U.S. Department of Labor

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

BRB No. 23-0205 BLA

HUMBOLT B. PRITT, III	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG TYGART VALLEY, LLC	)	
	)	
and	)	
	)	
ARCH COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/22/2024
	)	
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order on Remand Awarding Benefits (2019-BLA-06146) rendered on a claim filed on November 12, 2015, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In his initial Decision and Order Awarding Benefits, the ALJ found Claimant established thirty-four years of underground coal mine employment. He also found Claimant established a totally disabling respiratory or pulmonary impairment based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i). Consequently, he determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

Employer appealed and the Board affirmed the ALJ's finding that Claimant established thirty-four years of underground coal mine employment. *Pritt v. ICG Tygart Valley, LLC*, BRB No. 20-0573 BLA, slip op. at 2 n.3 (Mar. 15, 2022) (unpub.). However, the Board reversed the ALJ's finding that Claimant established total disability based on the pulmonary function study evidence and further vacated his weighing of the medical opinion evidence in finding it does not establish total disability. *Id.* at 5-7. Consequently, the Board vacated the ALJ's findings that Claimant established total disability and therefore invoked the Section 411(c)(4) presumption, and remanded the case for the ALJ to reevaluate the medical opinion evidence. *Id.* at 10. The Board instructed the ALJ to first address the validity of the February 2, 2016 pulmonary function study and render a finding on the exertional requirements of Claimant's usual coal mine employment prior to addressing the medical opinion evidence. *Id.* at 9-10.

On remand, the ALJ found the medical opinion evidence supports a finding that Claimant is totally disabled from his last coal mine job, which required heavy labor. 20 C.F.R. §718.204(b)(2)(iv). He concluded Claimant established a totally disabling respiratory impairment and thus found Claimant invoked the Section 411(c)(4)

[1] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

presumption. 30 U.S.C. §921(c)(4). The ALJ further determined Employer did not rebut the presumption and again awarded benefits.

On appeal, Employer argues the ALJ erred in finding the medical opinion evidence establishes total disability. Claimant responds in support of the award of benefits. 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.[2] 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 his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work.[3] *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 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 concluded Claimant established total disability based on the medical opinion evidence.[4] 20 C.F.R. §718.204(b)(2)(iv).

[2] 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's last coal mine job as a shuttle car operator required heavy labor. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 11.

[4] In addition to holding the pulmonary function studies do not support total disability, the Board previously affirmed the ALJ's findings that the arterial blood gas study evidence does not establish total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Pritt v. ICG Tygart Valley, LLC*, BRB No. 20-0573 BLA, slip op. at 4 n.7 (Mar. 15, 2022) (unpub.); *see* 20 C.F.R. §718.204(b)(2)(i)-(iii).

Validity of the February 2, 2016 Pulmonary Function Study

An ALJ must determine whether pulmonary function studies are in substantial compliance with the requirements of 20 C.F.R. §718.103 and 20 C.F.R. Part 718, Appendix B. 20 C.F.R. §§718.101(b), 718.103(c); *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 at 20 C.F.R. Part 718, Appendix B, is presumed. 20 C.F.R. §718.103(c). If a study does not precisely conform to the requirements of 20 C.F.R. §718.103 and Appendix B, 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 his role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

Pursuant to the Board's instruction, the ALJ first evaluated the validity of the non-qualifying[5] February 2, 2016 pulmonary function study, as it could potentially influence the ALJ's weighing of the medical opinion evidence. *Pritt*, BRB No. 20-0573 BLA, slip op. at 9; Decision and Order on Remand at 8-9. He determined the FEV1 and FVC test results are in substantial compliance with the quality standards. Decision and Order on Remand at 8. While he found the MVV test only had one tracing and thus does not conform with the quality standards at 20 C.F.R. §718.103, he found the MVV result worthy of "limited weight." *Id.* at 8-9.

Employer contends the ALJ erred in finding the February 2, 2016 pulmonary function study MVV result worthy of some weight and thus supportive of the medical opinion evidence that relied on the MVV result to find total disability.[6] Specifically, it argues the ALJ erred in finding the MVV result valid given that the test had only one tracing. Employer's Brief at 3-5. It further contends the ALJ ignored its experts' opinions that there was inadequate effort and he also "misunderstood or misapplied" their explanations comparing the MVV result to the FEV1 result. Employer's Brief at 4-7. We disagree.

[5] 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).

[6] Employer does not contend the ALJ erred in finding the FEV1 and FVC results are in substantial compliance with the quality standards; thus, we affirm this finding. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 8.

Contrary to Employer's argument, the ALJ permissibly found that while the MVV test from the February 2, 2016 pulmonary function study did not fully conform to the quality standards at 20 C.F.R. §718.103, as only one tracing was provided, a missing tracing did not require the test to be precluded from consideration. Employer's Brief at 3-8, 15; *see* 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see also DeFore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-29 (1988); *Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-478-79 (1983 (while missing tracings render a pulmonary function study non-conforming, the study is not necessarily unreliable). The ALJ recognized the MVV test did not precisely conform to the quality standards but accorded the MVV result "limited weight" as the two recorded maneuvers were within ten percent of each other, the technician graded Claimant's effort as "good," and the "acceptability" of the test was supported by the well-reasoned opinions of Drs. Sood and Krefft. *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987) (ALJ must, in his role as factfinder, determine the probative weight to assign a study); Decision and Order on Remand at 8-9; Employer's Brief at 3-8, 15; 20 C.F.R. Part 718, Appendix B(2)(iii). Employer contends the Board's explanation in a footnote in its prior decision, stating "[non]-compliance with quality standards does not necessarily mean that the test result cannot be considered in assessing disability," is incorrect, asserting that substantial compliance is required. Employer's Brief at 4-5, citing *Pritt*, BRB No. 20-0573 BLA, slip op. at 6 n.12. But the Board did not state substantial compliance is not required; rather, we explained *full* compliance is not required, which is what Employer appears to be arguing. *Pritt*, BRB No. 20-0573 BLA, slip op. at 6 n.12.

Further, the ALJ permissibly found the opinions of Drs. Zaldivar and Tuteur, who used the FEV1 result to determine the validity of the MVV result,[7] are contrary to the regulatory provision that "[i]f the [MVV] is reported, the results of such test shall be obtained independently rather than calculated from the results of the FEV1." 20 C.F.R. §718.103(a); Decision and Order on Remand at 9. Thus, the ALJ acted within his discretion to find Drs. Zaldivar's and Tuteur's opinions undermined to the extent they invalidated the February 2, 2016 MVV result because it does not equal the FEV1 result multiplied by thirty-five or forty. *See Harman Mining Co. v. Director, OWCP* [*Looney*],

[7] Dr. Tuteur opined that the MVV result should be about forty times the FEV1 result and "[t]hat would mean the number should be 96, and in this case it was 59. Thus, again, the effort generated by the patient for whatever reason is inappropriately low, and on that basis the MVV is totally invalid . . . ." Employer's Exhibit 7 at 16. Dr. Zaldivar similarly opined the FEV1 result should be multiplied by "35 or 40" to determine the MVV result and that the disparity in the FEV1 and MVV results demonstrates "an effort problem." Employer's Exhibit 6 at 16, 18-19.

678 F.3d 305, 310 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); Decision and Order on Remand at 19-20.

Employer also contends that the ALJ ignored its experts' statements that the MVV study was invalid because Claimant's breathing rate was not fast enough. Employer's Brief at 4. Although the ALJ did not specifically discuss Drs. Zaldivar's and Tuteur's statements regarding the rate of Claimant's breathing, we consider any such error harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Employer points to no explanation from either doctor regarding how not breathing fast enough relates to the quality standards the Department of Labor (DOL) adopted for determining the validity of the MVV test result. *See* 20 C.F.R. §718.103(b), (c); 20 C.F.R. Part 718, Appendix B (2)(iii); *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 unreliable). Further, as noted above, the ALJ found the recorded results were within ten percent of each other, consistent with the regulatory requirements for assessing effort, a finding Employer does not contest. Decision and Order on Remand at 8-9. He permissibly determined this factor, along with others he considered, rendered the study worthy of limited weight. 20 C.F.R. Part 718, Appendix B(2)(iii); *Orek*, 10 BLR at 1-54-55.

Moreover, as discussed further below, Claimant's experts did not, contrary to Employer's contention, rely solely on the February 2, 2016 MVV test result in finding Claimant totally disabled. Thus, even assuming the ALJ erred in according limited weight to the test result, Employer has failed to explain how finding otherwise would have made a difference in the outcome. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Sood, Krefft, Zaldivar, and Tuteur.[8] Decision and Order on Remand at 19-20. Drs. Sood and Krefft found Claimant is totally disabled from his usual coal mine employment, while Drs. Zaldivar and Tuteur opined he is not. Claimant's Exhibits 1, 1a, 3, 3a; Employer's Exhibits 1, 2, 6, 7. The ALJ found Dr. Krefft's opinion the most well-reasoned and documented, supported by Dr. Sood's opinion, and outweighed Drs. Zaldivar's and Tuteur's opinions. Decision and

[8] Although the ALJ also reconsidered Dr. Scattaregia's opinion on remand, the Board previously affirmed the ALJ's according little weight to his opinion. *Pritt*, BRB No. 20-0573 BLA, slip op. at 8 n.15; Decision and Order on Remand at 19.

Order on Remand at 19-20. Thus, the ALJ found the medical opinion evidence supports a finding of total disability.

Employer argues the ALJ erred in his weighing of the medical opinion evidence. Initially, the only contention of error Employer raises regarding the ALJ's discrediting of Dr. Zaldivar's opinion is that he allegedly misunderstood the doctor's explanations for calculating the February 2, 2016 pulmonary function study's MVV result based on the measured FEV1 result. Employer's Brief at 19-20. As we have already rejected this argument, we affirm the ALJ's finding that Dr. Zaldivar's opinion regarding total disability is worthy of little weight.[9] Decision and Order on Remand at 19. Similarly, we reject Employer's argument that the ALJ misunderstood Dr. Tuteur's opinion regarding the validity of the February 2, 2016 pulmonary function study's MVV result based on the FEV1 result. Employer's Brief at 19.

In addition, Employer contends the ALJ failed to adequately explain the discrediting of Dr. Tuteur's opinion and substituted his opinion for that of the expert in finding the February 2, 2016 pulmonary function study's FEV1 results were valid as they were within five percent of each other. Employer's Brief at 17-20. We disagree.

The ALJ explained he found Dr. Tuteur's opinion contrary to his pulmonary function study findings, as Dr. Tuteur opined none of the studies could be relied upon except for a 2008 study demonstrating normal function; thus, the ALJ permissibly found his opinion poorly documented and reasoned. *See Compton*, 211 F.3d at 211; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (ALJ may discount medical opinions he finds contradict his findings); Decision and Order on Remand at 19; Employer's Brief at 18. Further, the ALJ accurately found Dr. Tuteur was incorrect in stating there was too much variation between the February 2, 2016 pulmonary function study's FEV1 results, as the two best FEV1 results of 2.27 and 2.37 are within five percent of each other. 20 C.F.R. Part 718, Appendix B(2)(ii)(G); Employer's Brief at 18; Decision and Order on Remand at 14 n.8. Thus, the ALJ was within his discretion to find Dr. Tuteur's opinion regarding total disability is poorly documented and reasoned. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (ALJ has exclusive power

[9] The ALJ also noted that Dr. Zaldivar acknowledged Claimant has a mild impairment but found it did not prevent him from performing his usual coal mine employment, which the ALJ found to be outweighed by the opinions of Drs. Sood and Krefft that Claimant has a moderate impairment which prevents him from performing heavy labor. Decision and Order on Remand at 19.

to make credibility determinations and resolve inconsistencies in the evidence); Decision and Order on Remand at 19.

Next, Employer argues the ALJ erred in crediting the opinions of Drs. Sood and Krefft. Specifically, it contends their opinions are undermined given their reliance on the February 2, 2016 pulmonary function study's MVV result. Employer's Brief at 3-5, 7-17. Employer further argues the ALJ erred in crediting Drs. Krefft's and Sood's opinions as they used different disability standards than those prescribed by the DOL to find total disability established even though the objective studies were not qualifying. Employer's Brief at 2, 14-15. We find Employer's arguments unpersuasive.

Even if the MVV result were found unreliable, Claimant's experts did not, contrary to Employer's contention, rely solely on the MVV result when rendering their total disability opinions. Dr. Sood concluded Claimant is totally disabled based on his chronic respiratory symptoms, activity intolerance, disabling MVV result, a rapid decline in his FEV1 results, abnormally elevated alveolar-arterial gradient, and reduced peak exercise capacity. Claimant's Exhibits 1 at 8; 1a at 5. Dr. Krefft found total disability not only based on Claimant's abnormally reduced MVV result, but also his mild hypoxemia at rest and persistently reduced FVC and FEV1 results, including a moderate reduction in the FEV1 result. Claimant's Exhibits 3 at 6-7; 3a at 2. When viewing these multiple respiratory abnormalities in the aggregate, she concluded Claimant does not have the respiratory capacity to return to his last coal mine employment. Claimant's Exhibit 3a at 2.

Further, a physician may offer a reasoned medical opinion diagnosing total disability even when the objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Scott v. Mason Coal Co*., 60 F.3d 1138, 1142 (4th Cir. 1995); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); 20 C.F.R. §718.204(b)(2)(iv). The regulations specifically provide total disability may be established when "a physician exercising reasoned medical judgment, based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine employment or comparable gainful employment]." 20 C.F.R. §718.204(b)(2)(iv).

Consequently, the ALJ permissibly credited Drs. Sood's and Krefft's opinions as consistent with the objective testing of record which, "although non-qualifying, still reveal[s] impairment sufficient to prevent the Claimant from performing his last coal mine employment as a shuttle car operator which requires heavy labor." Decision and Order on

Remand at 20; *see Akers*, 131 F.3d at 441; *Scott*, 60 F.3d at 1142; *Killman*, 415 F.3d at 721-22.

We therefore affirm the ALJ's finding that the opinions of Drs. Sood and Krefft are well-reasoned and documented and his determination that they better integrate the totality of the evidence, considered a more detailed description of Claimant's job duties,[10] and were consistent with his findings as to the February 2, 2016 pulmonary function study's results.[11] *See Compton*, 211 F.3d at 207-08; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order on Remand at 17-20. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Consequently, we affirm the ALJ's determination that Claimant established total disability based on Dr. Krefft's opinion as supported by Dr. Sood's opinion, and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order on Remand at 19-20. Therefore, we also affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order on Remand at 20; 20 C.F.R. §718.305.

Because Employer does not challenge the ALJ's findings that it failed rebut the Section 411(c)(4) presumption, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1); Decision and Order on Remand at 28, 30.

[10] Employer does not contest this finding by the ALJ. *See Skrack*, 6 BLR at 1-711.

[11] Contrary to Employer's argument, Drs. Sood's and Krefft's opinions are not "diametrically opposed;" Dr. Sood diagnosed Claimant with a moderate restrictive impairment and intermittent obstruction and Dr. Krefft indicated he had an obstructive impairment but could not rule out an associated restrictive process. Employer's Brief at 8; Claimant's Exhibits 1 at 4, 5; 1a at 3; 3 at 2; 3a at 1-2. A miner may suffer from both a restrictive and obstructive impairment. *See* 20 C.F.R. §718.201(a)(2). Indeed, Employer's expert, Dr. Zaldivar, indicated Claimant has both mild restriction and obstruction. Employer's Exhibit 1 at 5.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge