U.S. Department of Labor

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

BRB Nos. 21-0209 BLA
and 21-0209 BLA-A

LLOYD DAVID MILLS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL DEVELOPMENT	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/24/2022
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal and Claimant cross-appeals Administrative Law Judge (ALJ) Carrie Bland's Decision and Order on Remand Awarding Benefits (2015-BLA-05227) 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 September 18, 2013,[1] and is before the Benefits Review Board for a second time.

In her initial Decision and Order, the ALJ found Claimant established thirty-one and one-quarter years of coal mine employment, with at least fifteen years performed at underground mines or in substantially similar conditions at surface mines, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement[2] 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); 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

[1] On April 29, 2010, the district director denied Claimant's prior claim, filed on April 29, 2010, because he failed to establish total disability. Director's Exhibit 1. Claimant took no further action until filing the current claim. Director's Exhibit 3.

[2] Where 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)(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 Claimant did not establish a totally disabling respiratory or pulmonary impairment in his prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *Id*.

[3] 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.

Considering Employer's appeal, the Board affirmed the ALJ's finding that Claimant established at least fifteen years of underground or substantially similar coal mine employment. The Board vacated, however, the ALJ's determination that the new pulmonary function study and medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(i), (iv). Therefore, the Board vacated her determinations that Claimant established total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption and remanded the case for further consideration.[4] The Board instructed the ALJ to reconsider whether the new pulmonary function study and medical opinion evidence establish total disability. It also held Employer's withdrawal of its challenge to the ALJ's finding that Claimant has sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption rendered Claimant's cross-appeal challenge to the ALJ's length of coal mine employment finding moot. *Mills v. Mountaineer Coal Development*, BRB Nos. 18-0378 BLA and 18-0378 BLA-A (June 27, 2019) (unpub.).

On remand, the ALJ found Claimant established total disability, a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 725.309. Thus she reinstated her previous determination that Employer did not rebut the Section 411(c)(4) presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding the new pulmonary function study evidence established total disability and Claimant invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief. On cross-appeal, Claimant contends that if the Board holds the ALJ erred in finding the October 17, 2013 pulmonary function study valid, then the case must be remanded to the district director for a complete pulmonary evaluation. Neither Employer nor the Director has responded to Claimant's cross-appeal.

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

[4] The Board declined to address Employer's argument that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption, but noted Employer could challenge those findings in a future appellate proceeding. *Mills v. Mountaineer Coal Development*, BRB Nos. 18-0378 BLA and 18-0378 BLA-A, slip op. at 6 n.11 (June 27, 2019) (unpub.).

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 Associates, Inc.*, 380 U.S. 359 (1965).

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

To invoke the Section 411(c)(4) presumption, a 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. 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 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 established total disability based on the newly submitted pulmonary function studies, medical opinions, and evidence as a whole.[6] 20 C.F.R. §718.204(b)(2); Decision and Order on Remand 6-7.

Employer argues the ALJ erred in finding Claimant established total disability based on the new pulmonary function study evidence.[7] 20 C.F.R. §718.204(b)(2)(i); Employer's Brief at 5-12; Decision and Order on Remand at 6. We disagree.

In her prior decision, the ALJ considered the newly submitted October 17, 2013 and April 2, 2014 pulmonary function studies. She determined Claimant established total

[5] 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 4; Hearing Tr. at 19.

[6] The Board noted the ALJ's findings that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *Mills v. Mountaineer Coal Development*, BRB Nos. 18-0378 BLA and 18-0378 BLA-A, slip op. at 4 n.7 (June 27, 2019) (unpub.); 2018 Decision and Order at 10, 19.

[7] The ALJ found Claimant did not establish total disability based on the new blood gas studies, and there is 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 6, 16.

disability because both studies produced qualifying[8] results. 20 C.F.R. §718.204(b)(2)(i). On appeal, the Board held the ALJ's evaluation of the studies did not comply with the Administrative Procedure Act[9] because she did not make a finding regarding their validity. The Board instructed the ALJ to resolve the conflict between the opinions of Drs. Gaziano, Ranavaya, and Sood and those of Drs. Zaldivar and Castle concerning the validity of the studies and determine whether they are reliable to support a finding of total disability. *Mills*, BRB Nos. 18-0378 BLA and 18-0378 BLA-A, slip op. at 5. The Board also instructed her to reconsider the medical opinions of Drs. Gaziano, Sood, Zaldivar, and Castle in light of her findings regarding the pulmonary function studies. *Mills*, slip op. at 5-6.

On remand, the ALJ again considered the two newly submitted pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 3-6. The October 17, 2013 study produced qualifying results before the administration of a bronchodilator; a post-bronchodilator study was not performed. Director's Exhibit 11. The April 2, 2014 study produced qualifying results both before and after the administration of a bronchodilator. Director's Exhibit 24. The ALJ also considered the opinions of Drs. Gaziano, Ranavaya, Sood, Zaldivar, and Castle concerning the validity of the studies. Decision and Order on Remand at 3-6. Weighing Drs. Zaldivar's and Castle's opinions that the October 17, 2013 and April 2, 2014 studies are invalid against Drs. Gaziano's, Ranavaya's, and Sood's contrary opinions and the administering technician who noted "good effort and cooperation," the ALJ found the studies are valid and support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 6.

We reject Employer's argument that the ALJ erred in finding the October 17, 2013 and April 2, 2014 pulmonary function studies valid. Employer's Brief at 5-12.

When considering the pulmonary function studies conducted in anticipation of litigation, an ALJ must determine whether the studies are in substantial compliance with

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

[9] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the 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).

the regulatory quality standards.[10] 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see also* 20 C.F.R. Part 718, Appendix B. 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 must then, in her role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable).

Dr. Gaziano administered the October 17, 2013 study and Dr. Zaldivar administered the April 2, 2014 study. Director's Exhibits 11, 24. The technician who conducted the October 17, 2013 study for Dr. Gaziano reported Claimant exhibited good cooperation and the ability to understand and follow directions. Director's Exhibit 11. Dr. Ranavaya reviewed the October 17, 2013 study for the Department of Labor and opined the "vents are acceptable." Director's Exhibit 11. Drs. Gaziano and Sood reviewed both the October 17, 2013 and April 2, 2014 studies and opined they meet the American Thoracic Society criteria for acceptability and repeatability. Director's Exhibit 25; Claimant's Exhibits 3, 4. In contrast, Drs. Zaldivar and Castle opined both studies are invalid because Claimant did not provide sufficient effort.[11] Director's Exhibit 24; Employer's Exhibits 3, 5, 6.

The ALJ noted Drs. Zaldivar and Castle relied on the normal results of prior pulmonary function studies to invalidate the October 17, 2013 and April 2, 2014 studies

[10] An ALJ must consider a reviewing physician's opinion regarding a claimant's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

[11] Dr. Zaldivar initially suggested Claimant performed both the October 17, 2013 and April 2, 2014 studies with submaximal effort, but he opined the studies were technically acceptable "until proven otherwise by other studies" because they yielded similar values. Director's Exhibit 24 at 3. He subsequently reviewed prior pulmonary function studies that produced normal results and concluded that the October 17, 2013 and April 2, 2014 studies were invalid due to hesitation and inadequate effort. Employer's Exhibit 6 at 15-19. Dr. Castle opined both studies were invalid due to submaximal and variable effort. Employer's Exhibits 3 at 6, 9; 5 at 19-28.

for insufficient breathing effort.[12] Decision and Order on Remand at 6. She stated the results of the prior pulmonary function studies "are not relevant to the quality standards in Appendix B of the regulations to establish the validity of the particular [pulmonary function studies] in 2013 and 2014." *Id*. She permissibly found their opinions unpersuasive because they did not explain how the October 17, 2013 and April 2, 2014 studies failed to comply with the technical aspects of the quality standards in Appendix B.[13] *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); *Oreck* 10 BLR at 1-54-55 (party alleging objective study is invalid has a "two-part obligation at the hearing": "specify in what way the study fails to conform to the quality standards" and "demonstrate how this defect or omission renders the study unreliable"); Decision and Order on Remand at 6. Because substantial evidence supports it, we affirm the ALJ's finding that the October 17, 2013 and April 2, 2014 pulmonary function studies are valid and establish total disability.[14] 20 C.F.R. §718.204(b)(2)(i).

We also affirm as unchallenged the ALJ's finding that Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7. We further affirm the ALJ's determination that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order on Remand at 7.

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[12] The ALJ stated that "[b]ased on the pattern of clearly normal results in those earlier tests, it was [Dr. Zaldivar's] opinion that Claimant simply did not try with him or Dr. Gaziano and that their tests were therefore both invalid." Decision and Order on Remand at 4, *citing* Employer's Exhibit 5 at 19. She further noted "Dr. Castle stated that based on his review of the PFS from 1981 to 2010, Claimant had entirely normal pulmonary function until the invalid studies in 2013 and 2014." Decision and Order on Remand at 5, *citing* Employer's Exhibit 6 at 23.

[13] Employer's doctors criticized the pulmonary function study results as showing variability of effort, but they did not provide any detail as to the extent of the variability and how the studies do not meet the quality standards. Employer's Brief at 7-11.

[14] Because the ALJ provided a valid reason for discrediting Drs. Zaldivar's and Castle's opinions on the validity of the pulmonary function studies, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 5-12.

We therefore affirm the ALJ's findings that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309; Decision and Order on Remand at 7. As Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 7. We thus affirm the award of benefits. Consequently, we need not address Claimant's argument on cross-appeal regarding the district director's obligation to provide him with a complete pulmonary evaluation.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge