U.S. Department of Labor

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

BRB No. 21-0165 BLA

HOMER J. STARR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/24/2022
	)	
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 Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits (2018-BLA-05514) rendered on a claim filed pursuant to the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on March 16, 2017.[1]

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

On appeal, Employer argues the ALJ erred in denying its motion to compel Claimant to attend a post-hearing medical examination. Employer further contends the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. It also argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.[4]

[1] Claimant filed two prior claims. Director's Exhibits 1, 2. He filed his most recent prior claim on July 24, 2013. Director's Exhibit 2. On November 14, 2013, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) and preliminarily found Claimant failed to establish a totally disabling respiratory impairment and total disability due to pneumoconiosis. Director's Exhibit 2. Employer responded, agreeing with the preliminary determination that Claimant is not entitled to benefits. There is nothing in the record indicating Claimant challenged the SSAE preliminary findings or further pursued his 2013 claim.

[2] The ALJ further found no evidence of complicated pneumoconiosis; therefore, she determined Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018).

[3] Section 411(c)(4) 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); *see* 20 C.F.R. §718.305.

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

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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Order Denying Post-Hearing Blood Gas Study

On December 28, 2018, Employer received Claimant's submission of Dr. Green's November 29, 2018 medical report which included a qualifying blood gas study. On January 7, 2019, Employer filed a motion requesting a second examination of Claimant to respond to Dr. Green's report. At the January 16, 2019 hearing, the ALJ ruled Dr. Green's report was timely submitted and admitted it into the record as Claimant's Exhibit 2. Hearing Transcript at 12. Employer modified its motion to request only the opportunity to obtain a new blood gas study. *Id.* at 9-10. Claimant's counsel objected to further testing but not to a rebuttal response. *Id.* at 10-11. The ALJ agreed Employer was entitled to respond to Claimant's evidence but indicated she would issue a post-hearing order on whether to allow further testing.[6] *Id.* at 11.

Subsequent to the hearing, the ALJ denied Employer's request to obtain a new blood gas study but gave it the opportunity to otherwise respond to Dr. Green's report. February 4, 2019 Order Denying Employer's Request to Conduct Post-Hearing Exam of Claimant at 2, *citing Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1985), *aff'd on*

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[6] At the hearing the ALJ stated:

> I'm inclined not to allow the testing. But, certainly even if I say no to the testing, you're entitled to the rebuttal response. You know, whether that's through a deposition of the doctor who conducted the testing here that was submitted on the 20th day or whether that's a deposition of your own doctor or your own physician reviewing that testing results, I leave that up to you. As to the testing of the miner, I'm going to have to think that over and give you a final response on that.

Hearing Transcript at 11.

recon., 9 BLR 1-236 (1987) (en banc).[7] Employer subsequently submitted Dr. Tuteur's deposition in response to Dr. Green's report. Employer's Exhibit 9.

Employer argues the ALJ erred by denying its request to obtain a post-hearing blood gas study to rebut Dr. Green's November 29, 2018 study. Employer's Brief at 2, 8; February 4, 2019 Order Denying Employer's Request to Conduct Post-Hearing Exam of Claimant; Claimant's Exhibit 2. We disagree.

Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Further, although *Shedlock* requires Employer be given an opportunity to respond to evidence submitted immediately prior to the twenty-day deadline requirement 20 C.F.R. §725.456 imposes, Employer's opportunity to respond does not include an automatic right to have Claimant reexamined. *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 147-48 (4th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990) (en banc). The ALJ determines whether an additional examination is required, based on her review of the evidentiary submissions of record. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Employer's general contention that a new blood gas study might have shown Claimant does not have a permanent or disabling respiratory impairment fails to show why the ALJ abused her discretion in denying its request to obtain a post-hearing blood gas study. *Blake*, 24 BLR at 1-113; *Owens*, 14 BLR at 48-49 (1990); *Shedlock*, 9 BLR at 1-200; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Having already submitted its two affirmative blood gas studies, Employer was entitled only to have a physician review Dr. Green's blood gas study as the regulations limit the parties' rebuttal response. To rebut evidence submitted in support of an opposing party's affirmative case, the claimant and the responsible operator

[7] In *Shedlock*, the employer attempted to submit a rebuttal report at the hearing in response to an examination report the claimant submitted just prior to the twenty-day deadline for submitting documentary evidence. 9 BLR at 1-200-01; *see* 20 C.F.R. §725.456(b)(2). The claimant objected to the report as untimely, and the ALJ excluded the rebuttal report. *Id*. On appeal, the Board held the claimant's submission of an examination report "just prior to the deadline imposed by the [twenty]-day rule for submitting documentary evidence into the record, coupled with the [ALJ's] refusal to allow employer the opportunity to respond to the claimant's introduction of this 'surprise' evidence, constituted a denial of employer's due process right to a fair hearing." *Id*.

may each submit "no more than one physician's *interpretation* of each . . . arterial blood gas study" that the opposing party submits. 20 C.F.R. §725.414(a)(2)(ii), (3)(ii) (emphasis added). Therefore, contrary to Employer's argument, the ALJ was not required to have Claimant undergo post-hearing blood gas testing; rather, she permissibly gave Employer the opportunity to submit Dr. Tuteur's post-hearing deposition to respond to Dr. Green's qualifying blood gas study and opinion.[8] *Henderson*, 939 F.2d at 147-148; *Owens*, 14 BLR at 48-49; *see Shedlock*, 9 BLR at 1-200; Employer's Brief at 8. We therefore affirm the ALJ's evidentiary ruling. *See Dempsey*, 23 BLR at 1-63.

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

To invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock*, 9 BLR at 1-198.

The ALJ found that although the pulmonary function studies were non-qualifying and therefore did not establish total disability, Dr. Green's medical opinion and the preponderance of the blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 14, 27. Weighing all the evidence together, she found Claimant established total disability. Decision and Order at 28. Employer argues the ALJ erred in finding the preponderance of the blood gas studies established total

[8] Additionally, on its evidence summary form, Employer identified Dr. Tuteur's October 23, 2017 and Dr. Nader's July 18, 2018 blood gas studies as its affirmative evidence. However, in its motion to obtain a post-hearing examination, Employer acknowledged it only obtained one medical evaluation in support of its case (Dr. Tuteur's October 23, 2017 report), as Claimant actually obtained Dr. Nader's July 18, 2018 report. Employer's Motion at 2. Therefore, Employer chose to rely on Claimant's evidence as part of its litigation strategy although it had the opportunity to obtain a second examination of Claimant along with a blood gas study at any time prior to the hearing. February 4, 2019 Order Denying Employer's Request to Conduct Post-Hearing Exam of Claimant at 2.

disability and in discrediting Dr. Nader's opinion that Claimant is not totally disabled. Employer's Brief at 3-8.

Blood Gas Studies

The ALJ weighed five blood gas studies.[9] Decision and Order at 14. Dr. Green's July 10, 2017, June 13, 2018, and November 29, 2018 resting studies were qualifying; Dr. Tuteur's October 23, 2017 resting study was non-qualifying; and Dr. Nader's July 18, 2018 resting and exercise studies produced non-qualifying values.[10] Director's Exhibits 25, 35; Claimant's Exhibit 2; Employer's Exhibit 5. Director's Exhibit 2. The ALJ found a preponderance of the studies are qualifying and therefore concluded Claimant established total disability under 20 C.F.R. §718.204(b)(2)(ii).

Employer argues the ALJ relied solely on a numerical count of the blood gas study evidence and failed to properly consider Dr. Nader's non-qualifying exercise study. Specifically, Employer notes that while the ALJ included Dr. Nader's exercise study on her chart of the evidence, she later misstated that Dr. Nader was not able to exercise Claimant. *Id.* at 3. Employer contends the ALJ's mischaracterization of Dr. Nader's blood gas study is significant because she acknowledged that exercise blood gas studies may be considered more probative of Claimant's ability to perform coal mine employment requiring physical exertion. *Id.* at 4. In addition, it asserts the ALJ simply counted the number of qualifying blood gas studies without regard to Dr. Nader's study being the only one performed during exercise, and thus did not adequately explain how she resolved the conflict in the evidence. Employer's arguments have merit.

Although the ALJ included Dr. Nader's July 18, 2018 non-qualifying exercise study in her chart of the blood gas study evidence, she later noted in her summary of the medical opinion evidence that Dr. Nader "could not exercise [Claimant] for the [arterial blood gas (ABG)] test due to his arthritis." Decision and Order at 14, 19; *see* Employer's Brief at 3-4; Employer's Exhibit 5. Contrary to the ALJ's statement, while Dr. Nader indicated

[9] ALJ also considered Dr. Ammisetty's August 21, 2013 non-qualifying resting blood gas study submitted with Claimant's prior claim. Decision and Order at 14. Noting that pneumoconiosis is considered a latent and progressive disease, the ALJ found Dr. Ammisetty's study did not "accurately reflect Claimant's current pulmonary condition." *Id*.

[10] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

Claimant was unable to exercise on the treadmill due to his arthritis, he noted Claimant was exercised on an ergometer. Employer's Exhibit 5. We are unable to discern the extent to which this mischaracterization affected the ALJ's overall weighing of Dr. Nader's exercise blood gas study.

In addition, although the ALJ indicated greater weight could be given to the most recent evidence, which is Dr. Green's qualifying November 29, 2018 resting study, she also noted that "[e]xercise ABG values may be credited as more probative of a claimant's ability to perform coal mine employment requiring physical exertion because exercise testing assesses oxygen levels during exertion." Decision and Order at 13-14. But then she did not consider whether Dr. Nader's non-qualifying exercise study may therefore be more probative when weighing the blood gas studies. Instead, the ALJ apparently relied solely on a numerical count of the studies, noting "five pre-exercise ABG tests and one post-exercise ABG test" and concluding "a preponderance of ABG values on record in the present claim met Federal qualifying standards for total disability." Decision and Order at 14. However, of the five studies, one of which provided both resting and exercise values, three were qualifying at rest, two were non-qualifying at rest and one was non-qualifying with exercise. Director's Exhibits 25, 35; Claimant's Exhibits 1, 2; Employer's Exhibit 5.

Thus, because the ALJ failed to conduct both a quantitative and qualitative analysis of the conflicting blood gas study evidence and did not adequately explain how she resolved the conflicts in that evidence, we vacate her conclusion that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Medical Opinion Evidence

The ALJ also found Claimant established total disability based on the medical opinion evidence. Decision and Order at 15-28. Dr. Green opined Claimant is totally disabled from performing his usual coal mine work, while Dr. Nader opined he does not have a disabling respiratory or pulmonary impairment. Director's Exhibits 25, 29; Claimant's Exhibits 1, 2; Employer's Exhibit 5. Dr. Tuteur initially opined Claimant is totally disabled from performing his usual coal mine work due to "lifelong upper gastrointestinal dysfunction," but subsequently concluded Claimant has no impairment of pulmonary function based on the objective studies he reviewed. Director's Exhibit 35; Employer's Exhibits 7, 9 at 16-18. The ALJ gave significant weight to Dr. Green's opinion because he relied on qualifying blood gas studies consistent with the ALJ's finding that the preponderance of the blood gas evidence supports total disability. Decision and Order at 24. Conversely, the ALJ discredited the opinions of Drs. Nader and Tuteur for failing to adequately explain why Claimant is not totally disabled based on the qualifying blood gas

studies. *Id.* at 25-26. As we have vacated the ALJ's weighing of the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii), which influenced her weighing of the medical opinion evidence, we also vacate her determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on the blood gas studies and explain how she resolves the conflict in that evidence. The ALJ must properly characterize the evidence and undertake a quantitative and qualitative analysis in reaching her conclusion. *Sea"B" Mining Co. v. Addison,* 831 F.3d 244, 252-54 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *see also Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence").

She must also reconsider the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). In rendering her credibility findings, she must consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). If the ALJ finds either the blood gas studies or medical opinions support a finding of total disability, she must weigh all of the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If the ALJ determines Claimant is totally disabled, Claimant will have invoked the Section 411(c)(4) presumption. The ALJ must then address whether Employer has rebutted it.[11] If Claimant is unable to establish total disability, benefits are precluded. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). In reaching her conclusions on remand, the ALJ must explain the bases for her credibility determinations and findings of fact as the Administrative Procedure Act requires.[12] *See Wojtowicz*, 12 BLR at 1-165.

[11] We decline to address Employer's challenge to the ALJ's findings that it failed to rebut the Section 411(c)(4) presumption as premature.

[12] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and reasons or basis therefor, on all material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge