U.S. Department of Labor

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

BRB No. 23-0473 BLA

RONNIE L. SIZEMORE Claimant-Petitioner v. PINE BRANCH MINING, LLC and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/12/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Ronnie L. Sizemore, Oneida, Kentucky.

Jason H. Halbert and Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits (2020-BLA-05937) rendered on a claim filed on December 28, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found the record does not contain any evidence of complicated pneumoconiosis and thus Claimant could not 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); 20 C.F.R. §718.304. He found Claimant established thirty-three years of coal mine employment based on the parties' stipulation but did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, the ALJ found Claimant did not invoke the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis,[2] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718, and denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.

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 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).

[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 the ALJ's decision, but she is not representing Claimant on appeal. *See Shelton v. Claude v. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[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); 20 C.F.R. §718.305.

[3] 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*

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits.[4] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Invocation of the Section 411(c)(4) Presumption – Total Disability

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. *See* 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 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).

Pulmonary Function Studies

The ALJ considered three pulmonary function studies Claimant performed on December 4, 2017, February 26, 2018, and November 21, 2018. Decision and Order at 5, 11-13. Dr. Forehand's December 4, 2017 study produced qualifying results; bronchodilators were not administered. Claimant's Exhibit 3. Dr. Ajjarapu's February 26,

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 9; Director's Exhibit 3.

[4] The ALJ accurately found there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 4, 11. Therefore, 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); 20 C.F.R. §718.304.

[5] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values listed 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).

2018 study, which was conducted as a part of the Department of Labor (DOL) sponsored complete pulmonary evaluation of Claimant, produced qualifying results pre-bronchodilator and non-qualifying results post-bronchodilator. Director's Exhibit 15 at 13-22. Dr. Dahhan's November 21, 2018 study produced non-qualifying results pre- and post-bronchodilator. Director's Exhibit 26 at 6-15.

The ALJ determined the February 26, 2018 study is invalid and the December 4, 2017 and November 21, 2018 studies are valid. Decision and Order at 5 n.28, 12-13. He noted that of the two valid studies, the more recent November 21, 2018 study was non-qualifying; he concluded that the pulmonary function study evidence is "inconclusive at best"; and he therefore found Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 12-13.

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. §§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). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in his role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). However, 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 the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

In considering the validity of the February 26, 2018 study, the ALJ weighed Dr. Ajjarapu's opinion against the conflicting opinions of Drs. Vuskovich, Dahhan, and Jarboe. Decision and Order at 11-13; Director's Exhibits 24 at 3; 25 at 11-14; 26 at 5; 30; Employer's Exhibit 2 at 4. Dr. Vuskovich opined the study is invalid because the tracings showed Claimant gave inadequate effort that artificially lowered his FEV1 and FVC results. Director's Exhibits 24 at 3; 25 at 11-14. Dr. Dahhan agreed that the study is invalid and did not represent Claimant's "true ventilatory capacity." Director's Exhibit 26 at 5. Dr. Jarboe noted the MVV results pre- and post-bronchodilator are invalid because Claimant did not "achieve an optimal depth of breath." Employer's Exhibit 2 at 4.

After reviewing Dr. Vuskovich's opinion invalidating the February 26, 2018 study, Dr. Ajjarapu wrote in a supplemental report:

> Even though, Spirometry is effort dependent, when evaluating the technical details, if the test is suboptimal due to effort or incomplete testing technique,

> we usually recommend the miner repeat the test for best and accurate testing. Even then, some miner's test may show drastic declines in one instance and near normal values at another instant and this does not mean that the test at one area was inaccurate. It means that the various testing conditions [should be considered] such as patient medication status, weather conditions, and type of standard values used to compare the data, etc. This miner did his exam at Stone Mountain health, and there they use NHAINES [sic] III [National Health and Nutrition Examination Survey III] values for their standardized testing. Based on these values, this miner's pulmonary data showed severe pulmonary impairment. Dr. Vuskovich uses a different set of standard values and does calculations to get his values. In my opinion this is like comparing oranges and tangerines. They both are similar, but not exact. NHAINES [sic] III is more comprehensive and inclusive and should be the gold standard for all institutions.

Director's Exhibit 30 at 1-2.

The ALJ found that Dr. Ajjarapu's supplemental report was "entirely theoretical" and did not actually address whether the pulmonary function study is valid or whether Claimant put forth sufficient effort. Decision and Order at 12. Thus, the ALJ credited the opinions of Employer's experts that the February 26, 2018 study is invalid for poor effort. *Id.*

We are unable to affirm the ALJ's determination as he did not address all the relevant evidence, including Dr. Ajjarapu's statement in her initial report that Claimant's cooperation and comprehension were "[g]ood"; the actual report of the study, which included quality notations indicating there was "[g]ood effort";[6] or Dr. Gaziano's validation report, which stated the "[v]ents are acceptable."[7] Director's Exhibits 15 at 13-22; 20; 53 at 9; *see Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir. 1984) (finding which does not encompass discussion of contrary evidence does not warrant affirmance); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v.*

[6] The report of study also indicates that it is an "UNCONFIRMED REPORT" and "UNCONFIRMED INTERPRETATION – MD SHOULD REVIEW." Director's Exhibit 15 at 14-22.

[7] While the signature on the DOL Validation Report for the February 26, 2018 pulmonary function study is illegible, the district director's Proposed Decision and Order states that Dr. Gaziano validated the February 26, 2018 study. Director's Exhibits 20; 53 at 9.

Cent. Appalachian Coal Co., 6 BLR 1-996, 1-998 (1984) (factfinder's failure to discuss relevant evidence requires remand).

Moreover, the ALJ did not render any findings as to whether the study is in substantial compliance with the quality standards even if it is not entirely conforming. 20 C.F.R. §718.101(b). In that regard, we remind the ALJ that the study is presumed to be in substantial compliance, and it is Employer's burden to prove otherwise. Thus, the ALJ must determine not only whether Dr. Ajjarapu's opinion is credible but, importantly, whether Employer's medical evidence is credible to carry its burden.

We therefore vacate the ALJ's finding that the February 26, 2018 study is invalid and his conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 11-14.

Arterial Blood Gas Studies

The ALJ correctly found the three arterial blood gas studies, dated February 26, 2018, November 21, 2018, and February 4, 2021, are non-qualifying for total disability. Decision and Order at 6, 13; Director's Exhibits 15 at 9-11; 26 at 17-21; Employer's Exhibit 2 at 12-14. Therefore, we affirm his finding that the arterial blood gas studies do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 13-14.

Cor Pulmonale

The ALJ correctly found that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 11. Thus, Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

Medical Opinions

The ALJ considered the medical opinions of Drs. Ajjarapu, Dahhan, and Jarboe. Decision and Order at 6-14. Dr. Ajjarapu conducted the DOL sponsored complete pulmonary evaluation of Claimant on February 26, 2018, and obtained a qualifying pulmonary function study and a non-qualifying blood gas study. Director's Exhibit 15. She opined Claimant has a "severe pulmonary impairment" and does not have the pulmonary capacity to continue his previous coal mine employment. *Id.* at 7; Director's Exhibit 30 at 1-2. Drs. Dahhan and Jarboe examined Claimant and opined he is not totally disabled. Director's Exhibit 26 at 5; Employer's Exhibit 2 at 10.

The ALJ gave little weight to Dr. Ajjarapu's opinion because she relied on the February 26, 2018 pulmonary function study, which the ALJ found invalid. Decision and

Order at 13. He found Drs. Dahhan's and Jarboe's opinions reasoned and documented because they were supported by the non-qualifying pulmonary function study and arterial blood gas study results. *Id.* at 13-14. Thus, he found Claimant failed to establish total disability based on the medical opinions. *Id.* at 14.

Because the ALJ's consideration and weighing of the pulmonary function study evidence influenced his credibility determinations regarding the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), we vacate them. Decision and Order at 14.

Moreover, in determining whether a miner is totally disabled, the ALJ must compare the exertional requirements of Claimant's usual coal mine work with the physicians' description of any pulmonary impairment and physical limitations. 20 C.F.R. §718.204(b)(2)(iv); *see 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); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991). Here, the ALJ did not make a finding regarding Claimant's usual coal mine work or the exertional requirements of such work and did not then compare those requirements with the physicians' assessments to determine whether the opinions support a finding of total respiratory disability. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 578; *Ward*, 93 F.3d at 218-19; *Eagle*, 943 F.2d at 512 n.4; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); Decision and Order at 6-14.

Thus, we vacate the ALJ's conclusion that Claimant did not establish total disability based on the medical opinions or in consideration of the evidence as a whole. Decision and Order at 14. Consequently, we vacate the ALJ's denial of benefits and remand the case for the ALJ to determine if Claimant can invoke the Section 411(c)(4) presumption or otherwise establish entitlement to benefits under 20 C.F.R. Part 718.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i). Specifically, he must determine whether Employer met its burden to establish that the February 26, 2018 pulmonary function study is not in substantial compliance with the quality standards.[8] *See Keener*, 23 BLR at 1-237. Additionally, in weighing the pulmonary

[8] If the ALJ determines on remand that the February 26, 2018 pulmonary function study is invalid, he must consider whether Claimant is entitled to a new study. 20 C.F.R. §§725.406(c) (if a pulmonary function study conducted during the DOL sponsored evaluation is invalid due to "lack of effort on the part of the miner, the miner will be

function study evidence, he must provide an adequate rationale for his determinations and resolve the conflicting evidence without regard to recency alone. *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); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023); *Smith v. Kelly's Creek Res.*, 26 BLR 1-15, 1-27-28 (2023).

He must also determine the exertional requirements of Claimant's usual coal mine employment and reevaluate whether the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Cornett*, 227 F.3d at 578; *Ward*, 93 F.3d at 218-19. In weighing the medical opinions, the ALJ must consider the qualifications of the physicians, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

If the ALJ determines total disability is demonstrated by the pulmonary function studies or medical opinions, or both, he must weigh all the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198. If Claimant fails to establish total disability, the ALJ may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

However, if Claimant establishes total disability, the ALJ must determine whether he has established at least fifteen years of underground or substantially similar coal mine employment to invoke the Section 411(c)(4) presumption. If the presumption is invoked, the ALJ must determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1). If Claimant establishes total disability but fails to invoke the presumption, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. In rendering his determinations on remand, the ALJ must explain his rationale and conclusions as the Administrative

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afforded one additional opportunity to produce a satisfactory result"), 725.456(e) (if the ALJ finds that any part of the DOL complete pulmonary evaluation fails to comply with the quality standards, the ALJ "shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing").

Procedure Act requires.[9] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

[9] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge