U.S. Department of Labor

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

BRB No. 23-0352 BLA

DONALD R. MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAPPHIRE COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/13/2024
	)	
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 Awarding Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits (2020-BLA-06073) rendered on a subsequent claim filed on May 7, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 28.69 years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018).[3] He further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed four prior claims for benefits. Director's Exhibits 1-4. He withdrew the two most recent claims. Director's Exhibits 3, 4. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). Therefore, his claim filed on January 4, 2013, is considered his most recent prior claim. Director's Exhibit 2. The district director denied this claim because he did not establish total disability or disability causation. *Id.*

[2] 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); *see* 20 C.F.R. §718.305.

[3] When 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 he 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); *see 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 failed to establish total disability or disability causation in his most recent prior claim, Claimants had to submit new evidence establishing one of these elements to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 2.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

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 or comparable gainful work.[6] 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).

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 28.69 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7; Hearing Tr. at 13.

[6] The ALJ found Claimant's usual coal mine employment as an outside supply man required "heavy manual labor." Decision and Order at 7-8. We affirm this finding as it is not challenged. *See Skrack*, 6 BLR at 1-711.

The ALJ found Claimant established total disability based on the arterial blood gas studies, medical opinions, and evidence as a whole.[7] Decision and Order at 9-22; *see* 20 C.F.R. §718.204(b)(2)(ii), (iv).

Arterial Blood Gas Studies

The ALJ considered two arterial blood gas studies dated June 24, 2019, and November 6, 2019. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 11-12. The June 24, 2019 study yielded non-qualifying values[8] at rest, while the exercise portion was qualifying. Director's Exhibit 14. The November 6, 2019 arterial blood gas study, administered only at rest, produced non-qualifying values.[9] Director's Exhibit 26. The ALJ permissibly concluded the exercise testing was most indicative of Claimant's ability to perform his usual coal mine work, which constituted "heavy manual labor," and thus, found the June 24, 2019 blood gas study supported total disability.[10] *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (exercise studies may be more probative than resting blood gas studies regarding whether a miner is capable of performing his coal mine work); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); Decision and Order at 12.

Employer asserts the ALJ erroneously characterized the June 24, 2019 exercise blood gas study as "qualifying" by relying on qualifying values from blood drawn earlier in the exercise period rather than the non-qualifying results from blood drawn later in the exercise period. Employer's Brief at 5-8. Specifically, Employer contends the ALJ failed

[7] The ALJ found Claimant did not establish total disability based on the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10. Further, as there is no evidence of cor pulmonale with right-sided congestive heart failure, Claimant cannot establish total disability under this method. 20 C.F.R. §718.204(b)(2)(iii).

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

[9] Dr. Rosenberg did not administer an exercise blood gas study because he believed it was medically contraindicated. Director's Exhibit 26 at 2.

[10] Employer does not challenge the ALJ's determination that the exercise study is more indicative of Claimant's ability to perform his usual coal mine work. We, therefore, affirm the ALJ's determination in this regard. *See Skrack*, 6 BLR at 1-711.

to explain why he relied on the earlier blood draw rather than the later draw. *Id.* We disagree.

The June 24, 2019 exercise blood gas study produced a pCO2 value of 35 and pO2 value of 61 from a blood draw at 10:00 a.m. during exercise. Director's Exhibit 14 at 22. A blood draw taken two minutes later at 10:02 a.m. produced a pCO2 value of 33 and pO2 value of 72. *See* Director's Exhibit 14 at 24-25. Dr. Green listed the first qualifying values on the CM-1158 Form, Report of Arterial Blood Gas Study, and listed those values in his determination that Claimant could not perform the duties of his usual coal mine employment based on hypoxemia demonstrated during exercise. *See* Director's Exhibit 14 at 4, 22.

The ALJ considered opinions from Drs. Rosenberg and Jarboe that the qualifying values from the first blood draw during exercise were not representative of Claimant's condition at peak exercise and, thus, the non-qualifying values from the second, later-drawn sample should have been used instead. Decision and Order at 15-16, 18-21; Employer's Exhibits 2 at 4, 6 at 13-22, 11 at 3. In addition, the ALJ considered the opinion of Dr. Harris, who explained it was not possible to determine when Claimant reached "peak exercise" based on the data available from the study. Claimant's Exhibit 4 at 6. Dr. Harris further noted, based on his experience supervising exercise blood gas studies as part of Department of Labor-sponsored medical examinations, it was possible the first blood draw was done at this particular claimant's peak exercise. *Id.* The ALJ declined to credit the opinions of Drs. Rosenberg and Jarboe, finding the "the fact that the values relied upon were obtained at the beginning of exercise is insufficient to exclude them from consideration when evaluating Claimant's disability." Decision and Order at 16, 21.

Contrary to Employer's contention, the ALJ explained why he rejected Drs. Rosenberg's and Jarboe's criticisms regarding Dr. Green's reliance on the values produced by the first blood draw: because the regulations make no distinction nor require that blood be drawn at the end rather than the beginning of exercise, and nor do they require the sample be drawn at "peak exercise." Decision and Order at 16, 20-21. Rather, the regulations require only that blood be drawn "during exercise." 20 C.F.R. §718.105(c). Therefore, the ALJ permissibly relied on the qualifying values from the first blood draw when assessing the probative value of the June 24, 2019 exercise blood gas study. As the only exercise blood gas study of record is qualifying, we affirm the ALJ's finding that the blood gas studies support finding total disability as supported by substantial evidence.[11] 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 12.

[11] To the extent Employer argues the ALJ should have credited the opinions of Drs. Rosenberg and Jarboe over Dr. Harris's opinion regarding which blood draw is

Medical Opinions

The ALJ considered the medical opinions of Drs. Harris, Green, Rosenberg, and Jarboe. Decision and Order at 12-21. Drs. Harris and Green opined Claimant is totally disabled, while Drs. Rosenberg and Jarboe opined he is not. Director's Exhibits 14, 26; Claimant's Exhibit 4; Employer's Exhibits 2, 6, 8-11. The ALJ found the opinions of Drs. Harris and Green well-reasoned and documented and rejected the opinions of Drs. Rosenberg and Jarboe as not reasoned or documented. Decision and Order at 13-21. Thus, he found the medical opinions support a finding of total disability based on the opinions of Drs. Harris and Green. *Id*. at 21.

Employer argues that the ALJ's erroneous weighing of the June 24, 2019 arterial blood gas study tainted his credibility determinations with respect to the medical opinions. Employer's Brief at 8-14. We disagree.

As we have affirmed the ALJ's consideration of the June 24, 2019 exercise study and his finding that the blood gas study evidence supports a finding of total disability, we likewise affirm the ALJ's crediting the opinions of Drs. Harris and Green, who relied in part on the valid, qualifying June 24, 2019 exercise blood gas study to opine that Claimant is totally disabled. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Moreover, the ALJ observed that even if he were "to disregard the qualifying exercise [arterial blood gas study] result that was much debated by Drs. Rosenberg, Harris, and Jarboe," he would still find the abnormal results obtained on Claimant's non-qualifying, resting blood gas studies indicative of total disability based on the heavy exertional requirements of his usual coal mine work. Decision and Order at 22. Thus, we reject Employer's argument.

Employer has not otherwise challenged the ALJ's finding the opinions of Drs. Harris and Green more probative than the contrary opinions of Drs. Rosenberg and Jarboe. Decision and Order at 21. Thus, we affirm this determination. *See Skrack*, 6 BLR at 1-711. Because Employer raises no other specific allegation of error, we affirm the ALJ's finding the medical opinions support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv).

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representative of Claimant's respiratory capacity and impairment, its argument amounts to a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 8-14.

Thus, we affirm the ALJ's finding that all of the relevant evidence, when weighed together, established total respiratory disability.[12] 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 21-22. Further, we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. We also affirm, as unchallenged, his finding that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 23-29. Consequently, we affirm the award of benefits.

[12] We therefore affirm the ALJ's finding Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by establishing total disability. *See E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015); *see Skrack*, 6 BLR at 1-711; Decision and Order at 29.

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring.

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge