U.S. Department of Labor

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

BRB No. 23-0447 BLA

RANDY D. CAUDILL Claimant-Respondent v. CONSOL BUCHANAN MINING COMPANY, LLC and CONSOL ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/19/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2021-BLA-05621) rendered on a claim filed

on November 28, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established seventeen 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 Claimant 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).[1] He further found Employer failed to rebut the presumption and therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[2]

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 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 (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 or comparable gainful work.[4] *See*

[1] 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established seventeen years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13, 19.

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

[4] The ALJ found Claimant's usual coal mine employment as a belt maintenance man required him to frequently lift 30 to 100 pounds several times per day and carry 50 pounds 20 times per day. Decision and Order at 4-6. The ALJ found this work required "very

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,[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 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 the medical opinions support a finding of total disability.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18. Weighing all the evidence together, he concluded Claimant established total disability. 20 C.F.R. §718.204(b); Decision and Order at 19.

Employer argues the ALJ erred in weighing the medical opinions. Employer's Brief at 8-12. We disagree.

The ALJ considered the medical opinions of Drs. Ajjarapu and Vuskovich. Decision and Order at 10-18; Director's Exhibits 11, 21, 25, 26; Employer's Exhibit 5. Dr. Ajjarapu opined Claimant is totally disabled due to a severe pulmonary impairment evidenced by pulmonary function testing and moderate exercise induced hypoxemia evidenced by arterial blood gas testing, while Dr. Vuskovich opined Claimant is not totally disabled. Director's Exhibits 11 at 6-7, 21 at 2; Employer's Exhibit 5 at 15.

The ALJ found Dr. Ajjarapu's opinion is reasoned and documented. Decision and Order at 15, 19. He discredited Dr. Vuskovich's opinion because the doctor believed the February 1, 2017 and September 12, 2017 pulmonary function studies are invalid, but the ALJ found his opinion on their validity unpersuasive and thus found the studies valid and reliable. *Id.* at 9, 17. In addition, the ALJ found Dr. Vuskovich did not adequately discuss

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heavy manual labor." *Id.* This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711.

[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] The ALJ found the pulmonary function studies and arterial blood gas 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 at 4, 6, 10, 18-19.

why Claimant's inability to exercise for four minutes when performing the February 1, 2017 arterial blood gas study did not prevent him from performing the heavy exertional requirements of his last coal mine job. *Id*. at 17. Finally, the ALJ found Dr. Vuskovich did not adequately explain why the valid, non-qualifying testing of record still does not evidence a totally disabling lung impairment, as the doctor only cited the fact that the studies are non-qualifying as a basis for excluding total disability. *Id*. at 17-18.

Employer argues the ALJ erred in weighing Dr. Ajjarapu's opinion. Employer's Brief at 8-9. We disagree.

Dr. Ajjarapu opined the February 1, 2017 pulmonary function study reveals a severe pulmonary impairment. Director's Exhibit 11 at 7. She stated arterial blood gas testing from the same day reveals moderate exercise induced hypoxemia. *Id*. Further, she opined Claimant has chronic bronchitis based on respiratory symptoms of cough and shortness of breath, and noted he experiences dyspnea and wheezing with exertion. *Id*. at 3. She concluded Claimant is totally disabled due to his respiratory impairments from performing his usual coal mine employment that required lifting, standing, and walking. *Id*.

In a supplemental report, Dr. Ajjarapu noted Claimant's job required "strenuous" labor. Director's Exhibit 21 at 1-2. She also disputed Dr. Vuskovich's opinion that the February 1, 2017 pulmonary function study is invalid. *Id*. Further, she reviewed the September 12, 2017 pulmonary function study and opined it shows a moderate obstructive impairment. *Id*. She reiterated her opinion that Claimant is totally disabled. *Id*.

The ALJ permissibly found Dr. Ajjarapu's opinion is reasoned and documented because it is supported by the evidence the doctor reviewed, her knowledge of Claimant's usual coal mine employment, and her identification of Claimant's physical limitations caused by his respiratory symptoms.[7] *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 18-19.

Employer asserts the ALJ erred in crediting Dr. Ajjarapu's opinion because she did not consider the March 6, 2020 pulmonary function study. Employer's Brief at 3, 8-9. Contrary to Employer's argument, an ALJ is not required to discount a physician's opinion on the basis that she did not review the most recent objective testing; rather, a physician can render a reasoned and documented opinion regarding total disability based on her own

[7] As discussed below, we have affirmed the ALJ's finding that the February 1, 2017 and September 12, 2017 pulmonary function studies are valid. Thus they support Dr. Ajjarapu's opinion.

examination of the miner, review of objective test results, or both.[8] 20 C.F.R. §718.204(b)(2)(iv); *see Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

Employer further contends the ALJ should have discredited Dr. Ajjarapu's opinion as contrary to his finding that the pulmonary function studies do not support total disability. Employer's Brief at 11-12. We are not persuaded by its argument. As the ALJ correctly stated, even if total disability cannot be established by qualifying pulmonary function or arterial blood tests, it "may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents" him from performing his usual coal mine employment.[9] Decision and Order at 15, 17-18; *see* 20 C.F.R. §718.204(b)(2)(iv); *see also Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995) (medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job)*; 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").

Employer further challenges the ALJ's weighing of Dr. Vuskovich's opinion. Employer's Brief at 9-11. It first argues he erred in finding the February 1, 2017 and September 12, 2017 pulmonary function studies are valid, and thus erred in discrediting Dr. Vuskovich's opinion because the doctor believed these tests are invalid. *Id*. We disagree.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R.

[8] In a separate part of his Decision and Order, the ALJ noted Dr. Ajjarapu reviewed all the pulmonary function testing of record, which Employer argues is an erroneous finding. Employer's Brief at 8-9. Because the ALJ found Dr. Ajjarapu's opinion is supported by the evidence she reviewed, we consider this error harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] Employer also argues the ALJ should have found the pulmonary function studies, including those in Claimant's treatment records, weigh against a finding of total disability rather than finding their results are in equipoise. Employer's Brief at 2, 6-8. As Claimant can establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv) even if a preponderance of the pulmonary function testing does not support total disability at 20 C.F.R. §718.204(b)(2)(i), Employer has not set forth how the error it alleges would make a difference. *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.

§§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c). Thus, the party challenging a study's validity has the burden to establish the results are invalid. *See Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984); 20 C.F.R. Part 718, Appendix B. Substantial evidence supports the ALJ's finding that the February 1, 2017 and September 12, 2017 pulmonary function studies are valid because Employer did not meet its burden to invalidate them through Dr. Vuskovich's opinion.

In his medical reports, Dr. Vuskovich opined both pulmonary function studies are invalid because Claimant's respective respiratory rate and tidal volume were not sufficient to generate valid MVV results. Director's Exhibits 25 at 4; 26 at 4. He also invalidated both tests because Claimant did not put forth sufficient effort required to generate valid FEV1/FVC results. *Id*. Further, Dr. Vuskovich opined Claimant prematurely terminated his expiratory efforts, which artificially lowered his FVC results for both studies. *Id*. With respect to the February 1, 2017 study, he cited Claimant's "variable deep breath efforts" as a basis for invalidating the test. Director's Exhibit 26 at 4.

In his deposition, Dr. Vuskovich stated the "configurations of the flow-volume loops and volume time-tracings" for the February 1, 2017 pulmonary function study "were compatible with inconsistent and submaximal efforts" and Claimant did not "generate three acceptable tracings" as the quality standards require. Employer's Exhibit 5 at 10. He also acknowledged Claimant's effort for the September 12, 2017 study improved, but nonetheless stated Claimant could have given better effort as reflected in the maximum effort he gave for the March 6, 2020 study. *Id*. at 11-12.

The ALJ permissibly found Dr. Vuskovich's opinion that Claimant did not put forth the effort required to generate valid pulmonary function study results undermined by the first-hand technicians' comments. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 9. Specifically, the administering technicians for both studies indicated Claimant's respective degree of cooperation and ability to understand instructions were good and that the tests met American Thoracic Society criteria.[10] Director's Exhibits 11 at 13; 23 at 3.

Further, the ALJ permissibly discredited Dr. Vuskovich's opinions because he did not adequately explain "how he determined Claimant's deep breath efforts were variable or how he determined that the Claimant prematurely terminated his expiratory efforts."

[10] Dr. Gaziano indicated the "vents" for the February 1, 2017 pulmonary function study are acceptable. Director's Exhibit 16.

Decision and Order at 9 (internal quotations omitted); *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Although Employer argues Dr. Vuskovich's deposition testimony about flow-volume and volume-time tracings is a credible explanation, Employer's Brief at 4-5, 10, the ALJ acknowledged this testimony but nonetheless found it inadequate. Decision and Order at 7-10. Employer's argument amounts to a request to reweigh the evidence, which the Board may not do, even if our conclusions might have been different. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The Board cannot disturb factual findings that are supported by substantial evidence even if it might reach a different conclusion if it were reviewing the evidence de novo. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 189 (4th Cir. 2002).

Thus we affirm the ALJ's finding that the February 1, 2017 and September 12, 2017 pulmonary function studies are valid and his conclusion that Dr. Vuskovich's opinion is not credible because he assumed both studies are invalid. Decision and Order at 9, 17.

Further, Employer does not challenge the ALJ's additional reasons for discrediting Dr. Vuskovich's opinion. As discussed above, the ALJ found Dr. Vuskovich, in opining that Claimant is not disabled, did not set forth why Claimant's inability to exercise for four minutes on the February 1, 2017 arterial blood gas study would not prevent him from performing the heavy exertional requirements of his last coal mine job. *Hicks*, 138 F.3d at 533; Decision and Order at 17. In addition, the ALJ found Dr. Vuskovich merely cited the non-qualifying nature of the February 1, 2017 arterial blood gas study and the September 12, 2017 and March 6, 2020 pulmonary function studies as his basis for excluding a diagnosis of total disability. Employer's Exhibit 5. The ALJ found the doctor did not discuss whether these tests evidenced a disabling impairment independent of whether they are non-qualifying. *Scott*, 60 F.3d at 1142; *Cornett*, 227 F.3d at 577; Decision and Order at 17-18. We affirm these alternative findings as unchallenged. *Skrack*, 6 BLR at 1-711 (1983).

As it supported by substantial evidence, we affirm the ALJ's finding that the medical opinions support total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013). We further affirm the ALJ's conclusion that the evidence, weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 19. Thus, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 19. As Employer does not challenge the ALJ's finding that it did not rebut the presumption, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 23.

Accordingly, the ALJ's Decision and Order Awarding Benefits in an Initial Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge