U.S. Department of Labor

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

BRB No. 23-0194 BLA

BILLY WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING, INCORPORATED c/o ARCH COAL	)	
	)	
and	)	
	)	
Self-Insured Through ARCH COAL c/o UNDERWRITERS S & C	)	DATE ISSUED: 06/10/2024
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Billy Wilson, Harlan, Kentucky.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits on Remand (2019-BLA-06022) rendered on a claim filed on May 21, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.

In his initial Decision and Order Denying Benefits, the ALJ found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). He therefore denied benefits.

Pursuant to Claimant's appeal, the Board affirmed the ALJ's finding that Claimant had at least twenty-five years of qualifying coal mine employment. *Wilson v. Lone Mountain Processing Inc. c/o Arch Coal*, BRB No. 21-0376 BLA, slip op. at 2 n.4 (June 23, 2022) (unpub.). However, the Board held the ALJ erred in weighing the arterial blood gas studies and medical opinion evidence on the issue of total disability.[3] *Id*. at 5. Thus, the Board vacated his findings that Claimant did not establish this element of entitlement and therefore vacated his denial of benefits. *Id*. at 5-6. On remand, the ALJ again found Claimant failed to establish a totally disabling respiratory or pulmonary impairment and therefore denied benefits. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2)(ii), (iv).

On appeal, Claimant generally challenges the ALJ's denial of benefits. Neither the Director, Office of Workers' Compensation Programs, nor Employer and its Carrier, have filed response briefs.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc*., 18

[1] On Claimant's behalf, Courtney Hughes, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review of the ALJ's decision, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] Claimant withdrew his prior claim; therefore, it is considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 1.

[3] The Board affirmed the ALJ's finding that the pulmonary function studies do not support total disability under 20 C.F.R. §718.204(b)(2)(i) and there is no evidence of cor pulmonale with right-sided congestive heart failure at 20 C.F.R. §718.204(b)(2)(iii). *Wilson v. Lone Mountain Processing Inc. c/o Arch Coal*, BRB No. 21-0376 BLA, slip op. at 3 n.8 (June 23, 2022) (unpub.).

BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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

To invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2018)[5] or establish entitlement under 20 C.F.R. Part 718, Claimant must prove he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). 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.[6] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies,[7] 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 the arterial blood gas studies and medical opinion evidence do not support a finding of total disability and, as the Board previously affirmed his determination that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii), he denied benefits. Decision and Order on Remand at 10.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12; Director's Exhibit 4.

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

[6] The Board previously affirmed the ALJ's determination that Claimant's usual coal mine employment required heavy labor. *Wilson*, BRB No. 21-0376 BLA, slip op. at 4.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Arterial Blood Gas Studies

The ALJ reconsidered four blood gas studies. Decision and Order on Remand at 3-6. The July 9, 2018 and October 30, 2018 studies produced qualifying values at rest[8] while the October 29, 2018 and July 20, 2020 studies produced non-qualifying values at rest and with exercise. Director's Exhibits 15, 27, 28; Employer's Exhibit 2. The ALJ accorded little weight to the qualifying October 30, 2018 study, finding it does not comply with the quality standards at 20 C.F.R. §718.105, and accorded "normal" probative weight to the remaining studies. Decision and Order on Remand at 5. Weighing the evidence together, the ALJ concluded the arterial blood gas evidence does not "preponderate toward" a finding of total disability. *Id.* at 5-6.

Although no party challenged the validity of the October 30, 2018 arterial blood gas study, the ALJ identified several areas where it did not comply with the quality standards at Section 718.105, including a failure to indicate whether the blood sample was taken at rest or during exercise,[9] the technician's name or the physician's signature, Claimant's pulse, the altitude where the test was performed, or if the equipment was calibrated before or after the test. Decision and Order on Remand at 5. Thus, as noted, the ALJ found the October 30, 2018 arterial blood gas study did not comply with the regulatory quality standards. *Id.*

When considering arterial blood gas studies, an ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101, 718.105; 20 C.F.R. Part 718, Appendix C; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Keener v. Peerless Eagle 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). The ALJ, as the factfinder, must determine the probative weight to assign the study. *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

However, the regulatory quality standards do not apply to studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.105; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment). An ALJ must still determine if a miner's treatment

[8] No exercise blood samples were obtained for these studies. Director's Exhibits 15, 28.

[9] However, the ALJ acknowledged that given that only one blood sample was drawn, the sample was most likely taken at rest.

blood gas study results are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

The ALJ did not make a finding as to whether the October 30, 2018 blood gas study was taken in anticipation of litigation or as a part of Claimant's treatment and thus not subject to the regulatory quality standards.[10] Because the ALJ has not addressed the issue and we are not permitted to make such a factual finding, we must vacate his determination that the October 30, 2018 blood gas study is invalid and worthy of little weight. We thus remand the case for the ALJ to make this factual finding in the first instance. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order on Remand at 5.

Moreover, even assuming the October 30, 2018 blood gas study is subject to the regulatory quality standards, the ALJ failed to explain whether it is in substantial compliance with the standards, notwithstanding the missing information. *See* 20 C.F.R. §718.101(b); *see also Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Keener*, 23 BLR at 1-237. An otherwise reliable and probative blood gas study must not be rejected for failing to satisfy a non-critical quality standard.[11] *Orek*, 10 BLR at 1-54; *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).

The ALJ provided no explanation for rejecting the October 30, 2018 blood gas study except to note that it does not fully comply with the quality standards at 20 C.F.R. §718.105. Decision and Order on Remand at 5. In accordance with the Administrative Procedure Act (APA),[12] the ALJ must do more than simply identify missing information, but must explain why the omission of the information justifies according little probative

[10] We note, however, that the October 30, 2018 blood gas study was obtained at Harlan ARH Hospital at Dr. Dye's request, and the record contains other treatment records from Dr. Dye. *See* Director's Exhibit 28; Claimant's Exhibit 6.

[11] Similarly, pulmonary function studies that do not fully conform to the quality standards at 20 C.F.R. §718.103 are not precluded from consideration on that basis alone. *DeFore v. Ala. By-Products Corp*., 12 BLR 1-27, 1-29 (1988). While missing tracings render a pulmonary function study nonconforming, the study is not necessarily unreliable. *See Crapp v. U.S. Steel Corp*., 6 BLR 1-476, 1-478-79 (1983).

[12] The Administrative Procedure Act provides 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).

weight to the study. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); 65 Fed. Reg. at 79,928; *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). It is the ALJ's responsibility as the trier-of-fact to make these determinations in the first instance. 20 C.F.R. §802.301(a) (Board may not engage in a de novo weighing of the evidence).

Because the ALJ did not adequately consider the qualifying October 30, 2018 study, we must also vacate his finding that the blood gas study evidence does not preponderate toward a total disability finding at 20 C.F.R. §718.204(b)(2)(ii). *See Wiley v. Consolidation Coal Co.*, 892 F.2d 498, 500 (6th Cir. 1989) (Board may not make its own findings of fact or substitute its own judgment in the weighing of conflicting evidence); Decision and Order on Remand at 5-6.

Medical Opinion Evidence

The ALJ also reconsidered the three medical opinions.[13] Decision and Order on Remand at 6-10. Dr. Alam opined that Claimant is totally disabled, Dr. Dahhan opined he retains the capacity from a respiratory standpoint to perform his previous coal mine work, and Dr. Rosenberg opined he is "not definitely" disabled. Director's Exhibits 15 at 4-7; 24; 26; 27 at 1-2; Employer's Exhibit 3 at 4. The ALJ noted Dr. Alam based his most recent total disability diagnosis on the allegedly invalid October 30, 2018 blood gas study, but did not consider the most recent non-qualifying blood gas study which "shifted the weight of the arterial blood gas evidence to support a finding that Claimant is not totally disabled." Decision and Order on Remand at 9. He therefore discredited Dr. Alam's opinion because it was unclear whether it would change had he reviewed the most recent blood gas study. *Id*. at 9-10. The ALJ accorded "normal" weight to the opinions of Drs. Dahhan and Rosenberg, finding them well-reasoned and documented because they were consistent with the ALJ's findings and the blood gas study evidence. *Id.* at 10.

Because the ALJ's erroneous weighing of the blood gas studies may have influenced his credibility determinations regarding the medical opinion evidence, we must also vacate these findings. 20 C.F.R. §718.204(b)(2)(iv). Thus, we vacate the ALJ's finding that Claimant did not establish total disability based on the medical opinion evidence, or in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv). We therefore also vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits.

[13] The ALJ found each of the physicians well-qualified to offer an opinion. Decision and Order on Remand at 9.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on the arterial blood gas study evidence and provide an adequate rationale for how he resolves the conflict in the evidence. 20 C.F.R. §718.204(b)(2)(ii). First, he must make a factual finding regarding whether the October 30, 2018 study was obtained for treatment or in anticipation of litigation. If the ALJ determines the October 30, 2018 study was obtained as a part of Claimant's treatment, then the regulatory quality standards at Section 718.105 do not apply and the ALJ must then determine if it is sufficiently reliable to support a finding of total disability, despite its not complying with the specific quality standards. 65 Fed. Reg. at 79,928. However, if he determines the study was obtained in anticipation of litigation, the ALJ must determine whether the study is in substantial compliance with the quality standards despite missing certain information. 20 C.F.R. §718.101(b).

Given the ALJ's apparent disagreement with the Board's prior instructions, *see* Decision and Order on Remand at 5 n.7, 6 n.8, we reiterate that an ALJ may not mechanically credit evidence based on recency when it shows the miner's condition has improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (citing *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992));[14] *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993). The Board has directly addressed this issue, holding, consistent with circuit court precedent, that a "blind appeal to recency" in these circumstances is an "abdication of rational decisionmaking." *Kincaid v. Island Creek Coal*

[14] Although *Adkins'* analysis, on which *Woodward* relied, arose in the context of x-ray evidence, neither court limited its instructions regarding the "later-is-better" rule to x-rays or pneumoconiosis findings. Rather, they explained that the rule is an irrational approach to resolving conflicts in "the evidence" or between "tests," "results," or "exams" broadly, if "the evidence, taken at face value, shows that the miner has improved." *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (later-is-better rationale "began as a reasonable way to discount old nonqualifying test results or physical examinations in favor of subsequent results that reveal deterioration of the miner's condition"); *Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993) (noting the Fourth Circuit "fleshed out the parameters of this principle" in *Adkins*). Further, the *Adkins* court specifically discussed the Fourth Circuit's "skepticism" regarding use of the "later-is-better" rule in two prior cases involving blood gas studies and pulmonary function studies, both measures of a miner's impairment. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). Through its holding in *Adkins*, the court made its "earlier skepticism explicit." *Adkins*, 958 F.2d at 51 (discussing *Gray v. Director, OWCP*, 943 F.2d 513 (4th Cir. 1991) (blood gas studies) and *Greer v. Director, OWCP*, 940 F.2d 88 (4th Cir. 1991) (pulmonary function studies)).

Co., BLR , BRB Nos. 22-0024 BLA and BLA-A, slip op. at 7-9 (Nov. 17, 2023) (quoting *Thorn*, 3 F.3d at 719).

The ALJ must also reweigh the medical opinions, taking into consideration his findings regarding the blood gas studies and other evidence of record. In weighing the medical opinions, he must consider the qualifications of the respective physicians, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Rowe*, 710 F.2d at 255. The ALJ must also be mindful that a physician may conclude a miner is totally disabled even if the objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). The relevant inquiry is whether Claimant has a respiratory or pulmonary impairment that precludes the performance of his usual coal mine work. *Id.* at 578 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). If the ALJ determines total disability has been demonstrated by the blood gas studies, medical opinions, or both, he must consider the evidence as a whole and reach a determination as to whether Claimant is totally disabled. *See* 20 C.F.R. §718.204(b)(2)*; Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If the ALJ again finds a preponderance of the evidence insufficient to establish total disability, he may reinstate his denial of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

However, if the ALJ finds Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the ALJ must consider if Employer has rebutted it. 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015). In reaching his credibility determinations on remand, the ALJ must set forth his findings in detail and explain his rationale in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order on Remand Denying Benefits and remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge