U.S. Department of Labor

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

BRB No. 21-0376 BLA

BILLY WILSON Claimant-Petitioner v. LONE MOUNTAIN PROCESSING INCORPORATED c/o ARCH COAL and Self-Insured Through ARCH COAL c/o UNDERWRITERS S & C Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/23/2022 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Billy Wilson, Harlan, Kentucky.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits (2019-BLA-06022) rendered on a miner's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on May 21, 2018.[2]

The ALJ found Claimant established at least twenty-five years of qualifying coal mine employment, based on the parties' stipulation, but failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). He therefore found Claimant could not invoke 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), and denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits.[4] Employer has not filed a response brief.[5]

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[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but she does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant withdrew his prior claim; therefore, it is considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 1.

[3] Section 411(c)(4) 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.

[4] We affirm, as unchallenged, the ALJ's finding of at least twenty-five years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

[5] The Director, Office of Workers' Compensation Programs, filed a response brief urging the Board to reject Employer's arguments before the ALJ that the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) and 422(*l*) presumptions, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. However, we need not address this argument as Employer did not raise it on appeal. 20 C.F.R. §802.211(b); *Cox v. Benefits Review*

In an appeal filed by an unrepresented Claimant, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

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 if certain conditions are met, but failure to establish any one of these elements 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).

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

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must prove he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). 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 pulmonary function studies, arterial blood gas studies,[7] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[8] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant

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Board, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

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

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The ALJ correctly determined Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i), (iii). He found all of the pulmonary function studies non-

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 failed to establish total disability and thus denied benefits. Decision and Order at 13-14.

Blood Gas Studies

The ALJ considered the results of four arterial blood gas studies. Decision and Order at 7. Dr. Alam's July 9, 2018 study produced qualifying values at rest. Director's Exhibit 15 at 9. Dr. Dahhan's October 29, 2018 study produced non-qualifying values at rest and with exercise. Director's Exhibit 27 at 8. Dr. Dye's October 30, 2018 study produced qualifying values at rest. Director's Exhibit 28. Dr. Dahhan's July 20, 2020 study produced non-qualifying values at rest and with exercise. Employer's Exhibit 2 at 2.

In resolving the conflict in the evidence, the ALJ summarily stated:

> [T]wo of the four arterial blood gas studies produced qualifying results. Because the July 20, 2020, arterial blood gas study did not produce qualifying results and is the most recent study of record, the Tribunal finds that the arterial blood gas study evidence, considered alone, does not support a finding of total disability . . . .

Decision and Order at 8; *see* 20 C.F.R. §718.204(b)(2)(ii).

Contrary to the ALJ's analysis, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held it is irrational to credit evidence solely on the basis of recency when a miner's condition improves. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the Court

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qualifying and no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 6-8; Director's Exhibits 15, 27; Employer's Exhibit 1. Although the ALJ did not make a specific finding regarding complicated pneumoconiosis, he noted that Drs. Alam and Rosenberg opined that Claimant's x-rays do not establish that disease and none of the x-rays or CT scans identified large opacities consistent with complicated pneumoconiosis. *See* 20 C.F.R. §718.304; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 9-12; Director's Exhibits 15 at 6, 24, 29; Claimant's Exhibits 1-3, 5, 9; Employer's Exhibit 3 at 4.

reasoned that a "later test or exam" is a "more reliable indicator of [a] miner's condition than an earlier one" where a "miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's current condition." *Id.* But if "the later test or exams" show the miner's condition has improved, the reasoning "simply cannot apply": one must be incorrect — "and it is just as likely that the later evidence is faulty as the earlier." *Id*. An ALJ must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id.*; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJs must perform a qualitative analysis of conflicting tests when they indicate a miner's condition has improved); *Adkins*, 958 F.2d at 52 ("'[l]ater is better' is not a reasoned explanation").

Because the ALJ's sole rationale for concluding Claimant did not establish total disability based on the blood gas study evidence is that the most recent study is non-qualifying, we vacate his determination at 20 C.F.R §718.204(b)(2)(ii). *See Woodward*, 991 F.2d at 319; *Adkins*, 958 F.2d at 52; Decision and Order at 7-8.

Medical Opinion Evidence

The ALJ also considered three medical opinions.[9] Decision and Order at 12-14. Dr. Alam[10] opined that Claimant is totally disabled, Dr. Dahhan opined he retains the "physiological capacity" from a respiratory standpoint to perform his previous coal mine

[9] We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine work as a section and production foreman required heavy manual labor, including rock dusting, pulling and hanging cable, shoveling belts, and lifting fifty to seventy pounds. *Skrack*, 6 BLR at 1-711; Decision and Order at 4.

[10] Dr. Alam conducted the Department of Labor's (DOL's) complete pulmonary evaluation of Claimant on July 9, 2018. Director's Exhibit 15. He noted Claimant last worked in coal mine employment as a section foreman which required rock dusting, supply work, moving and hanging cable, pre-shift and on-shift inspections, and moving curtains. *Id.* at 3. He concluded Claimant has severe hypoxemia and is totally disabled based on the qualifying blood gas studies in the record. *Id.* at 4-7; Director's Exhibits 24, 26.

work,[11] and Dr. Rosenberg opined he is "not definitely" disabled.[12] The ALJ noted Dr. Alam did not consider the most recent non-qualifying blood gas study when concluding Claimant is totally disabled. Decision and Order at 12-13. He therefore discredited Dr. Alam's opinion as conflicting with his overall finding that Claimant did not establish total disability based on the blood gas study evidence. *Id.*

Because the ALJ's erroneous weighing of the blood gas studies influenced his credibility determination regarding Dr. Alam's medical opinion, we vacate it. 20 C.F.R. §718.204(b)(2)(iv). Thus, we vacate the ALJ's finding that Claimant did not establish total disability based on the medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv), or in consideration of the evidence as a whole. We therefore also vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on the blood gas studies and provide an adequate rationale for how he resolves the conflict in the evidence. 20 C.F.R. §718.204(b)(2)(ii). He must also reweigh the medical opinions taking into consideration his finding regarding the blood gas studies and other objective evidence. In weighing the medical opinions, he must consider the qualifications of the respective physicians, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). If the ALJ determines total disability has been demonstrated by the blood gas studies or medical opinions, or both, he must consider the evidence as a whole and reach a determination as to whether Claimant

[11] Dr. Dahhan examined Claimant on October 29, 2018, and July 20, 2020. Director's Exhibit 27; Employer's Exhibit 2. He noted Claimant worked as a section foreman, a miner, and as a shuttle car operator. Director's Exhibit 27 at 1. He opined Claimant has an "occasional cough and productive clear sputum with intermittent wheeze" and that there are "insufficient objective findings to justify the diagnosis of functional pulmonary impairment and/or disability . . . ." *Id.* at 1-2. He stated that "[f]rom a respiratory standpoint, [Claimant] retains the physiological capacity to return to his previous coal mining work or job of comparable physical demand." *Id.* at 2.

[12] Dr. Rosenberg reviewed the reports of Drs. Alam and Dahhan, and Claimant's objective testing and treatment records. Employer's Exhibit 3. He opined Claimant has "no significant ventilatory abnormalities," "a mildly reduced diffusing capacity," and variable blood gases "ranging from a mild to a severe gas defect." *Id.* at 4. Dr. Rosenberg concluded Claimant "is not definitely disabled from a pulmonary perspective." *Id.*

is totally disabled. *See* 20 C.F.R. §718.204(b)(2)*; Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988).

If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the ALJ must consider if Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant does not establish total disability, however, the ALJ may reinstate the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In reaching his credibility determinations on remand, the ALJ must set forth his findings in detail and explain his rationale in accordance with the Administrative Procedure Act.[13] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[13] 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 and remand the case for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge