U.S. Department of Labor

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

BRB No. 22-0533 BLA

BOBBY COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/05/2023
Employer-Petitioner	)	
	)	
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 of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly 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) John P. Sellers, III's Decision and Order Awarding Benefits (2021-BLA-05285) rendered on a subsequent claim filed on

March 19, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with at least thirty years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the Section 411(c)(4) presumption[2] of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and therefore erred in finding he invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a brief, unless requested.

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

[1] Claimant filed three prior claims for benefits. Director's Exhibits 1-3. The district director denied Claimant's previous claim because he failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2.

[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.

[3] 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)(1); *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 Claimant did not establish total disability in his prior claim, he had to submit new evidence establishing this element to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

[4] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant had at least thirty years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

accordance with applicable law.[5] 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

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work.[6] *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,[7] 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 established total disability based on the medical opinion evidence and the evidence as a whole.[8] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 26-27. Employer argues the ALJ erred.[9] Employer's Brief at 9-14.

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[5] 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 Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 12-13.

[6] The ALJ found Claimant's usual coal mine employment as a maintenance foreman required at least moderately heavy manual labor with periodic heavy labor. Decision and Order at 15. This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711.

[7] 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).

[8] The ALJ found the pulmonary function and arterial blood gas study evidence does not support 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 21.

[9] We reject Employer's contention that the ALJ shifted the burden of proof to Employer to establish the pulmonary function studies do not support total disability at 20 C.F.R. §718.204(b)(2)(i). Employer's Brief at 8-9. Maintaining the burden of proof on Claimant, the ALJ found Claimant did not meet his burden of establishing total disability

The ALJ considered the medical opinions of Drs. Raj, Jarboe, and Spagnolo. Decision and Order at 21-26; Director's Exhibits 17, 23, 25; Employer's Exhibits 1, 3.

Dr. Raj opined Claimant is totally disabled by a moderate restrictive lung impairment evidenced by reduced FEV1, FVC, and total lung capacity values on the May 14, 2019 pulmonary function study. Director's Exhibit 17 at 3-4. He stated this impairment reduced Claimant's "physical capacity" to work and, combined with shortness of breath when walking uphill for one-hundred feet, prevents Claimant from performing his usual coal mine employment. *Id*. Dr. Raj reiterated his opinion after reviewing Dr. Jarboe's August 22, 2019 report and test results. Director's Exhibit 23. The ALJ found Dr. Raj's opinion credible based on the doctor's reasoning and consideration of Claimant's pulmonary function testing. Decision and Order at 22. In reaching this finding, the ALJ determined the May 14, 2019 pulmonary function study is valid. *Id*. at 19-20.

Dr. Jarboe opined Claimant has a restrictive impairment, but concluded he is not totally disabled because the FEV1, FVC, and FEV1/FVC values from pulmonary function testing Dr. Jarboe conducted on August 22, 2019 are non-qualifying. Director's Exhibit 22. He conceded the FEV1 value from Dr. Raj's pulmonary function testing is qualifying but stated Claimant "may well have generated an FEV1 that was above the federal guidelines had bronchodilators been administered." *Id*. at 9. The ALJ found Dr. Jarboe's opinion unpersuasive because the doctor focused on post-bronchodilator results and because he did not explain whether Claimant is totally disabled by the restrictive impairment notwithstanding whether the objective studies are qualifying for total disability. Decision and Order at 22-24.

Dr. Spagnolo reviewed Claimant's medical records and opined Claimant's pulmonary function studies show no "consistent evidence" of obstruction or restriction. Employer's Exhibit 1 at 11-12. He opined that, although Claimant's FEV1 and FVC values were slightly reduced based on American Thoracic Society criteria, this reduction is attributable to obesity and not an intrinsic pulmonary impairment. *Id.* The ALJ discredited Dr. Spagnolo's opinion as unpersuasive and unsupported by the record. Decision and Order at 25-26. He found Dr. Spagnolo did not adequately address the most recent pulmonary function testing when concluding these studies show no consistent obstruction or restriction. *Id*. In addition, the ALJ noted Dr. Spagnolo indicated that every one of Claimant's chest examinations have been normal and thus opined Claimant has no intrinsic pulmonary impairment; but the ALJ found this conflicted with Dr. Jarboe's observation

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under this method because the results of the most recent testing are in equipoise, and thus this evidence neither supports nor refutes total disability. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994); *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 843 (6th Cir. 2016); Decision and Order at 21.

that Claimant's "breath sounds were 'somewhat diminished over the entire chest.'" *Id.*, *quoting* Director's Exhibit 22 at 13. The ALJ also found Dr. Spagnolo focused on the etiology of Claimant's restrictive impairment without adequately explaining whether Claimant is capable of performing his usual coal mine employment based on the reduced FEV1 and FVC values. Thus the ALJ found his conclusion inadequately explained. *Id.*

Employer first challenges the validity of the May 14, 2019 pulmonary function study that formed the basis of Dr. Raj's opinion. Employer's Brief at 14-17. We are not persuaded by its argument.

When considering pulmonary function studies, an 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). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B. 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. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

The ALJ weighed the opinions of Drs. Goodman and Jarboe that the May 14, 2019 pulmonary function study is invalid and Dr. Gaziano's opinion that the "vents" are acceptable. Decision and Order at 17-20; *see* Director's Exhibit 14, 17, 22. In finding the study valid, the ALJ concluded that Drs. Goodman and Jarboe did not adequately link their criticisms of the test to the quality standards. Decision and Order at 17-20. Although Dr. Goodman indicated Claimant failed to reach a plateau of two seconds in the volume-time tracings, the ALJ was not persuaded that this failure is a basis to invalidate the study because it conflicted with Dr. Gaziano's validation report and Dr. Gaziano is as equally qualified as Dr. Goodman. *Id.* The ALJ also found the study is valid because Dr. Raj relied on it to assess total disability with no indication the study was unreliable. *Id.* at 17.

Employer also argues the ALJ erred in his consideration of Dr. Gaziano's credentials. Citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc), Employer argues the ALJ violated its due process rights by taking official notice of Dr. Gaziano's credentials in his Decision and Order. Employer's Brief at 14-15; *see* Hearing Tr. at 13-14. As Employer concedes, however, the ALJ informed the parties he would take judicial notice of any credentials not in the record, Employer exercised its right to object, and the ALJ overruled Employer's objection. *Id.* Thus the ALJ's actions satisfy the principles of fairness and administrative efficiency outlined in *Preston*, as the ALJ took

official notice of the physicians' credentials, and addressed Employer's objection thereto, before he issued his Decision and Order. *Preston*, 24 BLR at 1-63.

Employer next asserts the ALJ should have found the opinions of Drs. Goodman and Jarboe more persuasive than Dr. Gaziano's validation report when finding the study valid. Employer's Brief at 14-17. Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus we affirm the ALJ's finding that the May 14, 2019 pulmonary function study is valid. Decision and Order at 19-20.

Employer further contends the ALJ erred in crediting Dr. Raj's opinion because Claimant failed to establish total disability based on qualifying pulmonary function testing at 20 C.F.R. §718.204(b)(2)(i). Employer's Brief at 9-11. It also argues the ALJ improperly faulted Dr. Jarboe for excluding a finding of total disability because the pulmonary function studies are non-qualifying. *Id*. at 11-13.

Contrary to Employer's assertion, it is well established total disability can be demonstrated with a reasoned medical opinion even in the absence of qualifying pulmonary function or arterial blood gas studies.[10] *See* 20 C.F.R. §718.204(b)(2)(iv); *see 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"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (explaining a claimant can establish total disability despite non-qualifying objective tests). Thus the ALJ could rationally credit Dr. Raj's opinion based on his diagnosis of a moderate restrictive impairment from non-qualifying tests, and also discredit Dr. Jarboe for failing to explain why Claimant is not totally disabled by the restrictive impairment the doctor acknowledges exists. Decision and Order at 22-24.

As Employer raises no further argument with respect to Drs. Raj and Jarboe,[11] we affirm his finding that Dr. Raj's opinion is credible and Dr. Jarboe's opinion is

[10] The ALJ recognized that Dr. Raj had incorrectly stated the August 22, 2019 pulmonary function studies were qualifying, but permissibly found this statement did not detract from the weight of Dr. Raj's opinion because the doctor based his conclusion on the values from pulmonary function testing when diagnosing a moderate restrictive impairment, "not simply whether [they] were qualifying or non-qualifying." Decision and Order at 22; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

[11] Employer does not specifically challenge the ALJ's discrediting of Dr. Jarboe's opinion insofar as the doctor focused on post-bronchodilator pulmonary function test results. Decision and Order at 22-24. Thus we affirm this finding. *Skrack*, 6 BLR at 1-

unpersuasive. *See Cornett*, 227 F.3d at 587; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility); Decision and Order at 22-24, 26.

We also reject Employer's argument with respect to Dr. Spagnolo. Employer's Brief at 12-13. The ALJ permissibly gave less weight to Dr. Spagnolo's opinion because he focused on the cause of the abnormalities on Claimant's pulmonary function testing without adequately addressing whether the abnormalities are disabling.[12] *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11 (May 26, 2023) (relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023); Decision and Order at 25-26.

Because it is 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 26. We also affirm his finding all the relevant evidence, when weighed together, establishes total disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 26-27. Thus, we affirm the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption, 20 C.F.R. §718.305, and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 26, 39.

As Employer does not challenge the ALJ's finding it did not rebut the presumption, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 38-39.

711; *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator pulmonary function test results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.").

[12] Employer does not challenge the ALJ's decision to discredit Dr. Spagnolo's opinion as conflicting with Dr. Jarboe's opinion. Decision and Order at 25-26. Thus we affirm this finding. *Skrack*, 6 BLR at 1-711.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge