U.S. Department of Labor

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

BRB No. 22-0149 BLA

RICKEY D. DUNN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 01/31/2023
WALTER ENERGY, INCORPORATED	)	
	)	
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 on Modification of Subsequent Claim of Patrick M. Rosenow, District Chief Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

John C. Webb, V, and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer and its Carrier.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

Claimant appeals District Chief Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order Denying Benefits on Modification of Subsequent Claim (2020-BLA-05804) rendered on a request for modification of a denial of a subsequent claim filed on September 23, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In his December 27, 2018 Decision and Order Denying Benefits, ALJ Lee J. Romero found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). As Claimant did not establish a change in an applicable condition of entitlement, ALJ Romero denied his subsequent claim. 20 C.F.R. §725.309(c). Claimant timely filed a request for modification on July 1, 2019, which the district director denied. 20 C.F.R. §725.310. Claimant appealed, and the case was assigned to District Chief ALJ Rosenow (the ALJ).

In his January 12, 2022 Decision and Order, the subject of this appeal, the ALJ accepted the parties' stipulation that Claimant has at least thirty-four years of qualifying coal mine employment. Considering the new evidence submitted on modification, in conjunction with the evidence previously submitted in Claimant's 2012 initial claim and this subsequent claim, the ALJ found Claimant failed to establish total disability, 20 C.F.R. §718.204(b)(2), and therefore failed to establish a mistake of fact in the prior denial or change in conditions since the prior denial. 20 C.F.R. §725.310. He therefore denied benefits.

On appeal, Claimant argues the ALJ erred in finding he failed to establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response.[2]

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 accordance with applicable law.[3] 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).

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[1] Claimant filed a prior claim for benefits which the district director denied for failure to establish any element of entitlement on October 31, 2012. Director's Exhibit 1 at 246.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least thirty-four years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13, 18.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his coal mine employment in Alabama.

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 claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *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).

When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must 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 district director denied Claimant's prior claim for failure to establish any element of entitlement, he had to submit new evidence establishing at least one element to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1. Additionally, because Claimant sought modification of the denial of his subsequent claim, the ALJ was required to determine whether the denial contained a mistake in a determination of fact or whether the evidence submitted on modification, along with the evidence previously submitted in the subsequent claim, is sufficient to establish a change in an applicable condition of entitlement. 20 C.F.R. §725.310(a); *Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 1218 (11th Cir. 2009); *USX Corp. v. Director, OWCP* [*Bridges*], 978 F.2d 656, 658 (11th Cir. 1992); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

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

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[4] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting

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See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 348.

[4] 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.

evidence against all relevant contrary evidence.[5] *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). Claimant contends the ALJ erred in finding the pulmonary function studies and the evidence as a whole failed to establish total disability. Claimant's Brief at 4-8.

Pulmonary Function Studies

The ALJ considered four new pulmonary function studies dated March 25, 2019, June 14, 2019, November 12, 2019, and November 2, 2020.[6] Decision and Order at 6, 14-15. The March 25, 2019 study was conducted in the course of Claimant's treatment at the Veterans Affairs Medical Center; it produced qualifying values pre- and post-bronchodilator. Claimant's Exhibit 8 at 42. Claimant's June 14, 2019 treatment study conducted at Alabama Regional Medical Services produced qualifying pre-bronchodilator and non-qualifying post-bronchodilator results. Claimant's Exhibit 5. Dr. Goldstein's November 12, 2019 study produced non-qualifying pre-bronchodilator and post-bronchodilator results. Director's Exhibit 19 at 6-15. Dr. Connolly's November 2, 2020 study produced qualifying results pre-bronchodilator.[7] Claimant's Exhibit 6.

The ALJ noted the comments with the November 2, 2020 pre-bronchodilator study indicated the results were "acceptable and reproducible" and that Claimant gave good effort and had good understanding. Decision and Order at 6 n.21; Claimant's Exhibit 6 at

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Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that the arterial blood gas studies, the medical opinions, and Claimant's treatment records do not support a finding of total disability, and that there is no evidence of cor pulmonale with right-sided congestive heart failure and no evidence of complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(ii)-(iii); Decision and Order at 14-18.

[6] Because the pulmonary function studies reported varying heights for Claimant ranging from 66.5 to 68 inches, the ALJ calculated an average height for Claimant of 67.25 inches. He then used the closest greater table height at Appendix B of Part 718 of 67.3 inches for determining the qualifying or non-qualifying results of the studies. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 5-6.

[7] Claimant only designated Dr. Connolly's November 2, 2020 pre-bronchodilator study as evidence supporting modification; he did not designate Dr. Connolly's post-bronchodilator study as evidence supporting modification and thus the ALJ did not consider it. Decision and Order at 15.

6. However, considering Employer's argument in its brief on modification that the test is invalid, the ALJ then independently assessed the November 2, 2020 study based on the quality standards in Appendix B of 20 C.F.R. Part 718. Decision and Order at 15 (*referencing* 20 C.F.R. Part 718, App. B(2)(ii)(G) (pulmonary function study effort is unacceptable if the variation between the two largest FEV1 measurements exceeds 100 ml or five percent, whichever is greater)); Employer's Modification Brief at 8. The ALJ found this study did not meet the "reproducibility and reliability" requirements of the regulations because of the excessive variability in the tracings and gave it little probative weight. *Id*. Further finding the March 25, 2019 qualifying treatment study merits "little evidentiary weight as it contains no spirometric tracings,"[8] and that the results of the June 14, 2019 qualifying treatment study and the November 12, 2019 non-qualifying study are in equipoise, the ALJ determined Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i).[9] *Id.* at 15-16.

Claimant contends the ALJ erred in finding the November 2, 2020 study invalid, arguing the ALJ substituted his opinion for that of a medical expert by interpreting the study and did not consider the documentation indicating the study was acceptable, reproducible and performed with good effort and understanding. Claimant's Brief at 4-7. In addition, Claimant contends the quality standards are not mandatory but rather a factor in determining the weight of the evidence and are not sufficient for excluding evidence from consideration altogether. *Id.* at 5. We agree.

When weighing pulmonary function studies that are conducted in anticipation of litigation, 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, App. 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 factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). However, interpretation of the factors listed in Appendix B requires medical expertise; the ALJ may not independently apply the Appendix B quality standard requirements to interpret the validity of pulmonary

[8] We affirm this finding as it is unchallenged on appeal. *See Skrack* 6 BLR at 1-711; Decision and Order at 15.

[9] The ALJ also considered the previously submitted pulmonary function study evidence submitted in conjunction with this claim and Claimant's 2012 initial claim, which he observed were conducted between 2003 and 2018. Decision and Order at 14. He accorded greater weight to the new pulmonary function studies as more indicative of Claimant's current condition. *Id*.

function studies, as interpretation of medical data is a matter for medical experts. *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22-24 (1993).

The ALJ impermissibly determined the November 2, 2020 study results were not reliable nor reproducible based on his interpretation of the factors in Appendix B without evidence from any medical expert opining the studies were invalid or unreliable. *Schetroma*, 18 BLR at 1-24; Decision and Order at 15. Neither party points to an expert opinion indicating the November 2, 2020 study was invalid or otherwise unreliable. Indeed, the technician[10] who administered the November 2, 2020 study commented the "spirometry data is ACCEPTABLE and REPRODUCIBLE. [Patient] gave good effort with good understanding during test." Claimant's Exhibit 6 at 6 (emphasis in original). Moreover, the Appendix B quality standard on which the ALJ relied specifically states that tests with "excessive variability" between the curves "may still be submitted for consideration in support of a claim" because "individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility." 20 C.F.R. Part 718, App. B(2)(ii)(G).

Because the ALJ erred by independently applying Appendix B's quality standards in the absence of medical evidence indicating the November 2, 2020 pulmonary function study is not in substantial compliance with the quality standards or unreliable, we vacate his finding that Claimant has failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 15-16.

Because we have vacated the ALJ's determination that the pulmonary function study evidence does not establish total disability, we further vacate his finding that the record as a whole does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 18. Consequently, we vacate his conclusion that Claimant did not invoke the Section 411(c)(4) presumption, vacate the denial of benefits, and remand this case for further consideration of total disability. 30 U.S.C. §921(c)(4).

Because we have vacated the ALJ's determination that the pulmonary function study evidence does not establish total disability, we further vacate his findings that Claimant did not establish a change in conditions since the prior denial at 20 C.F.R. §725.310(a), nor change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).

[10] While Claimant indicates Dr. Connolly provided comments regarding the acceptability, reproducibility, and effort provided in his pulmonary function testing, it appears the administering technician provided these comments. Claimant's Brief at 5; Claimant's Exhibit 6 at 6. However, as Claimant correctly notes, Dr. Connolly relied on this study to either "render treatment" or "formulate an opinion" about Claimant's pulmonary condition. Claimant's Brief at 5; Claimant's Exhibits 6, 9 at 2-5.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant can establish total disability based on the pulmonary function studies and resolve the conflicts in the evidence. *See Bradberry v. Director, OWCP*, 117 F.3d 1361, 1367 (11th Cir. 1997). If the ALJ finds the pulmonary function study evidence supports a finding of total disability, he must then weigh all of the relevant evidence together to determine whether Claimant has a totally disabling respiratory or pulmonary impairment and thereby invokes the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987); *Shedlock,* 9 BLR at 1-198.

If Claimant invokes the Section 411(c)(4) presumption on remand, he necessarily will have established both a change in conditions since the prior denial at 20 C.F.R. §725.310(a) and change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The ALJ then must address whether Employer has rebutted the presumption. 20 C.F.R. §718.305(d)(1); *Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1287-88 (11th Cir. 2019).

If the ALJ finds Claimant is entitled to benefits, he must address whether granting modification would render justice under the Act. He must also determine the commencement date for benefits in accordance with 20 C.F.R. §725.503(b). Alternatively, if the ALJ again finds Claimant is not totally disabled, he must deny benefits as Claimant will have failed to establish an essential element of entitlement. *Anderson*, 12 BLR at 1-112; *Trent,* 11 BLR at 1-27.

In rendering all of his findings on remand, the ALJ must comply with the Administrative Procedure Act.[11] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[11] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits on Modification of Subsequent Claim and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge