U.S. Department of Labor

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

BRB No. 23-0057 BLA

DON C. GEHRIG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUARTO MINING COMPANY	)	
	)	DATE ISSUED: 03/29/2024
Employer-Respondent	)	
	)	
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 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.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

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

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2021-BLA-05932) rendered on a subsequent claim filed on

August 21, 2020,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has twenty-five years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309(c). She further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding Claimant totally disabled and, therefore, erred in finding he invoked the Section 411(c)(4) presumption. It further argues she erred in finding the presumption unrebutted.[4] Claimant responds in support of the

[1] Claimant filed two previous claims. Director's Exhibits 1, 2. On April 3, 2000, the district director denied his initial claim, filed on December 7, 1999, because Claimant failed to establish any element of entitlement. Decision and Order at 3 n.5; Director's Exhibit 1. Claimant filed and withdrew a second claim. Director's Exhibit 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[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); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, 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); *see 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 the district director denied Claimant's previous claim for failing to establish any element of entitlement, Claimant must submit evidence establishing at least one element of entitlement to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309; Director's Exhibit 2.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-five years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24.

award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless requested.

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.[5] 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).

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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[6] pulmonary function studies or 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 22-23.

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[5] 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 Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16, 24-25.

[6] 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).

[7] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 8 n.10, 13-14.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated October 6, 2020, March 10, 2021, and March 17, 2021. Decision and Order at 9-13; Director's Exhibits 13 at 12-19, 22 at 16-23; Claimant's Exhibit 4. She found all the studies are qualifying. Decision and Order at 10-13. In addition, she found the October 6, 2020 study is valid. *Id.* She found the March 10, 2021 study invalid. *Id.* Further, she was not persuaded by Dr. Fino's critique of the March 17, 2021 study and assigned it reduced weight. *Id.* She therefore determined the pulmonary function studies support total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 13.

Employer argues the ALJ erred in finding the October 6, 2020 study is valid. Employer's Brief at 9-12. We disagree.

When considering pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). A study need not precisely conform to the quality standards; if it 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, as the factfinder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). "In the absence of evidence to the contrary, compliance with the [quality standards in] Appendix B shall be presumed." 20 C.F.R. §718.103(c). Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The ALJ considered the opinions of Drs. Goodman, Fino, and Zaldivar that the qualifying October 6, 2020 study is invalid, Dr. Gaziano's opinion that the vents are acceptable, Dr. Aulick's opinion that the study's results still demonstrate a total respiratory disability notwithstanding the tracings, and the comments of the technician who conducted the study. Director's Exhibits 13, 14, 20, 25; Employer's Exhibits 4, 9; Claimant's Exhibit 1.

Dr. Goodman indicated the October 6, 2020 study showed multiple flow versus volume loops, but none of them are "completed (i.e., closed) loop[s] and therefore none can be considered valid graphic reflections of pulmonary function." Director's Exhibit 20 at 2. He also noted the "technician performing the study himself comment[ed] on [Claimant's] inability to perform these maneuvers in an acceptable and reproducible fashion meeting quality control standards despite good effort." *Id.* In addition, while he noted there are multiple volume versus time tracings, he found them "poorly reproduced in the copying process and the graphs [] reviewed are difficult to evaluate." *Id.* Thus he concluded he could not exclude the possibility that occasionally a "tracing reaches an

acceptable point of sustained effort at which the subject achieves a plateau in air." *Id*. But he found this is only true for "one or at most two of the graphs" and "for the rest, effort is terminated pre-maturely and the tracings should be considered invalid." *Id*. According to Dr. Goodman, Claimant's pulmonary function "would show improvement . . . with better effort." *Id*.

Dr. Fino initially opined the October 6, 2020 study is invalid by referencing his analysis of a different pulmonary function study conducted on March 10, 2021. Director's Exhibit 22. In the body of his report, Dr. Fino explained that the March 10, 2021 study, conducted during his examination of Claimant, reflects "premature termination to exhalation," "a lack of reproducibility in the expiratory tracings," and "a lack of an abrupt onset to exhalation." *Id*. at 7. At his deposition, Dr. Fino opined that Claimant did not give "good efforts" on either study "so they underestimate his true lung function." Employer's Exhibit 9 at 16.

Dr. Zaldivar stated the study did not include "enough tracings" to "independently evaluate it" but nevertheless concluded the study is invalid. Employer's Exhibit 3 at 4. He stated it "appeared to show uninterrupted flow" and the tracings he did review "showed that the effort was at best fair and the two best tracings are not reproducible." *Id*.

Dr. Aulick reviewed the study and opined Claimant "gave the best possible effort that he was capable of due to his severe obstructive restrictive lung disease." Claimant's Exhibit 1. He acknowledged issues with the tracings but stated Claimant "has got very bad lung function, so [it is] very . . . hard for him to actually do the test." Employer's Exhibit 1 at 20. Further, he noted the technician "made multiple attempts because [Claimant] was very short of breath while doing the test." *Id*. He opined the study is "reproducible, but not acceptable based on" Claimant's inability "to complete the loops." *Id*. However, he concluded that, in light of Claimant's obstructive lung defect, he is "never going to be able to fully exhale to residual volume." *Id*.

The technician who conducted the test noted Claimant put forth "[g]ood cooperation and effort [on] all trials." Director's Exhibit 13 at 14. But he stated that while Claimant "made great attempt[s] during spirometry testing," he was unable "to obtain flow volume loops without extrapolated volumes." *Id*. He indicated Claimant "attempted several times . . . at being able to obtain loops within [acceptable] range but was unable to achieve without extrapolated volume." *Id*.

The regulatory quality standards state that pulmonary function studies "shall be judged unacceptable" if there is "excessive variability between the three acceptable curves." 20 C.F.R. Part 718, Appendix B, para. (2)(ii)(G). The ALJ noted, however, that the regulations state individuals "with obstructive disease or rapid decline in lung function will be less likely to achieve" adequate variation in three acceptable tracings. Decision and

Order at 12, *citing* 20 C.F.R. Part 718, Appendix B. Thus, studies not meeting reproducibility criteria "may still be submitted for consideration in support of a claim for black lung benefits." *Id.*

In light of the language of the regulations, the ALJ permissibly credited Dr. Aulick's opinion that the October 6, 2020 study evidences total respiratory disability notwithstanding the tracings because Claimant's inability to achieve adequate flow-volume or volume-time loops can be ascribed to his severe obstructive lung defect and shortness of breath. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 12-13. She also rationally found Dr. Gaziano's validation of the study, along with the technician's statement that Claimant gave good effort and made "great attempts" when performing the study, supported Dr. Aulick's opinion. Decision and Order at 12-13; *see Napier*, 301 F.3d at 712-14. Although Drs. Goodman, Zaldivar, and Fino questioned the study's validity based on its tracings and Claimant's effort, the ALJ permissibly found their rationales inadequate to invalidate the study in light of Dr. Aulick's credible opinion and the technician's comments.[8] *Napier*, 301 F.3d at 712-14; *Banks*, 690 F.3d at 482-83; *Crisp*, 866 F.2d at 185; Decision and Order at 12-13.

[8] Our dissenting colleague does not allege this was an improper reason for the ALJ to credit Dr. Aulick and discredit Drs. Goodman, Zaldivar, and Fino. She nevertheless suggests the ALJ erred because the latter three physicians provided "reasons other than reproducibility" to question the study's validity. *Infra* at 12-13. However, as the ALJ observed, the primary dispute among the physicians was how to interpret Claimant's effort on the October 6, 2020 study, with Employer's experts opining Claimant did not give good effort, which renders the study invalid or otherwise demonstrates an underestimation of his lung function, and Dr. Aulick opining Claimant gave his "best possible" effort and the test demonstrates a totally disabling impairment. Decision and Order at 10-13, 16; *see* Claimant's Exhibit 1. Given that the ALJ rationally resolved this dispute by crediting Dr. Aulick's opinion, consistent with the administering technician's comments that Claimant gave good effort and made "great attempts," we disagree with our dissenting colleague that the ALJ did not adequately consider Employer's experts' opinions and failed to resolve the conflict in the evidence. Decision and Order at 12; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Contrary to our dissenting colleague's suggestion, *infra* at 14 n.17, the ALJ did not credit the comments of the technician over the opinions of Drs. Goodman, Zaldivar, and Fino; instead, she merely found the technician's comments consistent with Dr. Aulick's opinion, which she permissibly credited within her discretion. Decision and Order at 12.

We first reject Employer's argument that the ALJ erred in failing to weigh Dr. Fino's opinion with respect to the October 6, 2020 study. Employer's Brief at 9-10. She recognized his opinion that the study is invalid because Claimant had "premature termination to exhalation and a lack of reproducibility in the expiratory tracings" and "a lack of an abrupt onset to exhalation." Decision and Order at 11, *quoting* Director's Exhibit 22 at 9. Specifically, she found that rationale unpersuasive in light of Dr. Aulick's credible explanation that these defects are a result of Claimant's severe obstructive lung disease.[9] *Id.* at 13.

Employer argues the ALJ should have credited the opinions of Drs. Goodman, Fino, and Zaldivar to find the October 6, 2020 study invalid. Employer's Brief at 9-10. Its argument amounts to a request to reweigh the evidence, which the Board may not do.[10] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the ALJ's determination that the qualifying October 6, 2020 pulmonary function study is valid.

Furthermore, as we affirm the ALJ's finding that the October 6, 2020 pulmonary function study is valid and qualifying, and there are no contrary studies of record, any error in the ALJ's consideration of the qualifying March 17, 2021 pulmonary function study is harmless and we need not address Employer's argument with respect to this study. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10-12. As it is supported by substantial evidence, we affirm the ALJ's finding that the pulmonary function study evidence supports a determination that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 13.

Medical Opinions

Employer also argues the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 12-13. The ALJ considered the opinions of Drs. Aulick, Lenkey, Fino, and Zaldivar. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-22. Drs. Aulick and

[9] Contrary to Employer's argument, the ALJ accurately characterized Dr. Aulick's opinion. Decision and Order at 12-13; Employer's Brief at 11; Claimant's Exhibit 1; Employer's Exhibit 1.

[10] Employer argues the ALJ erred by failing to consider Dr. Zaldivar's deposition testimony that "[i]individuals with severe lung disease can produce a valid breathing test." Employer's Brief at 11-12, *quoting* Employer's Exhibit 10 at 37. We disagree. The ALJ recognized this aspect of Dr. Zaldivar's testimony but permissibly did not credit it given that, in at least one significant respect, the quality standards recognize that miners with reduced lung function will be unable to meet variability requirements. Decision and Order at 12-13, 21.

Lenkey opined Claimant is totally disabled by a respiratory or pulmonary impairment. Claimant's Exhibit 2 at 2; Director's Exhibits 13 at 5, 25 at 2. In contrast, Drs. Fino and Zaldivar opined Claimant is not totally disabled. Director's Exhibit 22 at 10; Employer's Exhibits 3 at 11, 7 at 6. The ALJ found the opinions of Drs. Lenkey, Fino, and Zaldivar poorly documented, but she found Dr. Aulick's opinion is reasoned and documented. Decision and Order at 22.

Employer argues the ALJ erred in crediting Dr. Aulick's opinion. Employer's Brief at 12-13. We disagree.

Dr. Aulick noted Claimant's usual coal mine employment as a general laborer required heavy exertion. Director's Exhibit 13 at 1. He observed during Claimant's exercise arterial blood gas study that Claimant was able to walk for one minute on a flat elevation, but at the second minute with the elevation increased to ten percent, Claimant "became severely short of breath and could not continue." *Id*. at 4; Claimant's Exhibit 1. Further, he relied on the October 6, 2020 pulmonary function study that showed both an obstructive and restrictive defect based on FEV1 and FVC values to conclude Claimant is totally disabled. Director's Exhibit 13 at 4-5; Claimant's Exhibit 1; Employers' Exhibit 1 at 18. The ALJ permissibly found Dr. Aulick's opinion is reasoned and documented because he "considered objective testing, symptoms, and Claimant's work requirements in his last position as a general laborer" in explaining why he diagnosed total disability.[11] Decision and Order at 21-22; *see Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185.

We also reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Fino and Zaldivar. Employer's Brief at 12-13. Both opined Claimant's three most recent pulmonary function studies, dated October 6, 2020, March 10, 2021, and March 17, 2021, are invalid. Director's Exhibit 22 at 12; Employer's Exhibits 3 at 8-11, 6 at 2, 7 at 5. Both physicians noted a February 14, 2000 study from Claimant's prior claim that produced non-qualifying values is valid and exhibited a very mild obstructive defect. *Id.* Relying on what they assumed was the only valid pulmonary function study in the record, both doctors opined Claimant is not totally disabled. *Id.*

The ALJ permissibly found their opinions less credible because both believed Claimant had no recent valid pulmonary function tests, contrary to her finding that the October 6, 2020 pulmonary function study is qualifying and valid. *See Napier*, 301 F.3d

[11] We reject Employer's contention the ALJ should have discredited Dr. Aulick's opinion because he did not consider all the objective studies of record. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996) (physician can render a reasoned and documented opinion regarding total disability based on his own examination of a miner, objective test results, or both); Employer's Brief at 13.

at 712-14; *Crisp*, 866 F.2d at 185; Decision and Order at 21-22. Thus, we affirm the ALJ's finding that Claimant established total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 22.

Further, we affirm the ALJ's finding Claimant established total disability in consideration of the evidence as a whole, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[12] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[13]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's

[12] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[13] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 27.

lung impairment." *Id.* at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The ALJ considered the opinions of Drs. Fino and Zaldivar that Claimant does not have legal pneumoconiosis. Director's Exhibit 22; Employer's Exhibits 1, 6, 7, 9, 10. Dr. Fino initially opined Claimant has no significant obstructive or restrictive impairment based on the absence of recent valid pulmonary function testing. Director's Exhibit 22. In a supplemental report, he acknowledged Claimant had a mild obstructive impairment in 2000 and that he could not exclude coal mine dust exposure as a cause of the impairment. Employer's Exhibit 7 at 5. Nonetheless, he stated he could not indicate if the impairment has progressed since 2000 because there are no recent valid pulmonary function studies. *Id*.

The ALJ found Dr. Fino's opinion is contrary to her finding that the October 6, 2020 pulmonary function study is valid. Decision and Order at 26-27. Employer raises no separate argument challenging this finding other than reiterating its contention that the October 6, 2020 study is invalid. Employer's Brief at 14-15. As we have rejected this argument, we affirm the ALJ's finding that Dr. Fino's opinion is insufficient to rebut the presumption of legal pneumoconiosis. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 26-27.

Dr. Zaldivar opined Claimant has asthma due to sarcoidosis and a restrictive pattern on pulmonary function testing caused by diaphragm paralysis. Employer's Exhibit 3. He stated both conditions are unrelated to coal mine dust exposure. *Id.* Furthermore, he explained Claimant's asthma does not constitute legal pneumoconiosis because there is no evidence he was getting treatment for asthma while working in the coal mines. *Id*. at 10. The ALJ permissibly found this rationale inconsistent with the regulations which recognize that legal pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding an ALJ's decision to discredit a physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); Decision and Order at 27.

In addition, Dr. Zaldivar excluded legal pneumoconiosis as a diagnosis for Claimant's restrictive pattern on pulmonary function testing because there was not a "high profusion of pneumoconiosis present." Employer's Exhibit 3 at 10. He explained the "reason the profusion has to be large is because [there] must be evidence of fibrosis radiographically and the large profusion indicates a great deal of reaction of the lungs to a large amount of inhaled mineral dust, which is occupying space within the lungs displacing air." *Id.* The ALJ permissibly found this explanation inconsistent with the regulations that legal pneumoconiosis can exist in the absence of positive x-ray evidence. 20 C.F.R.

§718.202(a)(4), (b); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *see* 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); Decision and Order at 27.

Because the ALJ permissibly discredited the opinions of Drs. Fino and Zaldivar, the only opinions supportive of Employer's burden on rebuttal, we affirm her finding Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 27. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). Because Employer raises no specific arguments on disability causation other than its argument with respect to legal pneumoconiosis, we affirm the ALJ's determination that Employer failed to prove that no part of Claimant's total disability was caused by pneumoconiosis. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 28-29.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's determinations that the pulmonary function study and medical opinion evidence support finding total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and that the evidence as a whole establishes total disability at 20 C.F.R. §718.204(b)(2). As Employer argues, in making these determinations, the ALJ failed to follow the requirements of the regulations and to consider all relevant evidence. Employer's Brief at 9-13.

In order to constitute evidence of impairment, a pulmonary function test developed as evidence by a party must be in substantial compliance with the standards set by the Department of Labor in 20 C.F.R. §718.103 and Appendix B of Part 718. 20 C.F.R. §§718.101 (b), (c).

Based on language from Section (2)(ii)(G) of Appendix B to Part 718 of the regulations, the ALJ rejected the opinions of Drs. Zaldivar, Goodman, and Fino that the October 6, 2020 pulmonary function study was invalid. Decision and Order at 12. The relevant portion of Appendix B recognizes that individuals with obstructive lung disease may be unable to achieve the degree of reproducibility normally required for valid testing, and therefore permits studies not meeting the requirement limiting the variability between three acceptable curves to be considered.[14] 20 C.F.R. Part 718 Appendix B (2)(ii)(G).

[14] 20 C.F.R. Part 718, Appendix B (2)(ii)(G) states, with respect to FEV1 and FVC measurement, a pulmonary function study shall be deemed unacceptable if it has an "excessive variability between the three acceptable curves," and notes the "variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater." *Id.* However, it provides that "tests not meeting *this criterion* may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report . . . ." (emphasis added).

There are many additional requirements for pulmonary function tests in 20 C.F.R. §718.103 and Appendix B to Part 718. With the exception of the section cited above, these requirements (20 C.F.R. Part 718 Appendix B (1)(i)-(ix), (2)(i), (2)(ii)(A)-(F), (2)(iii)(A)-(D), (2)(iv), and (2)(v)(A)-(B)) are unaffected by the above language. Excepting studies which fail to meet the above-cited requirements relating to test variability and cases involving a deceased miner where no pulmonary function tests are in substantial compliance with the requirements, all pulmonary function test evidence developed by the

However, this provision does not absolve studies from meeting the other requirements for validity. Because Drs. Goodman, Zaldivar, and Fino each opined that the study was invalid for reasons other than reproducibility, the ALJ erred by dismissing their opinions, failing to resolve the conflicting evidence of the study's validity and determine whether the study was in substantial compliance with the quality standards. *See* 30 U.S.C. §923(b) (factfinder must address all relevant evidence); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact-finder's failure to discuss relevant evidence requires remand); 20 C.F.R. §718.101(b) (tests proffered by the parties must be in substantial compliance with the standards).[15]

Dr. Goodman opined that none of Claimant's attempts with respect to the October 6, 2020 study produced completed flow-volume loops required to adequately reflect his pulmonary function. Director's Exhibit 20 at 2. He further opined that, while "one or two" volume-time tracings may have reached a plateau in air flow, the remainder demonstrated prematurely terminated exhalation rendering the study invalid. *Id.* Dr. Fino opined that Claimant's October 6, 2020 study is invalid "because of a premature termination to exhalation" and a lack of abrupt onset of exhalation.[16] Director's Exhibit 22 at 7, 10;

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parties must be in substantial compliance with these requirements in order to establish the fact for which the test is proffered. 20 C.F.R. §§718.101(b), 718.103(c). Consequently, the issue the ALJ must address is whether the test is in substantial compliance with the requirements.

[15] Contrary to my colleagues' view, neither the regulations relating to compliance with the standards nor the standards themselves have a blanket exception that dismisses the need for substantial compliance with the standards when a Claimant has difficulty executing the test. Dr. Aulick himself acknowledged that the test was not "adequate." Employer's Exhibit 1 at 25.

[16] The regulation at 20 C.F.R. Part 718 Appendix B(2)(ii) provides:

> The subject will . . . make a maximum inspiration from the instrument and when maximum has been attained, without interruption, blow as hard, fast and completely as possible for at least 7 seconds, or until a plateau has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal effort. . . . The effort shall be judged unacceptable when the patient: . . . (B) Has not used maximal effort during the entire forced expiration; or (C) Has not continued the expiration for at least 7 sec. or until an obvious plateau for at least 2 sec. in the volume-time curve has occurred; . . . or (F) Has an unsatisfactory start of expiration, one characterized by excessive hesitation (or false starts). Peak flow should be attained at the start of expiration and the volume-time tracing (spirogram)

Employer's Exhibit 9 at 16. Dr. Zaldivar opined that the study was invalid due to inconsistent effort and hesitation during exhalation. Employer's Exhibits 3 at 4; 10 at 30, 32-33.

As the portion of Appendix B cited by the ALJ does not address the physicians' opinions that the study is invalid for reasons other than its reproducibility, and the ALJ provided no other consideration of their opinions, she erred. The ALJ is required to consider all relevant evidence and determine whether the regulatory requirements have been met.[17] She did not do so in this case. I therefore would remand the case for the ALJ to consider the physicians' opinions concerning the validity of the study, and whether it substantially complies with the standards of Appendix B. Because the ALJ's consideration of the pulmonary function studies affected her weighing of the medical opinion evidence, I also would vacate her finding the medical opinions support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 22.

Since the ALJ failed to follow the regulatory requirements and to consider relevant evidence when weighing the pulmonary function studies and medical opinions, I would vacate the award of benefits and remand for the ALJ to reconsider whether Claimant established total disability at 20 C.F.R. §718.204(b)(2). Because the treatment of the evidence relevant to disability also affects invocation of the Section 411(c)(4) presumption

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> should have a smooth contour revealing gradually decreasing flow throughout expiration.

20 C.F.R. Part 718 Appendix B(2)(ii).

[17] Moreover, an ALJ may not credit the subjective observations of a technician over the medical opinion of a physician concerning the validity of a study. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) (factfinder must consider qualifications of medical experts interpreting objective evidence); *see also Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885 (7th Cir. 1992) (assuming a technician was equally qualified as a reviewing doctor to assess the validity of pulmonary function studies without supporting evidence was error). The ALJ thus erred to the extent she found the opinions of Drs. Zaldivar, Fino, and Goodman outweighed by the technician's comments. Decision and Order at 12.

and the consideration of evidence on rebuttal, if the presumption is invoked, it is premature to address the ALJ's determinations as to those matters.

JUDITH S. BOGGS
Administrative Appeals Judge