**U.S. Department of Labor**

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

BRB No. 22-0034 BLA

| | | |
|---|---|---|
| HAROLD J. WILKES | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| WARRIOR MET COAL, LLC f/k/a JIM WALTER RESOURCES | ) | DATE ISSUED: 03/03/2023 |
| | ) | |
| Self-Insured 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 Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

John C. Webb V and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer.

John R. Jacobs and Paisley Newsome (Maples Tucker & Jacobs, LLC), Birmingham, Alabama for Claimant.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Tracy A. Daly's Decision and Order Awarding Benefits (2020-BLA-05105), rendered on a subsequent claim filed on

March 12, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Claimant established twenty-four years of underground coal mine employment and has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined 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).[2] He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

---

[1] Claimant filed a prior claim for benefits on November 4, 1999. Director's Exhibit 1. The district director denied the claim on December 23, 1999, and it was administratively closed. Employer's Closing Brief at 1; Director's Exhibits 1, 25 at 6. The district director treated Claimant's current claim as an initial claim, stating that his prior claim "is not subject to adjudication per 20 C.F.R. [§]725.309." Director's Exhibit 29 at 6. The ALJ similarly found 20 C.F.R. §725.309 is not applicable. Decision and Order at 2 n.46.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, that Claimant established twenty-four years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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

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. *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.[5] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant evidence supporting total disability 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 challenges the ALJ's findings that Claimant established total disability based on the blood gas studies, medical opinions, and in consideration of the evidence as a whole.[6]

**Blood Gas Study Evidence**

The record contains one blood gas study dated April 12, 2019, which was obtained in conjunction with the Department of Labor's complete pulmonary evaluation. Director's Exhibit 13 at 11. The ALJ found the study produced non-qualifying values at rest and qualifying values with exercise. Decision and Order at 9-10. He also noted Dr. Fino opined the study was unreliable but gave his opinion little weight. *Id*. Relying on the qualifying exercise values as better representing Claimant's ability to perform the heavy labor required of his usual coal mine work,[7] the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 10.

Employer asserts the ALJ erred in rejecting Dr. Fino's opinion that the April 12, 2019 study is unreliable. We disagree. Dr. Fino opined that the study should not be relied

[5] 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. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The ALJ found Claimant did not establish total disability based on the pulmonary function study evidence and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 8, 10.

[7] The ALJ found Claimant's usual coal mine employment as a "bottom man" required heavy work. Decision and Order at 5-6. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

upon because the sum of Claimant's pO2 and pCO2 values at rest differed from the sum of these values with exercise. Employer's Exhibit 1 at 2-3. He explained:

> There is a measurement called the alveolar-arterial oxygen gradient which states that at room air or any given percent of oxygen inhaled, the sum of the pO2 and the pCO2 should always be the same. In this case, the pO2 at rest was 61 and the pCO2 at rest was almost 47, so the sum of those two values would be 108. With exercise, the pCO2 increased to 51 and the pO2 increased to 77. The sum of those two values is 128. That is not physiologically possible. In other words, if the pCO2 went up by almost 5 mmHg, I would expect the oxygen level or the pO2 to go down by 5 mmHg. I cannot be sure which of the two blood gases is valid, or if either of them is valid. However, this arterial blood gas study should not be used to determine [Claimant's] respiratory status.

*Id.* at 2-3.

In rejecting Dr. Fino's opinion, the ALJ stated "[i]n order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and rendered it unreliable." Decision and Order at 9 (citing *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Cardwell v. Circle B Coal Co.*, 6 BLR 1-788 (1984)). He found Dr. Fino's opinion unpersuasive because he provided no medical support or explanation for his opinion that the "sum of the pO2 and pCO2 should always be the same" and did not address any other circumstances that may have affected the validity of the test results. *Id.* at 10 (quoting Employer's Exhibit 1 at 2-3).

Employer argues the ALJ misinterpreted *Vivian* and *Cardwell* as providing the only two circumstances by which an employer may show a claimant's blood gas study is invalid. Employer's Brief at 4-5. Even assuming Employer is correct that the ALJ overstated the holdings of those cases, we see no error in his ultimate determination that Dr. Fino's opinion is not credible regarding the reliability of the blood gas study. When weighing arterial blood gas studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.105(c); 20 C.F.R. Part 718, Appendix C; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc); *Vivian* 7 BLR at 1-361 (party challenging the validity of a study has the burden to establish the results are unreliable). 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 correctly recognized that Employer, as the party challenging the validity of the study, has the burden to establish its results are suspect or unreliable. *See Vivian*, 7 BLR at 1-361; *Cardwell*, 6 BLR at 1-789-90. Dr. Fino did not identify any reason why the blood gas study lacked compliance with the quality standards. The ALJ also permissibly concluded his opinion is unpersuasive because he did not provide "medical support or an explanation" for his conclusion that the sum of the pO2 and pCO2 values at rest and with exercise should always be the same. *See Bradberry v. Director, OWCP*, 117 F.3d 1361 (11th Cir. 1997); *see also U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); Decision and Order at 10. Thus we affirm the ALJ's finding that the April 12, 2019 blood gas study is valid and reliable.

We further affirm the ALJ's permissible crediting of the qualifying exercise study as better reflecting Claimant's ability to perform the heavy work required of his usual coal mine work. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980); Decision and Order at 9. Thus, we affirm his conclusion that Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

**Medical Opinions and Evidence as a Whole**

The ALJ found the two medical opinions of record by Drs. Barney and Fino concluded that Claimant is not totally disabled; thus, Claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 12-13; Director's Exhibit 13; Employer's Exhibit 1. In weighing the evidence as a whole, however, the ALJ found neither Dr. Barney nor Dr. Fino provided a reasoned opinion to outweigh the qualifying blood gas study. Consequently, he found Clamant satisfied his burden to establish a totally disabling respiratory or pulmonary impairment and invoke the Section 411(c)(4) presumption.

Contrary to Employer's contention, we see no error in the ALJ's finding that the opinions of Drs. Barney and Fino are not well-reasoned. Dr. Barney opined that Claimant was "not disabled" because he considered Claimant's arterial blood gas study to be "normal." Director's Exhibit 13 at 3-4. The ALJ permissibly found Dr. Barney's opinion unexplained and contrary to his determination that the exercise study is qualifying for total disability under the regulatory criteria at 20 C.F.R. §718.204(b)(2)(ii) and entitled to greater weight than the non-qualifying resting study.[8] *See Jones*, 386 F.3d at 992; *Jordan*

[8] We reject Employer's assertion that the ALJ substituted his opinion for that of Dr. Barney in concluding Claimant's qualifying exercise study demonstrates a disabling impairment. Employer's Brief at 5-6. The regulations specifically set forth standards for total disability based on the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii), and

*v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); *Taylor v. Ala. By-Products Corp*., 862 F.2d 1529, 1531 n.1 (11th Cir. 1989); Decision and Order at 13 (citing Director's Exhibit 13).

Further, the ALJ permissibly found Dr. Fino's opinion unpersuasive because his report contained no information regarding the exertional requirements of Claimant's last coal mine job and did not otherwise indicate that Dr. Fino considered or understood them. *See* 20 C.F.R. §718.204(b)(2)(iv); *Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; *Taylor*, 862 F.2d at 1531 n.1; Decision and Order at 13. Employer identifies no specific error in this finding. S*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We thus affirm the ALJ's finding that the opinions of Drs. Barney and Fino are not credible and do not outweigh the qualifying exercise blood gas study. *Id.* at 12-13.

Having affirmed the ALJ's finding that the blood gas study evidence establishes total disability, and there being no credible contrary evidence of record, we affirm the ALJ's conclusion that Claimant established total disability on the record as a whole. *See* 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; *see also Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984) (non-qualifying pulmonary function tests do not undermine qualifying blood gas evidence because the studies measure different types of impairment); Decision and Order at 14. Consequently, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 14.

As Employer does not challenge the ALJ's finding that it did not rebut the presumption, we affirm his conclusion that Claimant is entitled to benefits. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Skrack*, 6 BLR at 1-711.

---

the ALJ properly applied the criteria absent a credible medical opinion explaining why the study was either invalid or unreliable. Dr. Barney did not discuss the reliability of the blood gas study nor did he explain why the qualifying study would not preclude Claimant from performing his usual coal mine work. Director's Exhibit 13 at 4. As the ALJ found when weighing the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), Dr. Barney only summarily stated that the study was "normal" and that Claimant is not totally disabled. *Id.*

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge