U.S. Department of Labor

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

BRB No. 23-0413 BLA

BEN H. ADAMS Claimant-Respondent v. DESERT MINING, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	**NOT-PUBLISHED** DATE ISSUED: 09/30/2024 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits in A Subsequent Claim and Order Granting Director's Motion for Reconsideration and Decision and Order Awarding Benefits on Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits in a Subsequent Claim and Order Granting Director's Motion for Reconsideration and Decision and Order Awarding Benefits on Reconsideration (2013-BLA-06021) rendered on a subsequent claim[1] filed on October 26, 2012, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In his initial Decision and Order Granting Benefits in a Subsequent Claim, the ALJ credited Claimant with at least fifteen years of underground coal mine employment. He found Claimant established complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, and thus established a change in an applicable condition of entitlement.[2] 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309(c). Further, he found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

The Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration requesting the ALJ determine whether Claimant was totally disabled due to pneumoconiosis at any time prior to establishing complicated pneumoconiosis and is thus entitled to an earlier benefits commencement date.[3]

The ALJ subsequently issued an Order Granting Director's Motion for Reconsideration and Decision and Order Awarding Benefits on Reconsideration. He found Claimant established 22.81 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found

[1] Claimant filed a prior claim on October 25, 2002. Director's Exhibit 1 at 294. On October 15, 2003, the district director denied the claim because Claimant failed to establish any element of entitlement. *Id.* at 72.

[2] 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 the district director denied Claimant's prior claim for failing to establish any element of entitlement, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of the current claim. *Id.*

[3] The ALJ initially found benefits commence the month in which Claimant first established complicated pneumoconiosis, May 2016. Decision and Order at 16.

Claimant also invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] He further found Employer failed to rebut the presumption and awarded benefits commencing the month in which the claim was filed.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis. It also argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director has not filed a response brief. Employer filed a reply brief, reiterating its contentions.[5]

The Benefits Review 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.[6] 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).

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. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying

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[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] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established 22.81 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Recon. at 7.

[6] 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); Director's Exhibit 1 at 292-93.

pulmonary function studies or arterial blood gas studies,[7] 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).

The ALJ found Claimant established total disability based on the arterial blood gas studies, medical opinions, and evidence as a whole.[8] Decision and Order on Recon. at 12-22; *see* 20 C.F.R. §718.204(b)(2)(ii), (iv). Employer argues the ALJ erred in weighing the blood gas study evidence.[9] Employer's Brief at 35-39.

The ALJ considered four blood gas studies dated December 19, 2012, May 22, 2013, November 1, 2013, and May 24, 2016. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order on Recon. at 12-16. The December 19, 2012 and November 1, 2013 studies yielded qualifying values at rest, while the May 22, 2013 and May 24, 2016 studies yielded non-qualifying values at rest. Director's Exhibit 9 at 31; Claimant's Exhibit 2 at 12-15 (unpaginated); Employer's Exhibits 1 at 8; 6. Only the May 24, 2016 study included an exercise study, which the ALJ found is qualifying. Claimant's Exhibit 2 at 13-15 (unpaginated). The ALJ found all of the blood gas studies are valid and permissibly concluded the May 24, 2016 exercise testing was most indicative of Claimant's ability to perform his usual coal mine work. *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

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[7] 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).

[8] The ALJ found the pulmonary function studies do not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order on Recon. at 8, 12.

[9] Employer also argues the ALJ erred in finding the November 1, 2013 and May 24, 2016 pulmonary function studies are valid. Employer's Brief at 36-37. We need not address this argument as the ALJ found both studies are non-qualifying and the pulmonary function study evidence does not support a finding of total disability. *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"); Decision and Order on Recon. at 10-12.

on Recon. at 15-16. He thus found the blood gas study evidence supports a finding of total disability. Decision and Order on Recon. at 16.

First, Employer argues the ALJ should have found the December 19, 2012 and November 1, 2013 studies are invalid based on Dr. Vuskovich's opinion.[10] Employer's Brief at 37-39. Dr. Vuskovich opined the resting PaO2 results from the December 19, 2012 and November 1, 2013 studies were not "true result[s] because [they] did not agree with [Claimant's] normal single breath carbon monoxide diffusing capacity test result" and "did not agree with his O2 saturation result measured with co-oximetry." Employer's Exhibit 7 at 8-9, 11; Director's Exhibit 10 at 2. Contrary to Employer's assertion, the ALJ permissibly found that Dr. Vuskovich did not adequately explain how disagreement between the PaO2 results, diffusing capacity results, and O2 saturation results render the December 19, 2012 and November 1, 2013 studies unreliable. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); Decision and Order on Recon. at 13-14.

Employer next asserts the ALJ erroneously characterized the May 24, 2016 exercise blood gas study as qualifying by relying on the values from blood drawn earlier in the exercise period of the study rather than the non-qualifying results from blood drawn later in the exercise period. Employer's Brief at 35-36. Specifically, Employer contends the ALJ failed to explain why he relied on the earlier blood draw rather than the later draw. *Id.* We disagree.

The May 24, 2016 exercise blood gas study includes three blood draws. Claimant's Exhibit 2 at 13-15 (unpaginated). The first blood draw at 3:18 p.m. produced a pCO2 value of 40 and pO2 value of 57; the second blood draw taken two minutes later at 3:20 p.m. produced a pCO2 value of 36 and pO2 value of 64; and the third blood draw taken at 3:21 p.m. produced a pCO2 of 39 and a pO2 of 65. *Id.* Thus the first two draws were qualifying and the third was not. 20 C.F.R. Part 718, Appendix C. Dr. Green opined all three "blood

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[10] Employer also asserts Dr. Vuskovich's opinion invalidates the May 24, 2016 blood gas study. Employer's Brief at 38-39. Dr. Vuskovich challenged the validity of the resting portion of the May 24, 2016 study, opining the resting results were not "resting" because Claimant's "abnormally low PaCO2 and his abnormally high pH showed that when his sample was drawn he was vigorously hyperventilating," artificially raising his PaO2. Employer's Exhibit 7 at 13. Because the ALJ found the resting portion of the May 24, 2016 study is non-qualifying, we need not address Employer's argument. *See Shinseki*, 556 U.S. at 413; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order on Recon. at 14-15.

gases demonstrated hypoxemia" and Claimant "is totally disabled from the pulmonary capacity standpoint on the basis of" the qualifying values from the first blood draw. *Id.* at 4-5 (unpaginated).

The ALJ correctly observed that although the third blood draw indicates it was drawn during "peak" exercise, the regulations do not require blood be drawn at the end rather than the beginning of exercise; they only require blood be drawn "during exercise." Decision and Order on Recon. at 15; 20 C.F.R. §718.105(b). He then permissibly found the first blood draw is more probative than the other two blood draws because Dr. Green relied on the first blood draw in opining Claimant is totally disabled. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order on Recon. at 15-16. Therefore, the ALJ permissibly considered the qualifying values from the first blood draw when assessing the probative value of the May 24, 2016 exercise blood gas study.

As Employer does not challenge the ALJ's determination that the May 24, 2016 exercise study is more indicative of Claimant's ability to perform his usual coal mine work than the resting test on that date or the blood gas testing on other dates, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Recon. at 16. We therefore affirm, as supported by substantial evidence, his finding that the blood gas studies support total disability. 20 C.F.R. §718.204(b)(2)(ii).

Employer next argues that in weighing the medical opinions and all relevant evidence, the ALJ erred in failing to address whether Claimant's impairment arose "as the result of a compensable pulmonary process rather than from non-compensable obesity and post-surgical scarring." Employer's Brief at 39-42. We disagree. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption.[11] *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir.

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[11] We reject Employer's argument that the Board held otherwise in *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986). In that case, the Board concluded a physician's testimony that a miner's "severe degenerative neuromuscular problem" affected his objective testing results may be "relevant to the issue of the *reliability* of pulmonary function studies as indicators of a chronic respiratory or pulmonary disease" for purposes of invoking an interim presumption that is no longer in effect. *Id.* at 1-134 (emphasis added). The Board did not hold, however, that a physician's opinion on the *cause* of a respiratory or pulmonary impairment as reflected on an otherwise reliable objective test is relevant to whether the miner is disabled. Further, the relevant regulation applicable to this claim specifically states that if "a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be

1989); *Johnson v. Apogee Coal Co., LLC*, 26 BLR 1-1, 1-10-11 (2023); 20 C.F.R. §718.305.

Thus we affirm the ALJ's finding the medical opinion evidence supports total disability, and that Claimant established total disability based on the evidence as a whole, thereby invoking the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see Skrack*, 6 BLR at 1-711; 20 C.F.R. §§718.204(b)(2), 718.305; Decision and Order on Recon. at 20-22.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[12] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

Employer does not challenge the ALJ's finding that it did not rebut the presumption of legal or clinical pneumoconiosis; thus we affirm it. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(i); Decision and Order on Recon. at 22.

Employer asserts the case must be remanded because the ALJ offered "no analysis of whether [Claimant] demonstrated that his disability arose from a compensable pulmonary or respiratory impairment." Employer's Brief at 39-42. Contrary to Employer's contention, once the Section 411(c)(4) presumption is invoked, Employer bears the burden of establishing no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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considered in determining whether the miner is or was totally disabled *due to pneumoconiosis*." 20 C.F.R. §718.204(a) (emphasis added).

[12] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Employer also argues the ALJ did not adequately consider the opinions of Drs. Rosenberg and Vuskovich. Employer's Brief at 41-42. We disagree. The ALJ considered their opinions regarding the cause of Claimant's total disability and rationally discredited them because they failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease. *See Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order on Recon. at 26-27. We therefore affirm the ALJ's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits in A Subsequent Claim and Order Granting Director's Motion for Reconsideration and Decision and Order Awarding Benefits on Reconsideration.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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[13] Because we affirm the ALJ's finding Claimant established entitlement to benefits under the Section 411(c)(4) presumption, we need not address Employer's arguments that the ALJ erred in finding Claimant established entitlement to benefits by invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Employer's Brief at 16-34.