U.S. Department of Labor

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

BRB Nos. 24-0014 BLA
and 24-0014 BLA-A

EWELL V. DANIELS, SR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MOUNTAINSIDE COAL COMPANY INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY INCORPORATED	)	DATE ISSUED: 1/15/2024
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Ewell V. Daniels, Sr., Pathfork, Kentucky.

Michael A. Pusateri and Sarah Lemon (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Amanda Torres (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: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,[1] and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Denying Benefits in a Subsequent Claim (2021-BLA-05957). This case involves a subsequent claim[2] filed on January 28, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

ALJ Merck (the ALJ) found Claimant has at least twenty-one years of qualifying coal mine employment, but also found he did not establish a totally disabling respiratory or pulmonary impairment.[3] 20 C.F.R. §718.204(b)(2). He therefore determined Claimant is unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at

[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review ALJ Merck's decision, but Ms. Napier 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 second claim for benefits. On August 2, 2016, ALJ Adele Higgins Odegard denied his prior claim, filed on February 2, 2012, for failure to establish any element of entitlement. Director's Exhibit 1 at 23. The Board affirmed the Decision and Order on August 15, 2017. *Daniels v. C T L Coal Co., Inc.*, BRB No. 16-0629 BLA (Aug. 15, 2017) (unpub.).

[3] As the record contains no evidence of complicated pneumoconiosis, Claimant is unable to 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); Decision and Order at 7.

Section 411(c)(4), 30 U.S.C. §921(c)(4) (2018),[4] to establish a change in an applicable condition of entitlement,[5] or to establish entitlement under 20 C.F.R. Part 718. Thus, the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds, urging the Board to affirm the denial.[6] Employer also filed a cross-appeal, asserting the ALJ erred in determining that it is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds to Employer's cross-appeal urging the Board to affirm the ALJ's finding that Employer is the responsible operator, but declined to respond to the merits of Claimant's appeal. Employer replied to the Director's response brief, reiterating its arguments and asserting it must be dismissed as the responsible operator if the case is remanded for further proceedings.

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 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

[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); 20 C.F.R. §718.305.

[5] 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 any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of the current claim. *Id.*; *see White*, 23 BLR at 1-3; Director's Exhibit 1 at 23.

[6] Employer also states, "assum[ing] that the ALJ was properly authorized to adjudicate the claim under the Appointments Clause," his denial of benefits is supported by substantial evidence. Employer's Brief at 10 n.1. Then Employer states that it "preserves its objection [to the ALJ's appointment]" for purposes of appeal. *Id*. We decline to address the ALJ's appointment as Employer did not brief the issue. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); Employer's Brief at 10 n.1.

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).

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 and comparable gainful work. 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). The ALJ found that Claimant did not establish total disability by any method. Decision and Order at 7-18.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated November 26, 2019, December 11, 2020, and September 22, 2022. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9-10; Director's Exhibits 14 at 6; 16; Employer's Exhibit 2. The November 26, 2019 study had qualifying values and no bronchodilator was administered. Director's Exhibit 14 at 6. The December 11, 2020 study was non-qualifying and no bronchodilator was administered. Director's Exhibit 16. The September 22, 2022 study had qualifying pre- and post-bronchodilator values. Employer's Exhibit 2.

The ALJ found the September 22, 2022 qualifying study was invalid. He gave more weight to the non-qualifying December 11, 2020 study as it was the more recent of the two valid studies. Decision and Order at 13. Alternatively, the ALJ found that, even if he gave

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 4; Hearing Transcript at 15, 18.

[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).

equal weight to both of the valid pulmonary function studies, they would be in equipoise and therefore still would not support Claimant's burden to establish total disability. *Id.*

We affirm the ALJ's finding that the qualifying September 22, 2022 pulmonary function study "does not meet the required regulatory standards for reliability," and thus is invalid. Decision and Order at 13. Dr. Rosenberg, who conducted the study; Dr. Vuskovich, who reviewed its tracings; and the technician who administered it all faulted the study because of Claimant's poor effort. The ALJ thus permissibly found it invalid. *See Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985) (consulting physician's opinion regarding the reliability of the pulmonary function studies may constitute substantial evidence for the rejection of qualifying studies); Decision and Order at 12-13; Employer's Exhibits 2 at 2; 4 at 4; 5 at 10. Because the September 22, 2022 pulmonary function study is invalid, it cannot constitute evidence of the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. §718.103(c).

Considering the two studies he found valid, the ALJ erred by crediting the more recent non-qualifying December 11, 2020 pulmonary function study over the qualifying November 26, 2019 study based on its recency, as it is irrational to credit evidence solely based on recency when it shows a miner's condition has improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (given the progressive nature of pneumoconiosis, a fact-finder must evaluate evidence without reference to its chronological order when the evidence shows a miner's condition has improved), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (when the evidence shows improvement in condition as opposed to deterioration, "[e]ither the earlier or the later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier"); *Smith v. Kelly's Creek Res.*, 26 BLR 1-15, 1-28 (2023); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023); Decision and Order at 13; Director's Exhibits 14 at 6; 16.

However, the error is harmless because the ALJ alternatively and permissibly concluded that the pulmonary function study evidence is in equipoise regardless of recency. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 13; Director's Exhibits 14 at 6; 16. We therefore affirm, as supported by substantial evidence, the ALJ's finding that Claimant did not establish total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 13.

Arterial Blood Gas Studies

The ALJ considered two arterial blood gas studies dated December 11, 2020 and September 22, 2022. Decision and Order at 13-14; Director's Exhibit 14; Employer's Exhibit 3. The December 11, 2020 study yielded qualifying values at rest and non-qualifying values during exercise. Director's Exhibit 14 at 11. The September 22, 2022

study yielded non-qualifying resting values and no exercise test was administered. Employer's Exhibit 3.

The ALJ permissibly reasoned that the exercise test was most indicative of Claimant's ability to perform his usual coal mine work. *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (an exercise blood gas study may be given more weight than resting blood gas studies); Decision and Order at 13-14; Director's Exhibit 14 at 11. Because the sole exercise blood gas study is non-qualifying, we affirm the ALJ's finding that Claimant did not establish total disability at 20 C.F.R §718.204(b)(2)(ii).[9] *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); Decision and Order at 14; Director's Exhibit 14 at 11.

Cor Pulmonale

The ALJ correctly found that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 7. Thus, we affirm his determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

Medical Opinions

Even in the absence of qualifying pulmonary function studies or blood gas studies, total disability can be demonstrated with a reasoned medical opinion indicating that the miner has a respiratory or pulmonary impairment that prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1)(i), (2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415

[9] The ALJ also accorded more weight to the non-qualifying September 22, 2022 resting blood gas study because it was performed almost two years after the qualifying December 11, 2020 resting study. Decision and Order at 14; Director's Exhibit 14; Employer's Exhibit 3. Because the ALJ provided a valid reason for finding that the arterial blood gas study evidence, considered as a whole, does not support a finding of total disability, any error in the ALJ also giving greater weight to the non-qualifying September 22, 2022 study based on its recency is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *see also 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); *Smith v. Kelly's Creek Res.*, 26 BLR 1-15, 1-28 (2023); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023); Decision and Order at 14; Director's Exhibit 14; Employer's Exhibit 3.

F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests). A miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982).

The ALJ initially found Claimant's last coal mine work as a heavy equipment operator required light manual labor. He based this finding on Claimant's hearing testimony that the job did not require lifting and Claimant's Description of Coal Mine Work Form, which indicated the job required him to sit for ten hours per day with minimal standing, no lifting, no carrying, and no crawling. *See* Decision and Order at 8-9; Director's Exhibit 5; Hearing Transcript at 18-19. We affirm the ALJ's determination as it is supported by substantial evidence.

The ALJ then considered three medical opinions. Decision and Order at 14-18; Director's Exhibit 14; Employer's Exhibits 4, 5. Dr. Forehand conducted the Department of Labor's complete pulmonary evaluation on December 11, 2020. Director's Exhibit 14. Dr. Forehand opined that while Claimant has a respiratory impairment, he retains "sufficient residual ventilatory capacity" to return to his last coal mine job. *Id.* at 4. Dr. Rosenberg opined that Claimant is not totally disabled because his pulmonary function tests show only mild restriction when he performs them with adequate effort, he has no airflow obstruction, and he has no "qualifying oxygenation abnormalities." Employer's Exhibit 4 at 4. Dr. Vuskovich opined that Claimant has the pulmonary capacity to return to both surface and underground coal mining. Employer's Exhibit 5 at 15.

As none of the physicians opined Claimant has a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's determination that the medical opinion evidence does not support a finding of total disability. *See Gee v. W. G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986) (en banc) (medical evidence that fails to state the miner is totally disabled or otherwise address the severity of the impairment in such a way as to permit the ALJ to infer total disability is not probative evidence of total disability); Decision and Order at 14-18; Director's Exhibit 14 at 4; Employer's Exhibits 4 at 4; 5 at 15. We therefore affirm his determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Treatment Records and Evidence as a Whole

Lastly, the ALJ considered Claimant's treatment records dated January 22, 2020, from St. Charles Community Health Center. He accurately found that while the records discuss Claimant's respiratory symptoms, they do not specifically address whether he is totally disabled from performing his usual coal mine work because of a respiratory or

pulmonary impairment. Decision and Order at 18; Claimant's Exhibit 2. Thus, we affirm the ALJ's finding that the treatment records do not establish Claimant is totally disabled. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility); Decision and Order at 18.

Claimant has the burden of establishing his entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Having affirmed the ALJ's findings that Claimant did not establish total disability under any of the subsections at 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm, as supported by substantial evidence, the ALJ's conclusion that Claimant did not establish a totally disabling respiratory or pulmonary impairment. We therefore affirm the ALJ's finding that Claimant did 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. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 18.

Further, because Claimant failed to establish total disability, a requisite element of entitlement, we affirm the ALJ's finding that Claimant did not establish entitlement to benefits under 20 C.F.R. Part 718.[10] 20 C.F.R. §718.204(b)(2); *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[10] As we affirm the ALJ's denial of benefits, we need not address Employer's contention on cross-appeal that the ALJ erred in finding it is the responsible operator. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 15-17; Employer's Reply Brief at 4.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits in a Subsequent Claim.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge