



BRB Nos. 20-0516 BLA  
and 20-0516 BLA-A

STEVEN E. HINKLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PAMMLID COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 09/27/2021
	)	
WEST VIRGINIA CWP FUND	)	
	)	
Employer/Carrier-Respondent	)	
Cross-Petitioner	)	
	)	
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.

Samuel B. Petsonk (Petsonk PLLC), Beckley, West Virginia, for Claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer  
and its Carrier.

Before:

PER CURIAM:

Claimant appeals and Employer and its Carrier (Employer) cross-appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2019-BLA-05061) rendered on a claim filed on June 27, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Initially, the ALJ credited Claimant with at least 23 years of underground coal mine employment, but found the evidence did not establish the presence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). She therefore found Claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,<sup>1</sup> 30 U.S.C. §921(c)(4) (2018), and failed to establish a required element of entitlement. She therefore denied benefits.

On appeal, Claimant contends the ALJ erred in finding he did not establish total disability and therefore erred in finding he did not invoke the Section 411(c)(4) presumption. In response, Employer urges affirmance of the denial of benefits. In its cross-appeal, Employer contends that, should the Benefits Review Board decline to affirm the denial of benefits, it must consider whether the ALJ erred in discounting its medical opinion evidence relevant to total disability. The Director, Office of Workers' Compensation Programs, has not filed a response.

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>2</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in

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<sup>1</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is 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), as implemented by 20 C.F.R. §718.305.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. See 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure,<sup>3</sup> or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the 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 did not establish total disability based on any category of evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 9-15.

#### **Pulmonary Function Study Evidence**

The ALJ considered three pulmonary function studies conducted on September 25, 2017, July 25, 2018, and June 10, 2019. Decision and Order at 8-10. The September 25, 2017 study was qualifying before and after the administration of bronchodilators. Director's Exhibit 12. The July 25, 2018 pulmonary function study was non-qualifying before and after the administration of bronchodilators. Employer's Exhibit 1. The June 10, 2019 pulmonary function study was qualifying before and after bronchodilators. Claimant's Exhibit 1. The ALJ found each test unreliable for establishing total disability, as the physicians who conducted and reviewed them questioned their validity.<sup>4</sup> Decision and Order at 9-10. As there were no reliable studies, the ALJ found the pulmonary function

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<sup>3</sup> As there is no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure, we affirm the ALJ's determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 8 n.10.

<sup>4</sup> Dr. Jin opined the FVC values for the September 25, 2017 study may not be "the best," while Drs. Castle and Zaldivar opined the study was invalid. Director's Exhibit 15; Employer's Exhibits 1, 7, 9. Drs. Zaldivar and Castle opined the July 25, 2018 study was technically invalid due to less than maximal effort during the forced vital capacity maneuvers and flow volume loops. Employer's Exhibits 1, 7, 9. Dr. Zaldivar also opined the June 10, 2019 study was invalid, noting there were not sufficient flow volume loops, the loops available were not within five percent agreement, and the lung volumes show hesitation. Employer's Exhibit 9 at 22.

study evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 10.

On appeal, Claimant maintains that the ALJ erred in not considering Dr. Gaziano's opinion that the September 25, 2017 pulmonary function study was valid, and that it might have changed the weight she afforded the study. Claimant's Brief at 5-6. We disagree.

The ALJ acknowledged the validation, stating "Dr. Dominic Gaziano provided a validation of the ventilatory studies on November 3, 2017, and noted the vents are acceptable." Decision and Order at 8 n.12. Dr. Gaziano checked a box indicating that the study was valid. Director's Exhibit 15. However, the technician who administered the September 25, 2017 study reported that Claimant was "unable to perform the technique for the diffusion portion of the test." Director's Exhibit 15. Dr. Jin, who conducted the examination associated with the study, opined that the "the FVC might not [be] the best result even though he gave good effort" based upon the technician's comments. *Id.* Dr. Castle reviewed the September 25, 2017 study and opined it is technically invalid as the flow volume loops show less than maximal effort. Employer's Exhibit 7. Similarly, Dr. Zaldivar opined the study was not valid, noting some hesitation during exhalation. Employer's Exhibits 1, 9.

The ALJ found the opinions of Drs. Jin, Castle, and Zaldivar sufficient to call into question the validity and reliability of the study such that it was insufficient to establish total disability. Decision and Order at 9. Although the ALJ did not directly weigh Dr. Gaziano's opinion against the contrary opinions of Drs. Jin, Castle, and Zaldivar, we are not persuaded that this is an error requiring remand. Claimant has not explained how Dr. Gaziano's report, which consists of a check mark indicating "vents are acceptable," would alter the ALJ's finding that the three physicians who offered a basis for the conclusion that the study is unreliable offered credible opinions. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (dismissing error as harmless when appellant fails to explain how "error to which he points could have made any difference"); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998) (holding that a physician's check-box validation of an arterial blood gas study "lent little additional persuasive authority" to the study); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); Decision and Order at 9. Because it is supported by substantial evidence, we affirm the ALJ's determination that the September 25, 2017 pulmonary function study is entitled to little weight. *Hicks*, 138 F.3d at 530; *Lane*, 105 F.3d at 172; Decision and Order at 9.

Claimant further contends the ALJ's determination that the June 10, 2019 study was unreliable is not adequately explained when only one physician found the study invalid. Claimant's Brief at 7. While Claimant is correct that only Dr. Zaldivar questioned the reliability of the June 10, 2019 study, he was also the only physician of

record to consider it. Employer's Exhibits 1, 9. Moreover, the technician who conducted the study opined Claimant "could not or would not forcefully perform peak flow." Claimant's Exhibit 1. Dr. Zaldivar opined the test was technically invalid because it did not contain three flow volume loops, at least two of which are within five percent of each other. Employer's Exhibit 9 at 22. He further noted the technician's comments indicate the FVC is invalid. *Id.* Consequently, because it is supported by substantial evidence and Claimant points to no contrary evidence, we affirm the ALJ's determination that the June 10, 2019 study is technically invalid and entitled to little weight. *Hicks*, 138 F.3d at 530; *Lane*, 105 F.3d at 172; Decision and Order at 9.

As Claimant raises no other challenges to the ALJ's weighing of the pulmonary function study evidence, we affirm her finding that the pulmonary function study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9-10.

### **Arterial Blood Gas Study Evidence**

Because the arterial blood gas studies were all non-qualifying, we affirm the ALJ's determination that they do not establish total disability.<sup>5</sup> 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10.

### **Medical Opinion Evidence**

The ALJ also considered the medical opinions of Drs. Jin, Castle, and Zaldivar. Dr. Jin initially opined Claimant's moderate impairment "may not have affected" his ability to perform his usual coal mine employment. Director's Exhibit 13. He subsequently opined it is "highly unlikely" Claimant is unable to perform his usual coal mine employment periodically but concluded Claimant "may not" be able to perform this work sustainably for 8 hours. Director's Exhibits 12. Conversely, Drs. Castle and Zaldivar opined Claimant is not totally disabled. Employer's Exhibits 1, 7, 9. The ALJ found Dr. Jin's opinion entitled to little weight because it was equivocal, especially considering his unexplained change in opinion without reviewing new evidence. Decision and Order at 15. She further found the physician's opinion was called into question by his reliance on the September 25, 2017 pulmonary function study, the reliability of which all three physicians questioned.

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<sup>5</sup> The ALJ considered three arterial blood gas studies conducted on September 25, 2017, July 18, 2018, and April 24, 2019. Decision and Order at 10. The September 25, 2017 study was non-qualifying at rest and with exercise. Director's Exhibit 13. The July 18, 2018 and April 24, 2019 studies were non-qualifying at rest. Employer's Exhibit 1; Claimant's Exhibit 2.

*Id.* The ALJ accorded some weight to the opinions of Drs. Zaldivar and Castle, finding them consistent with the weight of the arterial blood gas studies but noting they relied upon pulmonary function studies they believed to be invalid. *Id.* She therefore found the weight of the medical opinion evidence does not support a finding of total disability. Decision and Order at 15; 20 C.F.R. §718.204(b)(2)(iv).

On appeal, Claimant argues that the ALJ erred in finding the medical opinion evidence does not establish total disability. Claimant's Brief at 6-7. We disagree.

We affirm, as unchallenged on appeal, the ALJ's determination that Dr. Jin's opinion is equivocal, poorly documented, and entitled to little weight. *Skrack*, 6 BLR at 1-711; Decision and Order at 15. Because Claimant bears the burden of establishing that he is totally disabled and Dr. Jin is the only physician who opined Claimant is totally disabled, we must affirm the ALJ's determination that the medical opinion evidence does not establish total disability.<sup>6</sup> 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 15.

### **Weighing of the Evidence as a Whole**

Weighing together all of the relevant evidence, like and unlike, the ALJ determined Claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 15. Claimant contends that the ALJ erred when weighing together the pulmonary function study and arterial blood gas study evidence, and therefore erred in finding the evidence as a whole does not establish total disability. Claimant's Brief at 4-5. We disagree.

Contrary to Claimant's arguments, while the ALJ found the weight of the pulmonary function studies are qualifying, he found those studies unreliable and not sufficient to establish total disability. Decision and Order at 9-10; Claimant's Brief at 4. Moreover, we reject Claimant's arguments that the ALJ should have determined whether the arterial blood gas study evidence is less reliable than the pulmonary function study evidence because no exercise blood gas study was conducted. Claimant's Brief at 4. While an exercise blood gas study may be a better predictor of Claimant's ability to perform his coal mine work than a resting study, Claimant points to no authority for the proposition that a

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<sup>6</sup> Because we affirm the determination that Dr. Jin's opinion does not establish total disability, we need not address Claimant's arguments that the ALJ erred in crediting the opinions of Drs. Castle and Jarboe. Claimant's Brief at 5-6. Both doctors opined Claimant does not have a totally disabling respiratory impairment and, therefore, their opinions do not assist Claimant in satisfying his burden to establish he is totally disabled. Decision and Order at 14-15; Employer's Exhibits 1, 7, 9.

resting study is less reliable than an invalid pulmonary function study. *Id.* Moreover, an exercise study was conducted and it was non-qualifying. Director's Exhibit 13.

There also is no merit in Claimant's argument that the pulmonary function studies are a more reliable indicator of disability because they were taken more recently than the arterial blood gas studies. Claimants' Brief at 4. Initially we note that, as discussed above, the ALJ permissibly determined the pulmonary function study evidence is unreliable and not sufficient to establish total disability based upon the medical evidence, while there are no medical opinions suggesting the arterial blood gas study evidence is unreliable. Decision and Order at 9-10. Further, while a more recent study may be more indicative of a miner's impairment, only two months separate the most recent arterial blood gas study and pulmonary function study. *See Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (two months is insignificant when evaluating a miner's entitlement and thus court would not apply "later in time" rationale); *Martin v. Director, OWCP*, 6 BLR 1-535, 1-537 (1983) (later evidence rule does not require adjudicator to credit positive x-ray over negative x-ray taken just two months earlier); Claimant's Exhibits 1, 2. Moreover, the two types of studies measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

Claimant's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's determination that the evidence as a whole does not establish total disability when the pulmonary function studies were not sufficient to establish total disability and the arterial blood gas study evidence and the medical opinion evidence do not support a finding of total disability.<sup>7</sup> 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198; Decision and Order on Remand at 8. As Claimant failed to establish total disability, he did not invoke the Section 411(c)(4) presumption and failed to establish an essential element of entitlement. *Trent*, 11 BLR at 1-27. We therefore affirm the denial of benefits.

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<sup>7</sup> Because we have affirmed the ALJ's denial of benefits, we need not address Employer's contention on cross-appeal that the ALJ erred in according reduced weight to the opinions of Drs. Zaldivar and Castle that Claimant is not totally disabled. Employer's Brief at 13-14.

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

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge