U.S. Department of Labor

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

BRB No. 21-0006 BLA

CARL R. SOWDERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TENNCO, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 02/16/2022
	)	
AMERICAN MINING 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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits (2018-BLA-05573) rendered on a subsequent claim filed on December 17, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 26.72 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues that the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[4] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

---

[1] This is Claimant's second claim for benefits. The district director denied Claimant's first claim, filed on February 24, 2003, for failure to establish total disability. Director's Exhibit 1 at 3.

[2] 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 he 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)(1); *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 failure to establish total disability, he had to submit new evidence establishing this element. *See White*, 23 BLR at 1-3.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 26.72 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Decision and Order at 20.

The Benefit 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).

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). 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).

Employer alleges the ALJ erred in finding Claimant established total disability based on the pulmonary function study and medical opinion evidence.[6] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 24, 43; Employer's Brief at 9-11. Its arguments have no merit.

The ALJ considered the results of nine pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 22-24. The January 12, 2015 and August 16, 2018 studies produced non-qualifying pre-bronchodilator and post-bronchodilator values.[7] Employer's Exhibits 1 at 8; 4. The March 19, 2015, December 9, 2015, and December 18, 2015 studies produced non-qualifying pre-bronchodilator values. Director's Exhibit 13 at 1; Employer's Exhibits 5-6. The February 23, 2016 and July 28, 2016 studies produced

[5] We will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10; Director's Exhibit 4.

[6] The ALJ found the arterial blood gas studies insufficient to establish total disability and 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 25-26; Director's Exhibits 12, 14; Claimant's Exhibit 6; Employer's Exhibit 1.

[7] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Director's Exhibits 12 at 7; 14 at 8. The September 6, 2017 and July 18, 2018 studies produced qualifying pre-bronchodilator values. Claimant's Exhibits 4-5.

The ALJ concluded the pre-bronchodilator pulmonary function studies are a better measure of pulmonary disability. Decision and Order at 24. He further accorded greater weight to the five most recent studies as better reflecting Claimant's current condition. *Id.* Noting the February 23, 2016, July 28, 2016, September 6, 2017, and July 18, 2018 studies all produced qualifying pre-bronchodilator values and the August 16, 2018 pre-bronchodilator study was close to qualifying,[8] the ALJ determined Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer contends the ALJ improperly afforded less weight to the August 16, 2018 pulmonary function study because he noted the FEV1/FVC ratio is qualifying and that the FEV1 is close to qualifying. Employer's Brief at 6-7. Employer's contention is without merit. In accordance with the tables listed in Appendix B to 20 C.F.R. Part 718, the ALJ properly characterized the values of the August 16, 2018 pulmonary function study as non-qualifying. Decision and Order at 23-24. Moreover, the ALJ did not reject or otherwise discredit the August 16, 2018 pulmonary function study. Rather, in considering the five most recent pulmonary function studies, the ALJ permissibly weighed the four qualifying studies against the non-qualifying August 16, 2018 study and determined the pulmonary function studies establish total disability.[9] *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJ permissibly found valid pulmonary function tests established disability where two of three most recent studies were qualifying); *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); Decision and Order at 23-24. We therefore affirm the ALJ's determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i).

[8] The ALJ observed the August 16, 2018 pre-bronchodilator study produced a qualifying FEV1/FVC ratio, and that the FEV1 value "exceeds the Appendix B standard by '.02.'" Decision and Order at 24.

[9] There is likewise no merit to Employer's assertion that the ALJ inconsistently stated he accorded more weight to the more recent pulmonary function studies but did not credit the August 16, 2018 study despite its being the most recent. Employer's Brief at 8. The ALJ considered the results of nine pulmonary function studies and gave greater consideration to the "five most recent ventilatory tests, those conducted from February 2016," over those tests conducted before that date. Decision and Order at 24.

Turning to the medical opinion evidence, the ALJ considered the opinion of Dr. Forehand that Claimant is totally disabled, and the opinions of Drs. Dahhan and McSharry that he is not. Decision and Order at 40-43; Director's Exhibits 12, 14, 17; Employer's Exhibits 1-3, 10. He found Dr. Forehand's opinion more persuasive and therefore concluded the medical opinion evidence establishes total disability. Decision and Order at 40-43.

Employer contends the ALJ mischaracterized Dr. McSharry's opinion as supportive of a finding of total disability. Employer's Brief at 10. We disagree.

The ALJ correctly observed Dr. McSharry opined he found "no disability in this case," Decision and Order at 35, *quoting* Employer's Exhibit 1 at 2, but also Dr. McSharry acknowledged Claimant has a moderate respiratory impairment in the form of moderate obstructive lung disease. Decision and Order at 42; Employer's Exhibits 1 at 2; 3 at 2. Contrary to Employer's argument, the ALJ did not conclude that Dr. McSharry's opinion supports a finding of total disability but rather permissibly found his opinion unreasoned because, having acknowledged Claimant has a "moderate" impairment, Dr. McSharry did not adequately explain his conclusion that Claimant could return to his last coal mine employment, which required heavy labor.[10] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000); Decision and Order at 42.

Employer next contends the ALJ erroneously discredited Dr. Dahhan's opinion and held Drs. Dahhan and Forehand to different standards. Employer's Brief at 10. It argues he discredited Dr. Dahhan for failing to adequately address the qualifying pre-bronchodilator pulmonary function studies while crediting Dr. Forehand, who did not review every study of record. Employer's Brief at 10-11. We disagree. The ALJ did not discredit Dr. Dahhan for failing to review every pulmonary function study in the record. Rather, he permissibly found Dr. Dahhan's opinion unreasoned because the physician opined the post-bronchodilator pulmonary function study evidence establishes Claimant is not disabled without addressing the qualifying pre-bronchodilator studies, including his own.[11] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*,

[10] On appeal, Employer does not challenge the ALJ's finding that Claimant's last coal mine employment required heavy manual labor. Decision and Order at 20 n.11. This finding is thus affirmed. *See Skrack*, 6 BLR at 1-711.

[11] Dr. Dahhan opined the pulmonary function studies do not support the existence of a totally disabling pulmonary impairment because the post-bronchodilator values are non-qualifying. Employer's Exhibits 1 at 2; 3 at 2. He further opined the September 6,

866 F.2d at 185; 45 Fed. Reg. 13,677, 13,682 (Feb. 29, 1980); Decision and Order at 40-41; Director's Exhibit 14 at 2; Employer's Exhibits 2, 10.

Moreover, contrary to Employer's contention, the ALJ did not discredit Dr. Dahhan's opinion solely because he did not address the qualifying pre-bronchodilator pulmonary function studies. Employer's Brief at 10-11. The ALJ also permissibly discredited Dr. Dahhan for failing to adequately address the exertional requirements of Claimant's last coal mine work. *See Cornett*, 227 F.3d at 587; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 40-41.

In contrast, the ALJ permissibly found Dr. Forehand's opinion adequately reasoned because he based his opinion on his examination of Claimant, his review of additional medical records, and an accurate understanding of the exertional requirements of Claimant's last coal mine job. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 42. He further permissibly found Dr. Forehand persuasively explained his opinion that the qualifying pre-bronchodilator pulmonary function studies, as well as the reduced FEV1 results in non-qualifying studies, demonstrate Claimant cannot perform his last coal mine job. *See Cornett*, 227 F.3d at 587; Decision and Order at 42-43.

Employer raises no other argument with respect to the ALJ crediting Dr. Forehand's opinion and discrediting Drs. McSharry's and Dahhan's. Consequently, we affirm the ALJ's finding that the medical opinions establish total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 43. As Employer raises no additional challenge, we affirm the ALJ's findings that Claimant established total disability as well as a change in an applicable condition of entitlement, and that he invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1), 725.309(c); *Rafferty*, 9 BLR at 1-232; Decision and Order at 25. Further, as Employer has not challenged the ALJ's determination that it did not rebut the presumption, we affirm this finding and the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 52-53.

2017 and July 18, 2018 studies are invalid because neither test included post-bronchodilator testing. Employer's Exhibit 10 at 15.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge