U.S. Department of Labor

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

BRB No. 22-0402 BLA

ESTATE of LIMUEL J. DYE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY,	)	
INCORPORATED, Self-insured through	)	DATE ISSUED: 12/11/2023
PITTSTON COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
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.

Estate of Limuel J. Dye, Swords Creek, 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[1] appeals, without the assistance of counsel,[2] Administrative Law Judge (ALJ) William P. Farley's Decision and Order Denying Benefits (2020-BLA-05401) rendered on a subsequent claim[3] filed on August 17, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that the Miner had 26.71 years of underground coal mine employment but found Claimant did not establish a totally disabling respiratory or pulmonary impairment.[4] 20 C.F.R. §718.204(b)(2). He therefore determined Claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2018),[5] and could not establish entitlement under 20 C.F.R. Part 718.[6] Thus, the ALJ denied benefits.

[1] Claimant is the estate of the Miner, who died on December 10, 2021. Claimant's Mar. 1, 2022 Letter to the ALJ.

[2] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on Claimant's behalf, that the Benefits Review Board review the ALJ's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] The Miner filed three prior claims for benefits. Director's Exhibits 1-3. On May 1, 2017, ALJ Clement J. Kennington denied his previous claim, filed on July 12, 2013, because the Miner failed to establish total disability. Director's Exhibit 3.

[4] As the record contains no evidence of complicated pneumoconiosis, 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).

[5] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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.

[6] The ALJ thus also determined Claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. 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 Miner did not establish

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 filed 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.[7] 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 of total disability due to pneumoconiosis, 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 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,[8] 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).

---

total disability in his prior claim, Claimant had to submit evidence establishing that element to obtain review of the merits of the current claim. *Id.*; *see White*, 23 BLR at 1-3; Director's Exhibit 3.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15; Director's Exhibit 6.

[8] 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).

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated October 2, 2018, April 17, 2019, and December 10, 2020.[9] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10; Director's Exhibits 22 at 20; 25 at 16; Employer's Exhibit 3 at 46. The October 2, 2018 study produced qualifying values before and after the administration of a bronchodilator, while the April 17, 2019 and December 10, 2020 studies produced non-qualifying values before and after the administration of a bronchodilator. Director's Exhibits 22 at 20; 25 at 16; Employer's Exhibit 3 at 46. Because two of the three studies were non-qualifying, the ALJ found the preponderance of the pulmonary function testing did not support a finding of total disability.[10] Decision and Order at 10-11. We affirm this finding as supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(i); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012).

Arterial Blood Gas Studies

The ALJ next considered three arterial blood gas studies dated October 2, 2018, April 17, 2019, and December 10, 2020, all of which were performed at rest. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 11; Director's Exhibits 22 at 16; 25 at 22; Employer's Exhibit 3 at 62. The October 2, 2018 study produced qualifying values

[9] Because the pulmonary function studies reported varying heights for the Miner ranging from 70 to 72 inches, the ALJ calculated an average height for Claimant of 71.3 inches. He then properly used the closest greater table height at Appendix B of 20 C.F.R. Part 718 for determining the qualifying or non-qualifying results of the studies. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114, 116 n.6 (4th Cir. 1995); *Carpenter v. GMS Mine & Repair Maintenance Inc.*, BLR , BRB No. 22-0100 BLA (Sept. 6, 2023); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 11.

[10] The ALJ further noted "the most recent [pulmonary function studies] were nonqualifying." Decision and Order at 11. To the extent the ALJ purported to credit the April 17, 2019 and December 10, 2020 pulmonary function studies based on their recency, he erred, as it is irrational to credit evidence solely on the basis of recency where it suggests the miner's condition has improved. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Kincaid v. Island Creek Coal Co.*, BLR , BRB No. 22-0024 BLA and 22-0024 BLA-A, slip op. at 7-11 (Nov. 17, 2023); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14 (June 23, 2023). However, any such error is harmless in light of his permissible finding that the preponderance of the pulmonary function study evidence does not support total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

whereas the April 17, 2019 and December 10, 2020 studies did not. Director's Exhibits 22 at 16; 25 at 22; Employer's Exhibit 3 at 62. Because only one of the arterial blood gas studies produced qualifying values, the ALJ found the blood gas study evidence as a whole does not support a finding of total disability.[11] Decision and Order at 11-12. As the ALJ's finding that the arterial blood gas study evidence does not support a finding of total disability is supported by substantial evidence, we affirm it. 20 C.F.R. §718.204(b)(2)(ii); *see Looney*, 678 F.3d at 310.

Cor Pulmonale

The ALJ accurately found there is no evidence the Miner suffered from cor pulmonale with right-sided congestive heart failure, and therefore Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 12.

Medical Opinions

Before weighing the medical opinions, the ALJ determined the exertional requirements of the Miner's usual coal mine employment. Decision and Order at 8-9. A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period, *Shortridge v. Beatrice Pocahontas Coal Co*., 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of a respiratory inability to do his usual coal mine work. *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co*., 7 BLR 1-124, 1-127 (1984). The ALJ correctly observed the Miner testified in his prior claim that he performed general inside work, lifting and carrying up to seventy pounds at a time. Decision and Order at 8; Director's Exhibit 3 at 93. He also correctly observed the Miner's Description of Coal Mine Work form submitted in connection with a prior claim noted he "lifted and carried weights of [one-hundred] pounds." Decision and Order at 9; Director's Exhibit 2 at 184. As it is supported by substantial evidence, we affirm the ALJ's finding that the Miner's usual coal mine work as a general inside worker required heavy work. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 9.

[11] The ALJ also noted "the last two [arterial blood gas studies] did not produce qualifying values." Decision and Order at 12. Because the ALJ rationally found a preponderance of the arterial blood gas study evidence, considered as a whole, does not support a finding of total disability, any error in giving weight to the April 17, 2019 and December 10, 2020 studies based on their recency is harmless. *See Larioni*, 6 BLR at 1-1278; *Thorn*, 3 F.3d at 719; *Adkins*, 958 F.2d at 51-52; *Kincaid*, BRB No. 22-0024/A BLA, slip op. at 7-11; *Smith*, BRB No. 21-0329 BLA, slip op. at 14.

The ALJ then considered the medical opinion of Dr. Ajjarapu that the Miner was totally disabled and the opinions of Drs. Fino and Basheda that he was not. Decision and Order at 12-16; Director's Exhibits 22 at 2; 25 at 14; Employer's Exhibits 2 at 2; 3 at 44; 4 at 15-18. The ALJ permissibly credited Drs. Fino's and Basheda's opinions over that of Dr. Ajjarapu because their opinions are better supported by the objective testing. Specifically, the ALJ noted that Dr. Ajjarapu reviewed her own qualifying October 2, 2018 pulmonary function and blood gas testing and Dr. Fino's non-qualifying April 17, 2019 testing, and opined Dr. Fino's non-qualifying tests were "outliers." Decision and Order at 16; *see* Director's Exhibit 22 at 2; Employer's Exhibits 3 at 39-40; 4 at 15-18. But, as the ALJ permissibly found, Dr. Ajjarapu's qualifying tests were "in fact . . . the outliers" given that both Dr. Fino's April 17, 2019 tests and Dr. Basheda's December 10, 2020 tests—the latter of which Dr. Ajjarapu did not review—were uniformly non-qualifying for total disability. Decision and Order at 16; *see Looney*, 678 F.3d at 310; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000); *Hicks*, 138 F.3d at 528.

As the trier of fact, it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Looney*, 678 F.3d at 316-17; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997). Because substantial evidence supports the ALJ's credibility determinations, we affirm his finding Claimant did not establish total disability at Section 718.204(b)(2)(iv). We thus further affirm the ALJ's findings that Claimant did not establish total disability based on the evidence as a whole or therefore establish a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309; Decision and Order at 17. In addition, we affirm the ALJ's findings that Claimant did not invoke the Section 411(c)(4) presumption or establish entitlement to benefits as Claimant failed to establish an essential element of entitlement. *Anderson v. Valley Camp of Utah Inc.*, 12 BLR 1-111, 1-112 (1989).

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