order at 15. We affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983).

[11] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 15, 27. The parties do not challenge these findings; thus, they are affirmed. *See Skrack*, 6 BLR at 1-711.

not consider them when assessing total disability. Decision and Order at 26-27; Director's Exhibits 27, 32. However, he found the December 8, 2016, April 19, 2017, and July 12, 2018 studies produced valid, qualifying[12] values both before and after bronchodilators. Decision and Order at 17-27; Director's Exhibits 12, 22; Claimant's Exhibit 4. As all the valid studies were qualifying, he found the pulmonary function studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 27.

Employer asserts the ALJ erred in assessing the validity of the December 8, 2016, April 19, 2017, and July 12, 2018 studies. Employer's Brief at 9-13 (unpaginated). It contends the ALJ mischaracterized its arguments and failed to explain his weighing of the conflicting evidence. Employer's arguments are unpersuasive.

When considering pulmonary function studies conducted in anticipation of litigation, an ALJ must determine whether the studies are in substantial compliance with the quality standards. 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). Compliance with the quality standards at 20 C.F.R. Part 718, Appendix B, "shall be presumed," unless there is "evidence to the contrary." 20 C.F.R. §718.103(c). 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 ALJ must then, in his role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

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 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).

December 8, 2016 Pulmonary Function Study

In determining the validity of the December 8, 2016 study, the ALJ considered the notation in the study report that the American Thoracic Society (ATS) standards were met, the technician's notation of good effort, Dr. Forehand's opinion that the spirometry was

[12] 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).

acceptable, and Dr. Vuskovich's opinion that the study was invalid. Decision and Order at 17-21; Director's Exhibits 22, 29; Employer's Exhibit 14. The ALJ found Dr. Vuskovich's various reasons for invalidating the study to be unpersuasive and unsupported by the actual tracings. Decision and Order at 18-21. Thus, he found the study sufficiently reliable to assess total disability. *Id.* at 21.

Employer argues the ALJ erred in finding Dr. Vuskovich failed to adequately identify why he invalidated the December 8, 2016 pulmonary function study, as Dr. Vuskovich provided "multiple assertions" in support of his opinion. Employer's Brief at 10 (unpaginated). It also contends the ALJ failed to explain why the technician's notation and Dr. Forehand's validation outweigh Dr. Vuskovich's opinion, particularly given Dr. Forehand was not present during the study.[13] *Id.* at 10-11. We disagree.

First, the ALJ permissibly found Dr. Vuskovich did not adequately explain how he deciphered poor effort performing the test and that Claimant prematurely ended exhalation from the tracings, as well as permissibly found the physician's opinion that the variation between tracings was excessive was unsupported by the actual values. Decision and Order at 19-20. While the ALJ noted that Appendix B to 20 C.F.R. Part 718 did not apply to the December 8, 2016 study as it was obtained as part of Claimant's treatment, he noted Appendix B provides that a miner's effort "shall be judged unacceptable" when there is "excessive variability between the three acceptable curves." 20 C.F.R Part 718, App. B(2)(ii)(G). The variation between the two largest FEV1 values of the three acceptable tracings "should not exceed [five] percent of the largest FEV1 or 100 [milliliters (mL)], whichever is greater. . . . Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test." *Id.*

[13] Dr. Forehand did not validate the December 8, 2016 study until August 22, 2018. Director's Exhibit 22. As Employer challenged the validity of the July 12, 2018 study due in part to the delay in providing a validating signature, the ALJ found it "prudent" to consider similar issues regarding the December 8, 2016 study. Decision and Order at 17 n.23. The ALJ analyzed the chronology of events and found that "the length of time between administration and validation [of the study] does not suggest falsity of the signature" and found it reasonable to conclude that the test was validated once it was determined the test could be beneficial to the claim. Decision and Order at 24-25. Employer contends the ALJ erred in making these findings as Employer did not raise such arguments. Employer's Brief at 10 (unpaginated). Even if Employer did not raise this argument as to this specific study, it has not explained how the ALJ's assessment of relevant evidence prejudiced Employer, particularly given it also challenged the validity of the December 8, 2016 study.

The three largest FEV1 values from the December 8, 2016 study are 1.73, 1.72, and 1.70 liters. Director's Exhibit 22. As the ALJ found, the variation between the two largest FEV1 values is ten mL or 0.58 percent. Decision and Order at 19; Director's Exhibit 22 at 2-3. Thus, the ALJ permissibly found the actual values from the study contradicted Dr. Vuskovich's opinion that Claimant put forth poor effort. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 20.

Regarding Dr. Vuskovich's assertion that the scale ratios fail to conform to ATS standards, the ALJ found Dr. Vuskovich did not explain how any deviation from the scale recommendations automatically invalidates a study. Decision and Order at 21; Employer's Exhibit 14. Moreover, other than generally asserting Dr. Vuskovich made these statements, Employer has not explained how the ALJ erred in assessing his opinion. Employer's Brief at 10 (unpaginated). We thus affirm the ALJ's findings that Dr. Vuskovich's opinion is inadequate to undermine the reliability of the study. *See Orek*, 10 BLR at 1-54; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 19, 22-23, 25-26.

Finally, while Employer argues the ALJ did not explain why he gave "more weight" to the notations of the technician and Dr. Forehand that the study was reliable over the opinion of Dr. Vuskovich, Employer's Brief at 10-11 (unpaginated), the ALJ noted that their conflicting opinions were "not particularly probative" as they did not explain their opinions. Decision and Order at 20. Further, the ALJ permissibly found Dr. Vuskovich's opinion, the only opinion invalidating the study, insufficient to find the study unreliable; thus, even if the conflicting opinions were found probative, they do not weigh in favor of invalidating the study. *See Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361-62 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable).

Based on the foregoing, we affirm the ALJ's finding that the December 8, 2016 pulmonary function study is sufficiently reliable to assess total disability. Decision and Order at 21.

April 19, 2017 Pulmonary Function Study

The ALJ next considered the conflicting evidence regarding the validity of the April 19, 2017 pulmonary function study, obtained as a part of Claimant's Department of Labor-sponsored complete pulmonary evaluation. Decision and Order at 21-24. Dr. Gaziano reviewed the spirometry and found it acceptable, and the technician who administered the study noted "good effort." Director's Exhibits 12, 17. Dr. Ajjarapu, who performed the evaluation, agreed that the study was valid. Director's Exhibit 20. Dr. Vuskovich found

the study invalid, indicating there was excessive variability, Claimant prematurely terminated expiration, and there was an incomplete flow-volume graphic display. Director's Exhibit 25; Employer's Exhibit 14. Dr. Rosenberg also opined the study was invalid, as it demonstrated incomplete and inconsistent effort. Director's Exhibit 32. The ALJ found Drs. Vuskovich's and Rosenberg's opinions inadequate to invalidate the study. Decision and Order at 23-24.

Employer contends the ALJ erred by finding Dr. Gaziano's validation and the technician's notation outweighed Dr. Vuskovich's opinion to find the April 19, 2017 study valid. Employer's Brief at 11-12 (unpaginated). While we agree an ALJ should not provide greater weight to an administering technician over a reviewing physician simply because the technician was present during the testing, this was not the ALJ's sole basis, as addressed below, for finding the study valid; thus, any error is harmless.[14] *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The ALJ addressed the values from the study to determine the variability between the tracings. Decision and Order at 22-24. He noted Dr. Vuskovich appeared to be comparing the pre-bronchodilator values to the post-bronchodilator values when explaining the excessive variance rather than addressing each set of tracings independently. *Id.* at 22. As the ALJ indicated, the two largest pre-bronchodilator FEV1 values are 1.39 and 1.35 liters, a variation of forty mL or 2.92 percent, while the two largest post-bronchodilator FEV1 values are 1.82 and 1.80 liters, a variation of twenty mL or 1.1 percent. Decision and Order at 22-23; Director's Exhibit 12. Moreover, the ALJ also found Dr. Vuskovich's opinion that Claimant prematurely terminated his expiratory efforts to be unsupported by the tracings, which show Claimant exhaled for more than seven seconds and complied with the quality standard. Decision and Order at 23; 20 C.F.R Part 718, App. B(2)(ii)(C). Finally, he found Dr. Vuskovich's opinion as to the graphic display was undermined for the same reasons addressed above. Decision and Order at 22. Thus, the ALJ permissibly found Dr. Vuskovich's opinion that Claimant demonstrated poor

[14] In so finding, the ALJ inaccurately characterized the Board's holding in *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). The Board stated in *Revnack,* a case involving a claim arising under 20 C.F.R. Part 727, that the ALJ must consider a reviewing doctor's opinion that a pulmonary function study is unreliable when determining whether total disability is established, and the interim presumption has been invoked pursuant to 20 C.F.R. §727.203(a)(2). *Revnack*, 7 BLR at 1-773. It does not address the weight to which an administering technician's comments are entitled as compared to the opinion of a reviewing physician.

effort undermined by the actual tracings. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 22-23.

The ALJ also found Dr. Rosenberg's opinion invalidating the study inadequately explained, as he pointed to nothing specific in the tracings to support his opinion. Decision and Order at 23. Employer raises no arguments as to the ALJ's findings regarding Dr. Rosenberg's opinion other than generally asserting it is well-reasoned; thus, we affirm the ALJ's findings that Dr. Rosenberg's opinion is insufficient to render the study invalid. *See Skrack*, 6 BLR at 1-711; Decision and Order at 23-24.

Based on the foregoing, we affirm the ALJ's finding that the April 19, 2017 study is valid and thus can be used to assess total disability. Decision and Order at 24.

July 12, 2018 Pulmonary Function Study

Finally, the ALJ considered the conflicting evidence regarding the validity of the July 12, 2018 study, addressing Dr. Forehand's validation of the study and Drs. Vuscovich's and Rosenberg's opinions that the study is invalid due to insufficient effort. Decision and Order at 24-26; Claimant's Exhibit 4; Employer's Exhibits 11, 12, 14. As with the previously addressed studies, the ALJ found the invalidating opinions insufficient to find the study unreliable to assess disability.[15] Decision and Order at 25-26.

Employer challenges the ALJ's finding that Dr. Forehand's validation of the study was supported by the evidence, alleging there appears to be two different versions of the study in the record and the ALJ did not address when in time Dr. Forehand allegedly signed the study.[16] Employer's Brief at 12 (unpaginated). It further contends that, given the uncertainty of Dr. Forehand's validation, there is no contradictory opinion to undermine Dr. Vuskovich's opinion, which explained "exactly why" the tracings are invalid; rather, it asserts the ALJ appeared to substitute his opinion for that of the experts. *Id.* at 13.

[15] While the ALJ did not specifically address whether this study was obtained during Claimant's treatment or in anticipation of litigation, we note that, like the December 8, 2016 study, it was obtained at St. Charles Respiratory Care Center. Decision and Order at 19, 24; Director's Exhibit 22; Claimant's Exhibit 4; *Stowers*, 24 BLR at 1-92; 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[16] Employer deposed Dr. Forehand on September 28, 2020, having an unsigned copy of the July 12, 2018 study, but then, on May 7, 2021, Claimant submitted a copy of the study, signed and dated by Dr. Forehand on March 3, 2020. Employer's Brief at 12 (unpaginated); Employer's Exhibit 15; Claimant's Exhibit 4.

Contrary to Employer's argument, the ALJ considered Dr. Forehand's testimony and both the signed and unsigned copies of the July 12, 2018 study in the record. Decision and Order at 24. He considered the chronology of the events and noted that Dr. Forehand dated his signature on March 3, 2020, but permissibly found it irrelevant to determining whether the study is unreliable.[17] Decision and Order at 25; 20 C.F.R. §718.103(b); *Stowers*, 24 BLR at 1-92.

We also reject Employer's arguments that there "must" be contradictory evidence in order to find Dr. Vuskovich's opinion[18] undermined and that therefore the ALJ substituted his opinion for those of medical experts. Employer's Brief at 12-13 (unpaginated). Initially, as it is Employer's burden to demonstrate the testing is unreliable, it must provide well-reasoned evidence to support such a finding, notwithstanding any contradictory evidence. *Vivian*, 7 BLR at 1-361-62; *Napier*, 301 F.3d at 713-14. The ALJ found neither Dr. Vuskovich's nor Dr. Rosenberg's opinions were well-reasoned to support Employer's burden. Decision and Order at 25. Further, contrary to Employer's argument, the ALJ permissibly considered the actual values in the study to determine there was not excessive variation between the tracings[19] and thus that they undermined Dr. Vuskovich's opinion. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 25-26.

Therefore, we affirm the ALJ's finding that the July 12, 2018 study is sufficiently reliable to assess total disability. *See Crisp*, 866 F.2d at 185; *Stowers*, 24 BLR at 1-92; *Vivian*, 7 BLR at 1-361-62; Decision and Order at 21-25. Moreover, as we affirm the ALJ's permissible finding that all of the valid pulmonary function studies are qualifying,

[17] Employer also contends the ALJ "mischaracterized" its argument as to the July 12, 2018 study, stating it never accused Claimant of fraudulently including Dr. Forehand's signature on the testing. Employer's Brief at 9-10 (unpaginated). However, we note that Employer argued before the ALJ that "Claimant has submitted a piece of evidence into the record, and fraudulently purported that it was validated by Dr. Forehand." Employer's Post Hearing Brief at 12 (unpaginated).

[18] Employer does not contest the ALJ's finding that Dr. Rosenberg's opinion was insufficient to render the July 12, 2018 study unreliable; thus we affirm these findings. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25; Employer's Brief at 12-13 (unpaginated).

[19] The largest three FEV1 values were 1.18, 1.16, and 1.07 liters. Claimant's Exhibit 4. Thus, the ALJ correctly found the variation between the two largest FEV1 values in the July 12, 2018 study is twenty milliliters or 1.71 percent. Decision and Order at 25.

we affirm the ALJ's determination that they support the establishment of total disability. *See* 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 27.

Medical Opinion Evidence

The ALJ next considered the medical opinion of Dr. Ajjarapu, who found Claimant is incapable of performing his usual coal mine employment, and those of Drs. Broudy and Rosenberg, who opined Claimant is not totally disabled from a pulmonary perspective. Decision and Order at 28-31; Director's Exhibits 12, 27, 32. The ALJ credited Dr. Ajjarapu's opinion over those of Drs. Broudy and Rosenberg because he found her opinion is well-documented, well-reasoned, and consistent with the pulmonary function studies. Decision and Order at 31. Employer argues the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 13-15 (unpaginated). We disagree.

Dr. Ajjarapu opined Claimant is totally disabled from performing his usual coal mine work based on the qualifying pulmonary function studies showing a "severe pulmonary impairment." Director's Exhibit 12. Contrary to Employer's assertion, Dr. Ajjarapu need not review all evidence of record to give a well-documented opinion; rather, the ALJ permissibly found her opinion well-reasoned and documented based on her evaluation of Claimant, consideration of the objective studies from her evaluation, and understanding of his employment and medical history. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996) (medical opinion may be credited and sufficient to establish a claimant's burden if it is based on the doctor's own examination of the miner and objective test results); Decision and Order at 28; Employer's Brief at 13 (unpaginated).

We also reject Employer's contention that Dr. Ajjarapu's opinion is not credible because it makes "general and contradictory" assertions. Employer's Brief at 13-14 (unpaginated). In support of its argument, Employer points to Dr. Ajjarapu's opinion that a preexisting loss of lung function, obesity, and coal dust induced chronic obstructive pulmonary disease could have all combined to cause Claimant's impairment. Employer's Brief at 13-14 (unpaginated); Director's Exhibit 21. However, Employer's argument conflates total disability with disability causation. Total disability and disability causation are distinct issues, with the inquiry into the presence of a totally disabling respiratory or pulmonary impairment governed by 20 C.F.R. §718.204(b), and the cause of the impairment governed by 20 C.F.R. §718.204(c). Thus, Employer has not explained how the ALJ has erred in failing to find Dr. Ajjarapu's opinion regarding total disability is generalized or contradictory.[20]

[20] Employer also fails to explain why Dr. Ajjarapu's opinion is necessarily contradictory when she opines obesity and chronic obstructive pulmonary disease

Employer also contends Dr. Ajjarapu did not demonstrate an understanding of Claimant's usual coal mine employment. Employer's Brief at 14 (unpaginated). Even assuming the ALJ did not adequately evaluate whether Dr. Ajjarapu understood Claimant's usual coal mine employment in drawing her conclusions, her opinion does not constitute contrary evidence to the pulmonary function studies, which support total disability. 20 C.F.R. §718.204(b); Decision and Order at 28. Thus, any potential error by the ALJ is harmless. *See Larioni*, 6 BLR at 1-1278. Moreover, the ALJ could reasonably infer that Dr. Ajjarapu's opinion supports a finding that Claimant is unable to do his usual coal mine employment, which required heavy exertion, given her explanation that Claimant's pulmonary impairment is "severe." *See Budash v. Bethlehem Mines Corp*., 9 BLR 1-48, 1-51-52 (1986) (en banc); Director's Exhibit 12; Decision and Order at 28.

Finally, Employer challenges the ALJ's discrediting of Drs. Broudy's and Rosenberg's opinions that Claimant is not totally disabled. It argues his findings are reliant solely on his erroneous determinations regarding the validity of the pulmonary function studies. Employer's Brief at 15 (unpaginated). As we have affirmed the ALJ's finding that there are reliable pulmonary function studies of record probative of total disability, the ALJ permissibly discredited Drs. Broudy's and Rosenberg's opinions because their assessments of no impairment are dependent on their opinions that all the pulmonary function study evidence is invalid.[21] *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 29-31.

As Employer has not further challenged the ALJ's weighing of the evidence, we affirm the ALJ's finding that Claimant established total disability when considering the record as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 31. Thus, we also affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 31. Finally, we also affirm, as unchallenged, the ALJ's finding that Employer did not rebut the presumption. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 37.

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contribute to Claimant's impairment, given that a miner can have both restrictive and obstructive impairments. *See* 20 C.F.R. §718.201(a)(2).

[21] We note that the ALJ also found Dr. Broudy's opinion varied on total disability and does not contradict a finding of total disability based on the pulmonary function study evidence, findings Employer does not contest. *See Skrack*, 6 BLR at 1-711; Decision and Order at 28-29.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge