U.S. Department of Labor

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

BRB No. 22-0537 BLA

HOMER J. STARR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 12/21/2023
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 on Remand Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert 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) Patricia J. Daum's Decision and Order on Remand Awarding Benefits (2018-BLA-05514) rendered on a subsequent claim[1] filed on March 16, 2017, 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 (Board) for the second time.

In her initial Decision and Order Awarding Benefits, the ALJ found Claimant established twenty-eight years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Further, she found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed two prior claims. Director's Exhibits 1-3. He filed his previous claim on July 24, 2013. Director's Exhibit 1 at 480. On November 14, 2013, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) and preliminarily found Claimant failed to establish a totally disabling respiratory impairment and total disability due to pneumoconiosis. Director's Exhibit 1 at 407. Employer responded, agreeing with the preliminary determination that Claimant is not entitled to benefits. *Id.* There is nothing in the record indicating Claimant challenged the SSAE preliminary findings or further pursued his 2013 claim.

[2] 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 she 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 district director denied Claimant's prior claim for failure to establish total disability, he had to submit new evidence establishing that element to obtain review of his current claim on the merits. *White*, 23 BLR at 1-3; Director's Exhibit 1 at 407.

[3] 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.

Pursuant to Employer's appeal, the Board affirmed the ALJ's finding Claimant established more than fifteen years of qualifying coal mine employment. *Starr v. Island Creek Coal Co.*, BRB No. 21-0165 BLA, slip op. at 2 n.4 (Feb. 24, 2022) (unpub.). However, the Board vacated her finding Claimant established a totally disabling respiratory or pulmonary impairment and therefore vacated her determination that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. *Id*. at 7-8. Specifically, the Board held the ALJ erred in weighing Dr. Nader's exercise blood gas study and her consideration of the blood gas studies impacted her evaluation of the medical opinion evidence concerning total disability. *Id*. at 6-8. Thus, the Board vacated the award of benefits and remanded the case for further consideration of the blood gas study and medical opinion evidence. *Id.* at 8.

On remand, the ALJ again found Claimant established total disability and thus established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. The ALJ 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 invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to submit a substantive response.

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.[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, 361-62 (1965).

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

To invoke the Section 411(c)(4) presumption, 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.[5]

[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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Tr. at 21-22.

[5] The ALJ found Claimant's usual coal mine employment was working as a car trimmer, which required medium to heavy labor. Initial Decision and Order at 4.

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).

The ALJ found Claimant established total disability based on the arterial blood gas studies, medical opinions, and the evidence as a whole.[7] 20 C.F.R. §718.204(b)(ii), (iv); Decision and Order on Remand (Decision and Order) at 19.

Blood Gas Studies

The ALJ considered five blood gas studies conducted on July 10, 2017, October 23, 2017, June 13, 2018, July 18, 2018, and November 29, 2018. Decision and Order at 6-7. The July 10, 2017, June 13, 2018, and November 29, 2018 studies produced qualifying values at rest and no exercise studies were performed. Director's Exhibit 26 at 19; Claimant's Exhibits 1, 2. The October 23, 2017 study produced non-qualifying values at rest and no exercise study was performed. Director's Exhibit 36 at 12. The July 18, 2018 study produced non-qualifying values both at rest and with exercise. Employer's Exhibit 5.

The ALJ observed that "a preponderance of the *examinations* produced qualifying [blood gas] values, i.e., the three performed on [July 10, 2017], [June 13, 2018], and [November 29, 2018]" while "two exams, on [October 23, 2017] and [July 18, 2018] produced non-qualifying [blood gas] values." Decision and Order at 6 (emphasis in original). She also noted that three of the five resting blood gas studies from those five dates are qualifying, and thus found the preponderance of the resting blood gas studies are qualifying. Decision and Order at 6. She further found that although the July 18, 2018 examination also includes a non-qualifying exercise study, that single non-qualifying

[6] A "qualifying" pulmonary function study or blood gas study yields values that are 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 exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The ALJ found the pulmonary function studies do not establish total disability, and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Initial Decision and Order at 13-14; Decision and Order at 5.

exercise study is insufficient to outweigh the three qualifying resting studies. *Id.* at 6-7. In addition, she gave greatest weight to the November 29, 2018 qualifying resting study based on its recency. *Id.* at 5, 7. Thus, the ALJ concluded the blood gas study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 7.

Employer asserts the ALJ should have given most weight to the non-qualifying exercise study because, it alleges, the test is more reflective of Claimant's ability to perform his usual coal mine employment. Employer's Brief at 4-6. We disagree.

While an ALJ has discretion to give greater weight to exercise study results, she is not required to do so, as she correctly noted. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (it is within the ALJ's discretion to find a particular study more probative than another study); 20 C.F.R. §718.105(a) (a gas exchange impairment may manifest "either at rest or during exercise"); Decision and Order at 5-7. Moreover, Employer does not challenge the ALJ's finding that the November 29, 2018 qualifying resting study is entitled to the most weight as it is the most recent. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (because pneumoconiosis is a latent and progressive disease, more recent evidence may be rationally credited where it shows a miner's condition has worsened); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 7-11 (Nov. 17, 2023); Decision and Order at 5, 7. As it is unchallenged, we affirm this finding.[8] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Thus, as it is supported by substantial evidence, we affirm the ALJ's finding that the arterial blood gas study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 7.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Green, Nader, and Tuteur. Decision and Order at 8-19. Dr. Green opined Claimant is totally disabled due to a pulmonary impairment based on his resting blood gas study results. Director's Exhibits 26 at 5, 30 at 3; Claimant's Exhibits 1 at 5, 2 at 5. Dr. Tuteur opined Claimant is not totally disabled because the pulmonary function studies are non-qualifying and the qualifying blood gas studies do not show disability because they are "within normal limits."

[8] Because the ALJ provided a valid reason for finding the blood gas study evidence is supportive of total disability, we need not address Employer's remaining arguments regarding her weighing of the blood gas study evidence. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 6-8.

Employer's Exhibit 9 at 13-17, 24. Dr. Nader opined Claimant is not totally disabled because he does not meet the "Federal guideline criteria" for disability. Employer's Exhibit 5 at 3.

The ALJ found Dr. Tuteur's opinion is not well-reasoned because he did not adequately explain his opinion that the qualifying blood gas studies do not show disability or why Claimant would be able to perform his usual coal mine employment despite his qualifying blood gas study results. Decision and Order at 18-19; Employer's Exhibit 9 at 15-16. She further found Dr. Nader's opinion is not persuasive because he only considered his own non-qualifying blood gas study but did not consider any of the qualifying blood gas studies which the ALJ found support a finding of total disability. Decision and Order at 18. Finally, she found Dr. Green's opinion is well-reasoned and consistent with her finding that the blood gas studies support a finding of total disability. *Id.* at 17-18. Therefore, the ALJ concluded the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 19.

Initially, we affirm the ALJ's discrediting of the opinions of Drs. Nader and Tuteur as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 18-19. Further, we reject Employer's argument that because the ALJ discredited Dr. Nader for not considering "the three qualifying [resting blood gas study] values collected on three separate occasions," Decision and Order at 28, she should have discredited Dr. Green's opinion because he allegedly did not consider Dr. Nader's July 18, 2018 non-qualifying blood gas study results. Employer's Brief at 9-10. To the contrary, Dr. Green opined his November 29, 2018 blood gas study results "are in keeping with the results from the July 10, 2017, November 15, 2017, and June 13, 2018" studies. Claimant's Exhibit 2 at 5. He then specifically stated that "[w]hile we have some discrepancy with blood gases *from July 18, 2018*, we must recognize that this gentleman has consistently demonstrated hypoxemia over the course of the past [one] to [two] years, since 2017." *Id.* (emphasis added). Thus, Employer's argument is factually incorrect and fails to establish error in the ALJ's permissible crediting of Dr. Green's opinion, as the physician not only considered Dr. Nader's non-qualifying blood gas study but explained why it did not change his opinion that Claimant is totally disabled. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 17-18; Employer's Brief at 9-10; Claimant's Exhibit 2 at 5.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2); Decision and Order at 17-19. Consequently, Claimant has established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). We therefore affirm the ALJ's conclusion that Claimant invoked

the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 20. Because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm that determination, *see Skrack*, 6 BLR at 1-711; Decision and Order at 20-21, and the award of benefits.

Accordingly, the ALJ's Decision and Order on Remand 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