U.S. Department of Labor

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

BRB No. 24-0010 BLA

JAMES O. PATRICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND FORK CONSTRUCTION LIMITED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 07/17/2024
	)	
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 Granting Modification and Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds) Norton, Virginia, for Claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC) Charleston, West Virginia, for Employer and its Carrier.

Alice B. Catlin (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Granting Modification and Awarding Benefits (2020-BLA-06029) rendered on a claim filed on July 1, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a June 11, 2019 Decision and Order Denying Benefits, ALJ Natalie A. Appetta found Claimant did not establish complicated pneumoconiosis and therefore 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); 20 C.F.R. §718.304. While she credited Claimant with nineteen years of underground coal mine employment, she found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018) or establish entitlement to benefits under 20 C.F.R. Part 718. Consequently, she denied benefits.

Claimant filed a timely request for modification on February 14, 2020. Director's Exhibit 84. In her August 31, 2003 Decision and Order Granting Modification, which is the subject of the current appeal, ALJ Daum (the ALJ) also credited Claimant with nineteen years of underground coal mine employment and found the new evidence on modification established a totally disabling respiratory or pulmonary impairment. Thus, she found Claimant invoked the Section 411(c)(4) presumption. She further found Employer did not rebut the presumption and, therefore, concluded Claimant established modification based

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

on a change in condition, 20 C.F.R. §725.310, and that granting his request for modification rendered justice under the Act. Consequently, the ALJ awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and thereby invoked the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (Director), has filed a limited response urging rejection of Employer's arguments concerning the ALJ's reliance on the two most recent pulmonary function studies.

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.[3] 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, 361-62 (1965).

The ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact.[4] 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the ALJ], including the ultimate issue of benefits eligibility." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

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

To invoke the Section 411(c)(4) presumption, 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or

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

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because 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 7.

[4] The ALJ determined that the record does not show there was a mistake of fact in ALJ Appetta's Decision and Order Denying Benefits. Decision and Order at 21.

arterial blood gas studies,[5] 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).

The ALJ found Claimant established total disability based on the pulmonary function studies, the medical opinions, and the evidence as a whole.[6] Decision and Order at 31-33.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11, 31-32. The three studies previously submitted and evaluated by ALJ Appetta dated July 24, 2015, December 9, 2015, and February 22, 2018, produced non-qualifying results pre- and post-bronchodilator. Director's Exhibits 18 at 13, 23 at 9, 42 at 21. In contrast, the two studies from Dr. Crum dated August 17, 2021, and August 19, 2021, that Claimant submitted in support of his request for modification produced qualifying results pre- and post-bronchodilator. Claimant's Exhibits 2, 4. The ALJ found that while the non-qualifying studies were numerically superior, the more recent pulmonary function studies are the most probative of Claimant's current condition. Decision and Order at 31-32. Thus, the ALJ concluded Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 32.

Employer contends that the qualifying 2021 studies are invalid because they do not contain a physician's signature confirming compliance with the quality standards set forth

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The ALJ found none of the arterial blood gas studies produced qualifying values and, therefore, do not support total disability, and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 32.

at 20 C.F.R. 718.103[7] or any certification that Dr. Crum[8] supervised the August 17, 2021 study or even ordered the August 19, 2021 study. *Id*. at 5-6. While Dr. Green reviewed the 2021 studies, Employer notes that he did not specifically address the validity of the 2021 studies and also argues that the studies are unreliable because the "volume-time curve does not reach 7 seconds," as Appendix B of 20 C.F.R. Part 718 and 20 C.F.R. §718.103 requires.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle*

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[7] The quality standards set forth in 20 C.F.R. §718.103 for pulmonary function studies provide that the results include a signed statement by the physician or technician conducting the test which sets forth the following:

> (1) Date and time of test;
> (2) Name, DOL claim number, age, height, and weight of claimant at the time of the test;
> (3) Name of technician;
> (4) Name and signature of physician supervising the test;
> (5) Claimant's ability to understand the instructions, ability to follow directions and degree of cooperation in performing the tests. If the claimant is unable to complete the test, the person executing the report shall set forth the reasons for such failure;
> (6) Paper speed of the instrument used;
> (7) Name of the instrument used;
> (8) Whether a bronchodilator was administered. If a bronchodilator is administered, the physician's report must detail values obtained both before and after administration of the bronchodilator and explain the significance of the results obtained; and
> (9) That the requirements of paragraphs (b) [concerning MVV tracings] and (c) [concerning compliance with 20 C.F.R. Part 718 requirements] of this section have been complied with.

[8] Employer indicates that the reliability of the 2021 studies is also in question because Dr. Crum is a Board-certified radiologist and not an internist or pulmonologist. Employer's Brief at 6. However, Employer does not explain or offer any case law to support why Dr. Crum's credentials would affect the reliability of the studies. *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Coal Co., 23 BLR 1-229, 1-237 (2007) (en banc). 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). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); 20 C.F.R. Part 718, Appendix B. Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

Employer presented no evidence or argument to the ALJ that the 2021 pulmonary function studies fail to comply with the quality standards. We therefore agree with the arguments Claimant and the Director raise that Employer forfeited its right to challenge the validity of the pulmonary function study evidence since it failed to raise the issue before the ALJ and makes its arguments for the first time on appeal.[9] *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ); Decision and Order at 3 (Employer did not file a post-hearing brief); Hearing Transcript at 7-8 (Employer did not object to admission of Claimant's Exhibits 2 and 4).

Employer also contends the ALJ improperly relied on the recency of the pulmonary function study evidence alone to find that Claimant is totally disabled. Employer's Brief at 4. However, we see no error in the ALJ's analysis of the conflicting pulmonary function studies. The ALJ noted it is inappropriate to "mechanically" credit more recent evidence, and identified several factors that persuaded her to credit the more recent qualifying studies. Decision and Order at 32. Specifically, the ALJ noted the earlier tests were performed two and one-half to six years prior to the new 2021 pulmonary function studies submitted with Claimant's request for modification and also found the 2021 qualifying studies were performed two days apart with overall consistent results, lending support for their validity. *Id.* at 31-32. She further observed that while the earlier studies did not produce qualifying results, every physician opined to varying degrees that they demonstrated some degree of pulmonary dysfunction.[10] *Id.* at 32. Thus, the ALJ

[9] Employer did not raise the issue at the hearing and did not file a post-hearing brief. Employer also offers no reason to explain its failure to challenge the validity of the 2021 studies before the ALJ. *See* Employer's Brief at 5-7.

[10] In Dr. Green's July 24, 2015 report, he observed "[t]he abnormal pulmonary function studies [at that time] while not meeting total disability criteria do show moderate airflow obstruction which along with his symptoms of shortness of breath, cough, wheeze, and mucus expectoration contribute to his total pulmonary disability." Director's Exhibit 18 at 4. In his December 28, 2015 report, Dr. Zaldivar noted a "[m]ild irreversible airway obstruction" and a "[m]ild restriction of forced vital capacity, unchanged by

permissibly concluded that the more recent studies showed a progression of Claimant's respiratory impairment,[11] that they were most probative of his current condition, and that the pulmonary function studies overall support a change in Claimant's condition and establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*; *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). We therefore affirm the ALJ's conclusion as it is supported by substantial evidence and consistent with applicable law, 20 C.F.R. §718.204(b)(2)(i); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); Decision and Order at 33.

Because there is no contrary evidence undermining the qualifying 2021 pulmonary function studies, we further affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability.[12] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232;

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bronchodilators" on pulmonary function testing at that time. Director's Exhibit 23 at 2. Further Dr. Zalidvar observed that "[Claimant's] pulmonary abnormalities by spirometry do not completely revert to normal after inhaling bronchodilators." *Id.* at 3. In his July 29, 2018 report, Dr. Jarboe noted a "mild restrictive ventilatory defect measured repeatedly on spirometry" at that time. Director's Exhibit 42 at 11.

[11] Employer states that "a review of the absolute values for the various parts of the [pulmonary function studies] do not show a significant decline over the intervening years, especially between the 2018 testing and the two 2021 tests." Employer's Brief at 7. But the earlier tests were non-qualifying for total disability while the results of the more recent studies have declined sufficiently to be qualifying for total disability. Thus, we see no error in the ALJ's rationale that there was a decline in Claimant's condition. Decision and Order at 32.

[12] Employer raises no specific arguments at 20 C.F.R. §718.204(b)(2)(iv) regarding the ALJ's finding that the medical opinions of its medical experts are not relevant on modification as to whether Claimant is totally disabled because they did not review the most recent qualifying pulmonary function studies, other than its general contention that the ALJ erred in considering the recency of the evidence, which we have rejected. *See* Decision and Order at 32-33. We also need not address Employer's challenge to the ALJ's reliance on Dr. Green's 2021 opinion to support a finding of total disability since, having discredited Employer's experts, there is no evidence contrary to the qualifying studies. Employer's Brief at 7; *see* Claimant's Exhibits 3, 5.

Decision and Order at 14. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b).

As Employer raises no arguments regarding the ALJ's finding that it failed to rebut the 411(c)(4) presumption, we affirm this determination. 20 C.F.R. §718.305(b); *see Skrack*, 6 BLR at 1-711; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Toler v. E. Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 38. Consequently, we affirm the ALJ's determination that Claimant established a basis for modification at 20 C.F.R. §725.310, that granting modification would render justice under the Act, and the award of benefits.

Accordingly, the ALJ's Decision and Order Granting Modification and Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge