

U.S. Department of Labor

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



BRB No. 23-0084 BLA

KENNETH MCINTOSH)

Claimant-Respondent)

v.)

LOCUST GROVE, INCORPORATED)

Employer-Petitioner)

DATE ISSUED: 04/18/2024

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)

STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Reconsideration of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, 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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Awarding Benefits and his Order Denying Reconsideration (2017-BLA-05054) rendered on a subsequent claim filed on December 8, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.¹

In his initial 2019 Decision and Order Awarding Benefits, the ALJ credited Claimant with twenty-four years of qualifying coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,² 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement. 20 C.F.R. §718.309(c). Further, he found Employer did not rebut the presumption and therefore awarded benefits, commencing in December 2014.

On appeal, the Board affirmed all of the ALJ's findings on the merits and the award of benefits. *McIntosh v. Locust Grove, Inc.*, BRB No. 20-0049 BLA, slip op. at 4-11 (Dec. 23, 2020) (unpub.). However, because the ALJ did not provide any rationale for his finding regarding the commencement date for benefits, the Board remanded the case for further consideration of that issue and instructed the ALJ to evaluate whether the onset date of Claimant's total disability is ascertainable from the evidence. *Id.*

On remand, the ALJ found the exact date of total disability could not be ascertained; therefore, he again determined the commencement date for benefits is December 2014, the month Claimant filed this claim. He subsequently denied Employer's motion for reconsideration.

In the current appeal, Employer argues the ALJ erred in determining the onset date of Claimant's total disability given his determinations on remand regarding the pulmonary function study evidence. It further contends the ALJ's weighing of the pulmonary function study evidence in his current decision conflicts with his evaluation of the evidence in his prior decision, warranting the Board's reconsideration of the issue of total disability and

¹ We incorporate by reference the relevant procedural history set forth in the Board's prior decision in this case. *McIntosh v. Locust Grove, Inc.*, BRB No. 20-0049 BLA, slip op. at 1-2 (Dec. 23, 2020) (unpub.).

² 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.

thus Claimant's entitlement to benefits. Claimant has not filed a response. The Director, Office of Workers' Compensation Programs, filed a response brief, urging rejection of Employer's arguments.

The 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'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Benefits Commencement Date

The commencement date for benefits is the month in which Claimant 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 credible evidence establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

The ALJ considered the relevant evidence regarding the onset date of Claimant's total disability, noting the Board affirmed his finding of total disability based on the pulmonary function studies. Decision and Order at 1-2; *McIntosh*, BRB No. 20-0049 BLA, slip op. at 5-7. He also noted that, of the five pulmonary function studies of record, only the qualifying March 17, 2016 study was valid⁴ for assessing impairment, but that did not mean Claimant did not become disabled until that date. Decision and Order at 2-3. Further, the ALJ rejected Employer's argument that Claimant was not disabled as of the date of the non-qualifying March 3, 2016 study. *Id.* at 3. Thus, he found the precise date when Claimant first became totally disabled due to pneumoconiosis could not be ascertained. *Id.* at 3-4. He therefore concluded that Claimant is entitled to benefits beginning in December 2014, the filing date of the claim. *Id.* at 4.

Employer contends the ALJ failed to consider the non-qualifying March 3, 2016 pulmonary function study in determining the onset date of total disability. Specifically, it contends he did not explain why that study does not constitute at least "some evidence"

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

⁴ The Board affirmed the ALJ's finding that the March 17, 2016 pulmonary function study was valid. *McIntosh*, BRB No. 20-0049 BLA, slip op. at 6.

that Claimant was not totally disabled after the filing date given the ALJ's finding that the study reflects the Claimant's minimum function. Employer's Brief at 6, 10-12. We disagree.

Contrary to Employer's argument, the ALJ considered the March 3, 2016 study in determining the onset of total disability. As he explained, the March 3, 2016 pulmonary function study is invalid, a finding the Board affirmed; thus, it cannot constitute *credible* evidence that Claimant was not totally disabled as of that date. Decision and Order at 2-3; *see* 20 C.F.R. §§718.103(b) (invalid studies do not "constitute evidence of the presence *or absence* of a respiratory or pulmonary impairment") (emphasis added), 725.503(b); *see also McIntosh*, BRB No. 20-0049 BLA, slip op. at 5. Consequently, the ALJ reasonably concluded that Claimant's non-qualifying March 3, 2016 pulmonary function study does not establish Claimant was not totally disabled on or before that date. *Edmiston*, 14 BLR 1-65; *see also Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level); Decision and Order at 3.

Moreover, the ALJ permissibly determined that simply because the first valid, qualifying pulmonary function study of record was obtained on March 17, 2016, does not mean Claimant did not become totally disabled until that date. *See Owens*, 14 BLR at 1-50; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-108-09 (1985); Decision and Order at 3. Rather, it reflects only that he became disabled at some time prior to that date. Decision and Order at 3.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the record does not establish the precise date Claimant became totally disabled due to pneumoconiosis and contains no credible evidence Claimant was not totally disabled due to pneumoconiosis at any time after he filed his claim.⁵ *Id.* at 4. We thus affirm the ALJ's

⁵ We decline Employer's request for the Board to reconsider the ALJ's weighing of the pulmonary function studies and thus whether Claimant established total disability. Employer's Brief at 6-10. Employer generally argues the Board may decline to apply the law of the case doctrine and reassess these issues; however, it has not argued the Board's prior holding was clearly erroneous or set forth any other exception to the doctrine. *See Samons v. National Mines Corp.*, 25 F.4th 455, 463 (6th Cir. 2022) ("The doctrine known as 'law of the case' encapsulates a simple idea: courts generally decline to redecide issues that they have already decided."); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990). Thus, we decline to disturb the Board's prior affirmance of the ALJ's weighing of

finding that Claimant's benefits commence as of December 2014, the month he filed this claim. *Id.*; 20 C.F.R. §725.503(b).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

the pulmonary function studies, his finding of total disability, or Claimant's entitlement to benefits. Employer's Brief at 6-10; *McIntosh*, BRB No. 20-0049 BLA, slip op. at 4-8.