U.S. Department of Labor

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

BRB No. 23-0412 BLA

JIMMY D. MULLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS	)	DATE ISSUED: 06/05/2024
	)	
and	)	
	)	
Self-Insured through CONSOL ENERGY INCORPORATED c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Jimmy D. Mullins, Jenkins, Kentucky.

Jason H. Halbert and Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits on Remand (2019-BLA-05174) rendered on a subsequent claim[2] filed on October 16, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Board for the second time.[3]

In his initial Decision and Order Denying Benefits, the ALJ credited Claimant with thirty-four years of underground coal mine employment but found he is not totally disabled and thus did not invoke the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4)[4] of the Act or establish a change in the applicable condition of entitlement.[5] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

[2] This is Claimant's third claim for benefits. On May 5, 2014, he withdrew his initial claim filed on December 27, 2013. Director's Exhibit 21. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). On May 19, 2015, the district director denied his second claim, filed on August 20, 2014, for failure to establish total disability. Director's Exhibits 2, 29.

[3] We incorporate the procedural history of this case as set forth in *Mullins v. Consolidation Coal Co.*, BRB No. 21-0055 BLA (Oct. 26, 2021) (unpub.).

[4] 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.

[5] When a miner files a claim 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(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are

Upon consideration of Claimant's appeal, the Board vacated the ALJ's finding that Claimant did not establish total disability based upon the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).[6] *Mullins v. Consolidation Coal Co.*, BRB No. 21-0055 BLA, slip op. at 5-6 (Oct. 26, 2021) (unpub.). Specifically, the Board held the ALJ mischaracterized Dr. Alam's opinion as one that "made no finding as to total disability" as the ALJ had also noted in his decision that Dr. Alam opined "Claimant is [totally] disabled from a 'pulmonary point of view' based on a reduced FEV1 and on 'clinical grounds.'" *Id*., slip op. at 5 (citing Claimant's Exhibit 7 at 1 and 2020 Decision and Order at 12). The Board thus vacated the ALJ's finding that Claimant failed to establish total disability and remanded the case to the ALJ for reconsideration of the medical opinions of Drs. Alam, Dahhan, and Raj relevant to total disability, invocation of the Section 411(c)(4) presumption, and a change in the applicable condition of entitlement at 20 C.F.R. §725.309. *Id*., slip op. at 5-6.

On remand, the ALJ again found Claimant did not establish total disability and thus found he could not invoke the Section 411(c)(4) presumption or establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy*

"those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because the district director denied Claimant's last claim for failure to establish total disability, Claimant had to submit new evidence establishing this element. *See White*, 23 BLR at 1-3.

[6] The Board affirmed the ALJ's findings that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) because all of the pulmonary function studies were non-qualifying, a preponderance of the blood gas studies was non-qualifying, and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. *Mullins*, BRB No. 21-0055 BLA, slip op. at 3-5. At 20 C.F.R. §718.204(b)(2)(iv), the Board affirmed the ALJ's rejection of Dr. Forehand's opinion that Claimant is totally disabled as unreasoned and conclusory. *Id*., slip op. at 5. Moreover, the Board affirmed the ALJ's finding that Dr. Tuteur's opinion does not support Claimant's burden of proof because he did not diagnose a totally disabling respiratory or pulmonary impairment. *Id*., slip op. at 5 n.9.

Mines, Inc., 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

To invoke the Section 411(c)(4) presumption or establish entitlement to benefits under 20 C.F.R. Part 718, Claimant must establish he is totally disabled. 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[8] 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).

On remand, the ALJ noted Drs. Alam and Raj opined Claimant is totally disabled while Dr. Dahhan opined he is not. Decision and Order on Remand at 5-6. The ALJ found Dr. Alam's opinion was not well reasoned or documented. *Id*. at 5. Although he found the opinions of Drs. Dahhan and Raj were both reasoned and documented, he gave controlling weight to Dr. Dahhan's opinion and concluded Claimant does not have a totally disabling respiratory or pulmonary impairment. *Id*. at 5-6. We conclude the ALJ acted within his discretion in resolving the conflict in the medical opinions.

Dr. Alam diagnosed total disability based on an FEV1 of 57% and "clinical grounds." Claimant's Exhibit 7 at 1. The ALJ permissibly discredited Dr. Alam's opinion because the physician failed to specify in his report the date of the pulmonary function study he was relying on.[9] *See Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997)

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[7] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. Hearing Transcript at 21, 25.

[8] 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 exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] Employer accurately argued to the ALJ that Dr. Alam incorrectly reported Claimant's FEV1 was 57% when it actually was 66% during Dr. Alam's examination. *See*

(ALJ may reject a medical opinion which fails to adequately explain the bases for its conclusion); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (ALJ determines whether the underlying documentation is adequate to support the physician's conclusion); Decision and Order on Remand at 5; Claimant's Exhibit 7 at 1. He also permissibly found Dr. Alam's reference to "clinical grounds" was "incredibly vague and non-specific." *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986) (ALJ weighs the medical evidence and draws his own inferences); Decision and Order on Remand at 5; Claimant's Exhibit 7 at 1.

Dr. Raj opined Claimant is totally disabled based in part on the abnormal exercise blood gas study he conducted on October 31, 2017, which showed severe hypoxemia, as well as the abnormal pulmonary function study he conducted on the same date, which reflected a moderate obstructive defect. Director's Exhibits 14 at 4-5; 25 at 4. While Dr. Raj based his disability opinion only on the results produced by his own studies, Dr. Dahhan opined Claimant is not totally disabled based on all of the pulmonary function and blood gas studies of record, including his own and those of Drs. Raj, Alam, Forehand, and Tuteur. Employer's Exhibits 1 at 3-4; 12 at 2-3. Dr. Dahhan also specifically addressed the "transit hypoxemia" seen on Dr. Raj's testing and opined it did not "create a barrier" to Claimant's work status because all of the other blood gas studies were non-qualifying and his testing indicated the "transit hypoxemia" was "short lived." Employer's Exhibit 12 at 3.

In resolving the conflict in the medical opinions, the ALJ permissibly accorded greater weight to Dr. Dahhan's opinion because Dr. Dahhan considered all of the objective evidence, unlike Dr. Raj, and explained why Claimant's hypoxemia seen only on Dr. Raj's exercise blood gas studies did not affect Claimant's ability to perform his usual coal mine work.[10] *See Kertesz*, 788 F.2d at 163 (ALJ is not bound to accept the opinion or theory of

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Employer's 2019 Closing Brief at 12, 15; Employer's Remand Brief at 4-5. Dr. Alam conducted a pulmonary function study on December 6, 2018, which reflected an FEV1 of 66%. Employer's Exhibit 6. Although the pulmonary function study Dr. Forehand conducted on March 21, 2019 reflected an FEV1 of 57%, Dr. Alam could not have been relying on this pulmonary function study in rendering his opinion because it was conducted three months after his examination. Claimant's Exhibit 6.

[10] Because the ALJ provided valid reasons for crediting Dr. Dahhan's opinion over Dr. Raj's opinion, the ALJ's error, if any, in also finding Dr. Dahhan's opinion more credible because he "considered more recent testing" is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993) ("blindly ascribing more weight to the most recent evidence" is "arbitrary and irrational"); *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and

any medical expert, but may weigh the medical evidence and draw his own inferences); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (ALJ may assign less weight to a medical opinion which presents an incomplete picture of the miner's health); Decision and Order on Remand at 6 and n.34; Director's Exhibits 14, 25; Employer's Exhibits 1, 12. In sum, the ALJ permissibly relied on Dr. Dahhan's opinion that Claimant is not totally disabled because Dr. Dahhan explained that the one-time hypoxemia seen on Dr. Raj's testing had resolved. *Id*. Consequently, we affirm the ALJ's decision to give greater weight to Dr. Dahhan's opinion.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 6. As none of the categories of medical evidence support a finding of total disability, we further affirm the ALJ's overall finding that Claimant does not have a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). *Id*. Thus, because Claimant failed to establish total disability, a required element of entitlement, we further affirm the 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 (1988); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

22-0024 BLA-A, slip op. at 9 n.12 (Nov. 17, 2023) (holding it is error to credit evidence solely on the basis of recency if it shows the miner's condition has improved).