U.S. Department of Labor

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

BRB No. 24-0015 BLA

KENNITH F. MEADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	**NOT-PUBLISHED**
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED: 09/30/2024
	)	
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 of William P. Farley, Administrative Law Judge, United States Department of Labor.

Kennith F. Meade, St. Paul, Virginia.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) William P. Farley's Decision and Order Denying Benefits (2021-BLA-05004) rendered on a subsequent claim[2] filed on April 26, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis, and thus 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 credited Claimant with 25.42 years of coal mine employment based on the parties' stipulation and determined it all occurred underground. But he further found Claimant failed to establish a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b), and therefore could not invoke the presumption of total disability due to

[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 is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed ten prior claims; he withdrew eight, which therefore are considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 2. The ALJ stated the records for the remaining two claims were "unobtainable" from the Federal Records Center during the COVID-19 public health emergency. Decision and Order at 3 (unpaginated); Director's Exhibit 1.

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); *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 ALJ had no information about the prior closed claims, he proceeded as if no elements of entitlement had been established. Decision and Order at 3 (unpaginated). Therefore, Claimant had to submit new evidence establishing at least one element of entitlement in order to have the claim reviewed on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] or establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.

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

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.[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 (1965).

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.[5] *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).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner is total 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.

[4] 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 Virgina. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11, 16; Director's Exhibit 5.

[5] The ALJ accurately found there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 20 (unpaginated). 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.

Total Disability

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. *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,[6] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant did not establish total disability based on any category of evidence and thus denied benefits. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 21-25 (unpaginated).

Pulmonary Function Studies

The ALJ considered five pulmonary function studies performed on January 23, 2017, February 18, 2019, July 22, 2019, February 19, 2020, and September 3, 2021. Decision and Order at 7-8, 21-23 (unpaginated); Director's Exhibits 13 at 6; 15 at 3, 6; 17 at 13; Employer's Exhibit 4 at 7. Because the studies reported different heights ranging from 61 to 63 inches, the ALJ permissibly averaged them to find Claimant is 62.2 inches tall and used this height in determining whether each study is qualifying under Appendix B of 20 C.F.R. Part 718. *See Carpenter v. GMS Mine & Repair Maint. Inc.*, 26 BLR 1-33, 1-38-39 (2023); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 7-8 (unpaginated).

The ALJ accurately found the January 23, 2017 and February 18, 2019 studies produced qualifying results, while the July 22, 2019, February 19, 2020, and September 3, 2021 studies produced nonqualifying results. Decision and Order at 7-8 (unpaginated).

[6] 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).

When weighing pulmonary function studies, the ALJ must determine whether they are in substantial compliance with the 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 fact-finder, determine the probative weight to assign the study.[7] *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). "In the absence of evidence to the contrary, compliance with the [quality standards in] Appendix B shall be presumed." 20 C.F.R. §718.103(c). 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).

The ALJ initially observed that:

> Relevant to this claim, the quality standards at Appendix B provide that 'For the FEV1 and FVC, use of a *nose clip* is required. . . . The effort shall be judged unacceptable when the patient: . . . (B) Has not used *maximal effort* during the entire forced expiration; or . . . (D) Has *coughed* or closed his glottis; or . . . (G) Has an excessive variability between the three acceptable curves.'

Decision and Order at 21 (unpaginated) (quoting 20 C.F.R. Part 718, Appendix B (2)(ii)) (emphasis added).

The ALJ noted Drs. Fino and Rosenberg each opined the January 23, 2017 qualifying study is invalid due to incomplete and inconsistent effort.[8] Decision and Order at 22; Employer's Exhibits 1; 6 at 11-12. Dr. McSharry testified that the study was "probably" valid "because numerically" two of the three tracings were acceptable, although he noted the flow volume loops were not well-performed. Director's Exhibit 15 at 6; Employer's Exhibit 5 at 13-14. The ALJ also noted the study included a quality notation

[7] The quality standards do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101(b), 718.103. However, an ALJ must determine if the results are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,927-28 (Dec. 20, 2000).

[8] Dr. Fino testified Claimant "did not exhale forcefully, and there was still air coming out of his lungs when he stopped exhaling." Employer's Exhibit 6 at 12. Dr. Rosenberg found the study invalid because the flow-volume curves "display[ed] incomplete and inconsistent efforts." Employer's Exhibit 1 at 1.

indicating Claimant needed to "blast out faster," a comment stating "good effort and cooperation," and a handwritten note stating "acceptable spirogram[.]" Decision and Order at 21 (unpaginated) (quoting Director's Exhibit 15 at 6).

The ALJ found Drs. Fino's and Rosenberg's observations were consistent with the quality notation on the study for Claimant to "blast out faster" and did not conflict with Dr. McSharry's statement that the study was "numerically acceptable" but not well-performed. Decision and Order at 22 (unpaginated). In consideration of the quality standards, the physicians' opinions, and the comments on the study, the ALJ found the January 23, 2017 study was unreliable and entitled to no weight. *Id.* at 21-22, 22 n.147 (unpaginated) (quoting 20 C.F.R. Part 718, Appendix B (2)(ii)(B) ("effort shall be judged unacceptable when the patient . . . Has not used maximal effort during the [entire forced expiration]")).

Regarding the February 18, 2019 qualifying study, the ALJ noted Drs. Fino and Rosenberg each opined it is invalid due to incomplete effort and exhalation.[9] Decision and Order at 22 (unpaginated); Employer's Exhibits 2; 6 at 12. The ALJ also noted the technician conducting the study indicated Claimant gave good effort but could not use "nose clips . . . due to coughing and gagging – [Claimant] could not tolerate[.]"[10] Decision and Order at 22 (unpaginated) (quoting Director's Exhibit 15 at 3). For these reasons, the ALJ agreed with Drs. Fino and Rosenberg and determined the February 18, 2019 study was unreliable and entitled to no weight. *Id.*

Because the ALJ permissibly found the two qualifying studies unreliable and the remaining studies are nonqualifying, we affirm his conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 23-24 (unpaginated).

Arterial Blood Gas Studies

[9] Dr. Fino testified the study showed "no forceful exhalation and . . . [Claimant] didn't blow out all the air in his lungs." Employer's Exhibit 6 at 12. Dr. Rosenberg found the study invalid because the flow-volume curves "do not reveal complete and consistent efforts, and there is not a complete inspiration in association with exhalation." Employer's Exhibit 2 at 1.

[10] The ALJ also noted that there was a quality notation indicating good effort and a signed, handwritten note stating the spirogram was acceptable. Decision and Order at 22.

The ALJ correctly found the three arterial blood gas studies dated July 22, 2019, February 19, 2020, and September 3, 2021, are non-qualifying for total disability. Decision and Order at 9, 24 (unpaginated); Director's Exhibits 13, 17; Employer's Exhibit 4. We therefore affirm his finding that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Cor Pulmonale

The ALJ correctly found there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 23 (unpaginated). Thus, we affirm his determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

Medical Opinions and Claimant's Treatment Records

In considering the medical opinion evidence, the ALJ found Claimant's last coal mine work as a roof bolter required "heavy exertion."[11] Decision and Order at 5-6 (unpaginated). We affirm the ALJ's finding as it is rational and supported by substantial evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Tackett v. Cargo Mining Co*., 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his findings unless they are inherently unreasonable).

The ALJ next considered the opinions of Drs. Forehand, Fino, and McSharry. Decision and Order at 9-16, 24-25 (unpaginated). Dr. Forehand performed the Department of Labor sponsored complete pulmonary evaluation of Claimant on July 22, 2019, and obtained a non-qualifying pulmonary function study and a non-qualifying blood gas study. Director's Exhibit 13. He diagnosed Claimant with an obstructive lung disease and opined that, based on Claimant's shortness of breath and the pulmonary function study results, Claimant is totally disabled from performing his last coal mine job. *Id.* at 4.

Dr. Fino examined Claimant and obtained non-qualifying objective testing results. He also reviewed Claimant's medical records, including Dr. Forehand's report and objective testing results. He diagnosed Claimant with a mild obstructive impairment but opined it would not prevent him from performing his last coal mine job. Director's Exhibit 17 at 11; Employer's Exhibit 6 at 14. Dr. McSharry examined Claimant, noted his reported

[11] The ALJ relied on the Dictionary of Occupational Titles and Claimant's statements that he had to lift 100 pounds or more, that he had to lift fifty pounds five times per day, and that placing the roof bolts took "about all the strength you could get." Decision and Order at 5-6 (unpaginated); Hearing Transcript at 11-12; Director's Exhibit 6.

complaints of shortness of breath, and opined he is not totally disabled from continuing his usual coal mine employment and has no pulmonary or respiratory impairment. Employer's Exhibit 4 at 2.

Dr. Forehand subsequently reviewed Dr. Fino's report and objective testing. Director's Exhibit 18. He noted Dr. Fino diagnosed a non-disabling mild obstruction based on the pulmonary function study results he obtained. *Id*. Based on his review of Dr. Fino's objective testing, Dr. Forehand amended his original conclusions and instead opined "[Claimant's] mild impairment of ventilation, brought on by his coal mine employment[,] is not severe enough to keep him from returning to his last coal mining job." *Id.* at 2.

Because all of the physicians opined Claimant does not have a respiratory or pulmonary impairment that would preclude the performance of his usual coal mine work, the ALJ permissibly found Claimant did not establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).[12] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Compton*, 211 F.3d at 211; Decision and Order at 25 (unpaginated).

Additionally, the ALJ accurately noted Claimant's treatment and hospital records include diagnoses of chronic obstructive lung disease, coal workers' pneumoconiosis, chronic bronchitis, and symptoms of shortness of breath with exertion and going uphill, wheezing, and a severe cough. Decision and Order at 17-19, 25 (unpaginated); Claimant's Exhibits 2-5. The ALJ permissibly concluded that these records were entitled to "little weight on the issue of total disability" because they "[did] not provide sufficient explanation of these diagnoses and do not discuss the symptoms' impact on Claimant's ability to function." *See Looney*, 678 F.3d at 316-17; *Underwood*, 105 F.3d at 949; Decision and Order at 25 (unpaginated); Claimant's Exhibits 2-5. We therefore affirm the ALJ's conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 25 (unpaginated).

Claimant has the burden of establishing entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant did not establish total disability based on the evidence as a whole and thus did not invoke the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198;

[12] The ALJ noted that all the physicians understood Claimant's usual coal mine work as a roof bolter required "heavy labor." Decision and Order at 25 (unpaginated).

Decision and Order at 25-26 (unpaginated). As Claimant did not establish total disability, a requisite element of entitlement, benefits are precluded under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2); *see also Anderson*, 12 BLR at 1-112.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge