U.S. Department of Labor

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

BRB No. 23-0293 BLA

JOHNNY L. NEWSOME Claimant-Petitioner v. MATRIX ENERGY, LLC and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/29/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Benefits (2021-BLA-05407) rendered on a subsequent claim filed on November 30, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-two years of underground coal mine employment but did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, Claimant failed to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), or an essential element of entitlement under 20 C.F.R. Part 718. Consequently, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer and its Carrier (Employer) respond, urging affirmance of the ALJ's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file 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

[1] Claimant filed his initial claim on July 28, 2010, and the district director denied it on August 29, 2011, because Claimant did not establish pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1 at 10-17, 361.

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 did not establish pneumoconiosis or a totally disabling respiratory or pulmonary impairment, he had to submit evidence establishing either of those two elements to obtain review of the merits of his current claim. *Id.*

[2] 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.

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, 362 (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)(i). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work[4] or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying 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 failed to establish total disability under any of the subsections of 20 C.F.R. §718.204(b)(2).[6] Claimant contends the ALJ erred in weighing the blood gas studies, medical opinions, and the evidence as a whole.

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[3] 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); Decision and Order at 4; Hearing Transcript at 26.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-two years of underground coal mine employment and his usual coal mine work as an underground belt examiner required heavy manual labor and heavy exertion. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5.

[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] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not establish total disability based on the pulmonary function study evidence and that there is

Blood Gas Studies

The ALJ considered two resting blood gas studies; no physician conducted exercise studies. Decision and Order at 7-8. Dr. Alam's February 17, 2020 study, conducted in conjunction with the Department of Labor's complete pulmonary evaluation of Claimant, yielded qualifying results. Director's Exhibit 15. Dr. Fino's July 29, 2020 study yielded non-qualifying results. Director's Exhibit 35. The ALJ found no credible evidence indicating either study was invalid. Decision and Order at 8. Although Dr. Fino suggested the February 17, 2020 study could be invalid due to "venous contamination" and that "[i]t is always possible that another disease process was present and it has now resolved," Director's Exhibit 35 at 9, the ALJ found his statements were not supported by any evidence and equivocal, noting Dr. Gaziano had validated the study. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000) (ALJ may discredit an equivocal opinion); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (same); Decision and Order at 8; Director's Exhibit 13. Consequently, he found the February 17, 2020 blood gas study "sufficiently reliable for making a disability" determination. Decision and Order at 8.

Giving both studies equal weight, the ALJ found the preponderance of the blood gas studies insufficient to meet Claimant's burden to establish total disability. The ALJ stated he did not give the July 2020 blood gas study more weight because of its recency, noting that the two tests were administered close enough in time, neither test could be credited over the other based on their "temporal relation," and therefore both studies "may accurately represent the [M]iner's condition at the time each study was taken." *See* Decision and Order at 8; *Sunny Ridge Min. Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (four objective tests conducted within seven months of each other were "sufficiently contemporaneous"). Noting that "[t]he pertinent inquiry is whether a living miner is disabled at the time of the hearing," the ALJ concluded the "preponderant weight" of the blood gas study evidence does not support a finding of total disability. Decision and Order at 8; Director's Exhibits 15, 35.

Claimant contends the Board should vacate the ALJ's finding because he did not specifically indicate the studies were in equipoise and failed to properly "consider factors that could account for the divergent blood gas study results." Claimant's Brief at 22. Claimant contends the ALJ instead apparently relied on Dr. Fino's explanation that the

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no evidence of cor pulmonale with right-sided congestive heart failure or complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5, 7.

earlier qualifying results could be due to a disease process that had resolved.[7] *Id.* We disagree. Within his discretion, the ALJ rationally determined the two studies conducted within six months are contemporaneous and equally probative. *Keathley*, 773 F.3d at 740. He thus permissibly found the "preponderant weight" of the blood gas studies does not meet Claimant's burden to affirmatively establish a totally disabling respiratory impairment.[8] Decision and Order at 8; *see Greer v. Director, OWCP*, 940 F.2d 88, 90 (4th

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[7] Claimant also asserts, "Given that [Claimant] presented evidence of disability [on February 17, 2020] and that [he had twenty-two] years of underground coal mine employment, the Employer was required to rebut the presumption that the total disability was due to causes other than pneumoconiosis." Claimant's Brief at 22. We disagree. At this stage, the ALJ was tasked with determining whether Claimant established total disability and, therefore, invoked the Section 411(c)(4) presumption. As the ALJ had not yet determined Claimant had invoked the Section 411(c)(4) presumption, Employer was not yet required to rebut it at this stage. Claimant is not entitled to invoke the Section 411(c)(4) presumption unless he establishes total disability based upon a weighing of all relevant evidence, and not just one piece of evidence that may support a finding of total disability. *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).

[8] While the ALJ stated disability must be determined "at the time of the hearing," Decision and Order at 8, the Board noted in *Kincaid* that the "time of hearing" standard "arose predominantly in the context of a rebuttal method that no longer exists—whether the evidence shows claimant was, 'in fact,' still working as a miner at the time the claim was decided." *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 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). The purpose of the Board's "time of hearing" analysis was to "provide[] important guidance to ALJs who, with some frequency, credit evidence solely based on recency—*e.g.*, because that evidence is more recent it represents the miner's 'current condition' or condition at the 'time of the hearing' . . . ." *Id.* The ALJ's decision in the present claim does not run afoul of *Kincaid*, however, as he specifically declined to give the non-qualifying test additional weight based on its recency and conducted a qualitative and quantitative analysis of the evidence. Decision and Order at 8; *see Kincaid*, BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 12 n.14 (*Kincaid's* holding "does not mean that newer evidence showing an improvement cannot ever be credited over older conflicting evidence, that newer evidence showing a deterioration must always be credited as establishing disease or disability, or that pulmonary function test results cannot fluctuate depending on a number of factors.").

Cir. 1991) (deeming two contemporaneous, conflicting objective studies to be in equipoise).

Although the ALJ did not specifically state the studies are in "equipoise," it is clear from his decision that he found both studies to be valid and neither study was sufficient by itself to constitute a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994) (claim must be denied when the evidence is evenly balanced); *Larioni*, 6 BLR at 1-1278; Decision and Order at 8.

We therefore affirm the ALJ's finding that Claimant did not establish total disability based on the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinions

The ALJ considered five medical opinions relating to total disability. Decision and Order at 10-18. Drs. Alam, Turner, and Sikder opined Claimant is totally disabled while Drs. Tuteur and Fino opined he is not. Director's Exhibits 15, 24, 26, 31, 35, 37; Claimant's Exhibits 20, 23; Employer's Exhibits 4-6. The ALJ found Dr. Fino provided the only well-documented and well-reasoned opinion and thus concluded Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 17-18.

Claimant's sole argument is the ALJ erred in relying on Dr. Fino's opinion because he is not a treating physician, while Drs. Turner and Sikder are his treating physicians. Claimant's Brief at 24-27. We disagree.

A treating physician's opinion may be due additional deference based on the nature and duration of the physician's relationship with the miner and the frequency and extent of treatment. *See* 20 C.F.R. §718.104(d). The weight given to a treating physician's opinion, however, "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians' opinions get "the deference they deserve based on their power to persuade"). An ALJ cannot discredit an otherwise well-reasoned medical opinion simply because that doctor did not examine or treat the miner. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000).

Here, the ALJ found Dr. Alam's opinion and the opinions of Claimant's treating physicians, Drs. Turner and Sikder, were not well-reasoned and thus he could not resolve the conflict between the medical opinions based solely on the fact that Drs. Turner and Sikder are treating physicians. As Claimant does not identify any specific error with regard to the ALJ's rationales for discrediting the opinions of Drs. Turner and Sikder, we affirm them. *See* 20 C.F.R. §802.211(b); *see also Cox v. Benefits Review Board*, 791 F.2d 445,

446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Decision and Order at 10-18. Thus, we reject Claimant's general contention that the ALJ erred in giving Dr. Fino's opinion greater weight on the issue of total disability.[9]

Claimant has the burden of establishing entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). We therefore affirm the ALJ's finding that Claimant did not establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).

Lay Testimony

Claimant also contends the ALJ erred in finding his hearing testimony – that he cannot walk fifty or sixty yards without becoming short of breath – undermined by Dr. Tuteur's observation that Claimant was able to walk 1,088 feet (362 yards) without stopping on the six-minute walk test conducted during the physician's examination. Claimant's Brief at 19; Decision and Order at 18; Hearing Transcript at 27-30. According to Claimant, because the underlying test is not in the record, the ALJ could not rely on Dr. Tuteur's assessment of that test. But even assuming Claimant is correct, the ALJ's error would be 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*, 6 BLR at 1-1278. In a living miner's claim, "a miner's affidavit or testimony . . . may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(3); *see also* 20 C.F.R. §718.204(d)(5) ("In the case of a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony."). Because the ALJ found the medical evidence does not support a finding of total disability, he could not then rely on Claimant's testimony alone to establish total disability. 20 C.F.R. §§718.204(d)(5), 718.305(b)(3); *see Coleman v. Director, OWCP*, 829 F.2d 3, 4-5 (6th Cir. 1987).

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[9] Claimant suggests the ALJ gave Dr. Fino's opinion greater weight because he is *not* Claimant's treating physician. Claimant's Brief at 26. However, the ALJ's statement regarding Dr. Fino's lack of treating status was made in the context of several factors the ALJ identified to distinguish between Claimant's self-reported symptoms that Dr. Fino simply recorded, and Dr. Fino's own conclusions about Claimant's symptoms. Decision and Order at 15-16. The ALJ did not determine that Dr. Fino's status as a non-treating physician makes his opinion more credible.

As substantial evidence supports the ALJ's finding that Claimant did not establish total disability based on the evidence as a whole at 20 C.F.R. §718.204(b), we affirm his conclusion that Claimant did not invoke the Section 411(c)(4) presumption.[10] *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 18. Claimant's failure to establish total disability also precludes an award of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[10] Because Claimant did not invoke the Section 411(c)(4) presumption, he did not establish a change in an applicable condition of entitlement. *See E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794-95 (7th Cir. 2013). Further as Claimant did not establish total disability, a requisite element of entitlement, we reject Claimant's contention that the ALJ failed to properly address the remaining elements of entitlement under 20 C.F.R. Part 718. Claimant's Brief at 27-28.