U.S. Department of Labor

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

BRB No. 23-0371 BLA

DONNIE E. RAMEY Claimant-Respondent v. ICG KNOTT COUNTY LLC Employer- Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 10/30/2024 DECISION and ORDER

Appeal of the Decision and Order on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Sarah M. Hurley (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: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order on Remand (2015-BLA-05128) rendered on a claim filed on December 12, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-904 (2018) (Act). This case is before the Benefits Review Board for the second time.[1]

On April 1, 2021, ALJ Larry A. Temin issued a Decision and Order Awarding Benefits. ALJ Temin found benefits should commence as of December 2013, the month in which this claim was filed, as the onset date of Claimant's total disability due to pneumoconiosis was not ascertainable.

Pursuant to Employer's appeal, the Board affirmed the ALJ's determination that Claimant is entitled to benefits. *Ramey v. ICG Knott County, LLC*, BRB No. 21-0369 BLA, slip op. at 6 (Aug. 15, 2022) (unpub.). However, the Board vacated the ALJ's determination that benefits should commence as of December 2013 and remanded the case for him to consider whether credible evidence exists that Claimant was not totally disabled subsequent to the filing date of his claim.[2] *Id*. at 6-7.

On May 30, 2023, ALJ Sellers (the ALJ) issued a Decision and Order on Remand, which is the subject of this appeal.[3] He found that there is no credible evidence that Claimant was not totally disabled subsequent to the filing date of his claim and the onset

[1] We incorporate the procedural history of the case and the Board's prior holdings, as set forth in *Ramey v. ICG Knott County LLC*, BRB No. 21-0369 BLA (Aug. 15, 2022) (unpub.).

[2] The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b). If the date is not ascertainable, benefits commence the month the claim was filed, unless evidence the ALJ credits establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. *See* 20 C.F.R. §725.503(b); *see also* 65 Fed. Reg. 79920, 80011-12 (Dec. 20, 2000) (explaining that when benefits have been awarded but the actual date of disability onset is unclear, 20 C.F.R. §725.503 establishes a presumption that the miner was totally disabled as of the date of filing; however, an employer may overcome the presumed entitlement date by producing credible medical evidence that the miner was not disabled as of some time after the date of filing). The burden of persuasion rests with Claimant. *Amax Coal* v. *Director, OWCP* [*Chubb*], 312 F.3d 882, 894 (7th Cir. 2002).

[3] On remand, the case was transferred to ALJ Sellers due to ALJ Temin's retirement. Director's Brief at 1.

date of his total disability due to pneumoconiosis was not ascertainable. Thus, he found benefits should commence as of December 2013.

On appeal, Employer argues that the ALJ erred in finding benefits should commence in December 2013. Claimant and the Director, Office of Workers' Compensation Programs (the Director), have filed responses urging the Board to affirm the ALJ's findings.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are 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, 361-62 (1965).

The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless evidence the ALJ credits establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-68-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-51 (1990).

ALJ Temin found Claimant established he is totally disabled based upon the November 25, 2019 qualifying arterial blood gas study[5] and the reasoned medical opinions of his treating physicians, Drs. Breeding and Alam. Decision and Order at 14-16. However, Dr. Mettu examined Claimant on January 21, 2014, as part of the Department of Labor (DOL)-sponsored complete pulmonary evaluation, and opined that he had only a mild, non-disabling impairment as his pulmonary function testing and arterial blood gas studies were non-qualifying. Director's Exhibits 9, 23. ALJ Temin discredited Dr. Mettu's opinion because he failed to consider the more recent and qualifying November 25, 2019 study. Decision and Order at 15.

[4] 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 Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 12.

[5] 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).

Because ALJ Temin failed to consider whether Dr. Mettu's opinion and the results of his testing constitute credible evidence that Claimant was not totally disabled subsequent to the filing of his claim, the Board remanded the case for reconsideration of when benefits should commence. *Ramey*, BRB No. 21-0369 BLA, slip op. at 6-7. On remand, ALJ Sellers found the record does not contain any credible evidence establishing that Claimant was not disabled at any time after he filed his claim. Decision and Order on Remand at 3-4. Thus, he ordered benefits to commence as of the month this claim was filed, December 2013. *Id*. at 4.

Employer contends that the ALJ improperly shifted the burden of proof, and that the evidence affirmatively establishes that Claimant did not become totally disabled due to pneumoconiosis until November 24, 2019, at the earliest. Employer's Brief at 5-11. We disagree.

Initially we reject Employer's argument that the ALJ erroneously shifted the burden of proof by requiring it to affirmatively establish when Claimant became totally disabled, thus tainting his consideration of the evidence. Employer's Brief at 10. Because ALJ Temin found the record does not establish precisely when Claimant first became totally disabled, benefits must commence the month the claim was filed, unless there is credible evidence that Claimant was not totally disabled due to pneumoconiosis at any subsequent time.[6] *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 894 (7th Cir. 2002); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600 (3d Cir. 1989); *see also* 65 Fed. Reg. 79920, 80011-12 (Dec. 20, 2000) (explaining that the 20 C.F.R. §725.503(b) presumption shifts the burden of production to the party opposing benefits who may overcome the presumption by introducing credible medical evidence that the miner was not totally disabled for some period of time after he filed his claim); Decision and Order on Remand at 3-4; Director's Response Brief at 2. Thus, on remand, ALJ Sellers properly considered whether there is credible evidence that Claimant was not totally disabled at any point subsequent to the filing of his claim. Decision and Order on Remand at 3-4.

The ALJ considered Dr. Mettu's opinion that Claimant "has only [a] mild pulmonary impairment" and that he "has [the] pulmonary capacity to do one year of his last coal mine[] job." Decision and Order on Remand at 3-4; Director's Exhibits 9, 23. Specifically, the physician cited to the non-qualifying objective testing at the time of his examination in support of his opinion. Director's Exhibits 9, 23. But the ALJ found Dr. Mettu's opinion is not well-reasoned as the physician did not demonstrate an understanding

[6] As the ALJ noted on remand, the Board did not disturb ALJ Temin's finding and Employer does not challenge this finding; thus it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 3.

of the exertional requirements of Claimant's usual coal mine employment as a shuttle car operator and cited to the lack of qualifying studies to find no disability without considering whether his mild impairment would render him unable to perform his usual coal mine job. Decision and Order on Remand at 3-4; *see* 20 C.F.R. §718.204(b)(2)(iv) (total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing, as non-qualifying testing may still render a miner incapable of performing his usual coal mine work); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997). Thus, the ALJ found Dr. Mettu's medical opinion was not creditable to show Claimant was not totally disabled as of January 21, 2014. *Id.* As Employer does not challenge this credibility finding, it is affirmed.[7] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

On remand, Employer raised additional arguments to the ALJ that because the subsequent non-qualifying March 30, 2016 pulmonary function study and non-qualifying April 17, 2020[8] arterial blood gas study do not show that Claimant was disabled at the

[7] Employer asserts that the DOL failed to provide Claimant with a complete pulmonary evaluation as the Act requires. Employer's Brief at 10-11. Specifically, it argues that Dr. Mettu's opinion cannot be deemed a complete pulmonary evaluation because the ALJ found Dr. Mettu's opinion is deficient in that he failed to demonstrate an awareness of the physical demands of Claimant's usual coal mine work. Decision and Order on Remand at 4; Employer's Brief at 10-11; *see* 20 C.F.R. §725.406 (describing a miner's entitlement to a DOL-sponsored complete pulmonary evaluation). Employer lacks standing to argue that Claimant did not receive a complete pulmonary evaluation. *See Clevenger v. Mary Helen Coal Co*., 22 BLR 1-193, 1-197 (2002) (en banc) (party must assert his or her own legal rights and interests and cannot rest their claims on other parties' rights or interests); 20 C.F.R. §802.201(a). Moreover, as Claimant has established entitlement to benefits, this argument is moot. We therefore reject it. *See* 20 C.F.R. §802.201(a).

[8] Employer contends that the subsequent April 17, 2020 non-qualifying blood gas study establishes that Claimant's impairment is not permanent and thus benefits should be denied. Employer's Brief at 10 n.1. However, as Employer has not attempted to show that the Board's decision affirming Claimant's entitlement to benefits was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Moreover, ALJ Temin found the study was conducted at the hospital emergency room while Claimant was being treated for acute hypoxia and therefore cannot be used to assess disability, a finding Employer did

times of those tests, Claimant cannot receive benefits as of the time of that testing. Employer's Brief on Remand at 3; Director's Exhibit 38 at 84; Claimant's Exhibit 10. The ALJ rejected these arguments, finding that singular objective testing that is non-qualifying is not presumptive evidence of non-disability absent a medical opinion interpreting the studies. Decision and Order on Remand at 4.

Employer contends the ALJ's finding "overlooks all of the relevant evidence of record" and the fact that the subsequent studies show there is no chronic and progressive disease. Employer's Brief at 9. We disagree.

The Board affirmed ALJ Temin's finding that Claimant established total disability despite the non-qualifying March 30, 2016 pulmonary function study and that the April 17, 2020 arterial blood gas study was unreliable for assessing disability. *Ramey*, BRB No. 21-0369 BLA, slip op. at 4. Further, as the ALJ noted, the presence of a non-qualifying test does not, in and of itself, show Claimant was not totally disabled at that time. *See* 20 C.F.R. §718.204(b)(2)(iv) ("total disability may nevertheless be found if a physician exercising reasoned medical judgement . . . concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [coal mine] employment"); Decision and Order on Remand at 3. Additionally, the record contains credited evidence of total disability that predates the tests on which Employer relies. Specifically, Dr. Breeding opined Claimant is totally disabled in an April 20, 2016 report that ALJ Temin found to be reasoned and documented, a finding the Board affirmed. *Ramey*, BRB No. 21-0369 BLA, slip op. at 5; Decision and Order at 15-16; Director's Exhibit 38 at 66.

Consequently, we affirm the ALJ's finding that the March 30, 2016 pulmonary function study and the April 17, 2020 arterial blood gas study do not affirmatively establish Claimant was not totally disabled subsequent to the filing of his claim. Decision and Order on Remand at 4.

As Employer raises no other challenges to the ALJ's weighing of the evidence, we affirm his determination that there is no credible evidence Claimant was not totally disabled due to pneumoconiosis at any point subsequent to the filing of his claim. 20 C.F.R. §725.503(b); *see Edmiston*, 14 BLR at 1-68-69; *Owens*, 14 BLR at 1-51; Decision and Order on Remand at 3-4. Thus, we affirm his determination that benefits should commence as of December 2013, the month in which this claim was filed. *Id.*

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not challenge in its prior appeal. 20 C.F.R. Part 718, Appendix C; Decision and Order at 14; Claimant's Exhibit 10.

Accordingly, the ALJ's Decision and Order on Remand is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge