U.S. Department of Labor

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

BRB Nos. 23-0101 BLA
and 23-0101 BLA-A

PAUL DORSEY (o/b/o WILLIAM M. DORSEY)	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
HAWKS NEST MINING COMPANY	)	
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/12/2024
Employer/Carrier-Respondents Cross-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits and Order Denying Claimant's Motion to Reconsider of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk, Beckley, West Virginia, and Bren J. Pomponio (Mountain State Justice, Inc.), Charleston, West Virginia, for Claimant.

Chris M. Green and Wes A. Shumway (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant[1] appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Denying Benefits and Order Denying Claimant's Motion to Reconsider (2020-BLA-05615) rendered on a claim filed on January 10, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 23.24 years of underground coal mine employment, but she found Claimant failed to establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Because Claimant did not establish total disability, an essential element of entitlement, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he failed to establish the Miner was totally disabled, and therefore erred in finding he did not invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. It also argues Claimant failed to preserve his appeal of the denial of benefits because he appealed only

[1] The Miner died on March 16, 2021. Suggestion of Death and Mot. to Sub. Party Dated June 18, 2021. Claimant, his son, is pursuing the claim on behalf of his estate. *Id.*

[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); 20 C.F.R. §718.305.

the ALJ's Order Denying Reconsideration. The Director, Office of Workers' Compensation Programs (the Director), urges the Benefits Review Board to reject Employer's argument that Claimant failed to preserve his appeal of the denial of benefits. On the merits, the Director asserts the ALJ erred in weighing the pulmonary function study evidence.[3] On cross-appeal, Employer asserts the ALJ erred in giving any weight to the medical opinions of Drs. Werntz and Go on the issue of total disability.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Orders if they are 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).

Procedural Issue

Initially, we address Employer's contention that Claimant appealed only the ALJ's Order Denying Claimant's Motion to Reconsider (Order Denying Reconsideration) and thus any review of the Decision and Order Denying Benefits (Decision and Order) is precluded. Employer's Brief at 10. The Director argues Claimant has sufficiently invoked the Board's review of the underlying decision on the merits of entitlement. Director's Brief at 1 n.1. We agree.

The ALJ issued her Decision and Order on August 24, 2022. Claimant timely filed a Motion for Reconsideration on September 23, 2022, which the ALJ denied in an Order Denying Reconsideration on December 6, 2022. Claimant's Mot. to Recon. Denial of Benefits; Dec. 6, 2022 Order Denying Recon. Subsequently, Claimant timely filed a Notice of Appeal to the Board on December 29, 2022, in which he stated he was appealing the Order Denying Reconsideration issued on December 6, 2022. Notice of Appeal Dated Dec. 29, 2022. On February 8, 2023, Claimant filed a Petition for Review and supporting brief stating he was appealing the Order Denying Reconsideration and moving the Board to reverse the Decision and Order. Claimant's Brief at 1-2.

[3] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established the Miner had 23.24 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 27.

The Board obtains jurisdiction over a case where a party files a timely notice of appeal. 20 C.F.R. §§702.391, 802.204. The appeal must raise a substantial question of law or fact. 20 C.F.R. §702.392. The notice of appeal shall contain information identifying the decision or order being appealed. 20 C.F.R. §802.208(a)(4), (5). The regulations state that "any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice." 20 C.F.R. §802.208(b).

As Employer acknowledges, the Board's review "is properly invoked when the appealing party assigns specific allegations of legal or factual error in the [ALJ's] decision." Employer's Brief at 10; 20 C.F.R. §702.392; *see Tucker v. Thames Valley Steel*, 41 BRBS 62, 65, 2007 WL 1920458, at 3 (2007). The regulations governing a notice of appeal "do not give form priority over substance." *Tucker*, 41 BRBS at 65, 2007 WL 1920458 at 3; 20 C.F.R. §802.208(b). Where "it is clear that [an appeal is] seeking review of all of the administrative law judge's decisions," and "[a]s the regulations give the Board the discretion to ascertain the decisions being appealed, . . . it [is] reasonable" and "proper[]" for the Board to consider a "notice of appeal as being an inclusive notice of appeal of all of the administrative law judge's decisions." *Tucker*, 41 BRBS at 65, 68, 2007 WL 1920458 at 3, 6. Thus, as Claimant has appealed the Order Denying Reconsideration and his brief cites specific error in the underlying Decision and Order, review of both decisions is reasonable.

Specifically, in his Motion to Reconsider the denial of benefits, Claimant argued the ALJ should reverse her decision because she erred in discrediting Drs. Werntz and Go. Claimant's Mot. to Recon. Denial of Benefits. In her Order Denying Reconsideration, the ALJ denied Claimant's argument for the same reasons set forth in her Decision and Order. Dec. 6, 2022 Order Denying Recon. On appeal, Claimant argues the ALJ erred in rejecting those arguments in her Order Denying Reconsideration. Thus, review of whether the ALJ permissibly rejected those arguments in her Order Denying Reconsideration necessitates review of the Decision and Order regardless of whether Claimant specifically identified it as the decision he was appealing in his Notice of Appeal. Therefore, we reject Employer's suggestion that review of both decisions is improper.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had 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. 20

C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[5] pulmonary function or arterial blood gas studies, 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 by any method.[6] 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 19-20, 33.

Pulmonary Function Studies

The Director asserts the ALJ erred in finding the pulmonary function study evidence does not establish total disability. Director's Brief at 1-2. We agree.

The ALJ considered two pulmonary function studies conducted on March 11, 2019, and December 11, 2019. Decision and Order at 18-19. The March 11, 2019 study produced non-qualifying results pre- and post-bronchodilator, while the December 11, 2019 study produced qualifying results pre-bronchodilator, and no post-bronchodilator test was administered. Director's Exhibits 13 at 13, 21 at 10. The ALJ gave the non-qualifying March 11, 2019 study "normal probative weight," but she gave the qualifying December 11, 2019 study "little probative weight" because Dr. Zaldivar stated "he used a 'different method of measurement…the helium equilibration method'" to conduct the study and "did not explain what this method is or whether it conforms to the regulations." Decision and Order at 18-19 (quoting Director's Exhibit 21 at 5). Thus she found the pulmonary function studies do not support a finding of total disability. *Id.*

The Director asserts the ALJ erred in weighing the qualifying results of the December 11, 2019 pulmonary function study because she mischaracterized Dr. Zaldivar's

[5] 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).

[6] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 20. We affirm these findings as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

comments regarding the "helium equilibration method" as being a non-standard method he used for conducting the study. Director's Brief at 2. We agree.

The ALJ found the December 11, 2019 pulmonary function study merits little probative weight because Dr. Zaldivar used the helium equilibration method to gauge the Miner's FVC without explaining what the method is or whether it conforms to the regulations. Decision and Order at 19. However, contrary to the ALJ's finding, the record establishes Dr. Zaldivar conducted a pulmonary function study and a *separate* test of the Miner's respiratory capacity which he referred to as the "helium equilibration method."[7] Director's Exhibit 21 at 5-6, 10-11, 14. Specifically, Dr. Zaldivar stated there are two pulmonary function studies, "the one[] from [March 11, 2019] from Cabin Creek and the one in my office," and that both show restriction of forced vital capacity. *Id.* at 5. He then stated that when he used a different method of measurement, "which is the helium equilibration method," he found no restriction. *Id.* at 6, 14. Because Dr. Zaldivar's use of the helium equilibration method was *in addition to* the standard pulmonary function study, this basis for the ALJ's discrediting of the December 11, 2019 pulmonary function study is not supported by substantial evidence.[8] *See Scott v. Mason Coal Co.*, 289 F.3d 263, 267 (4th Cir. 2002); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

[7] The tests can be differentiated by several factors. The standard pulmonary function study contains comments consistent with Dr. Zaldivar's narrative description of the study results. Director's Exhibit 21 at 5-6, 10. The equilibration study states "[p]atient [h]as [e]quilibrated" and does not contain any of the FEV1, FVC, or MVV values that would be produced in a pulmonary function study. *Id.* at 14.

[8] The ALJ also gave the December 11, 2019 pulmonary function study little weight because Dr. Zaldivar failed to note the Miner's understanding, effort, and cooperation and used the wrong qualifying values in erroneously opining the study is not qualifying. Decision and Order at 19. To the extent the ALJ afforded the study reduced weight because Dr. Zaldivar's failure to note the Miner's understanding, effort, and cooperation affects the validity of the study, her finding lacks a proper basis as the quality standards do not require physicians to make such notations. 20 C.F.R. Part 718, Appendix B. Further, her finding is not otherwise supported by substantial evidence as there is no evidence of record that the study is invalid for any reason. *Scott v. Mason Coal Co.*, 289 F.3d 263, 267 (4th Cir. 2002). Moreover, Dr. Zaldivar's use of the wrong qualifying values in his opinion has no relevance to whether the study itself is valid and qualifying. 20 C.F.R. §718.204(b)(2)(i); 20 C.F.R. Part 718, Appendix B.

We therefore vacate her finding the pulmonary function studies do not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ next considered the opinions of Drs. Werntz, Zaldivar, Go, Basheda, and Forehand. Decision and Order at 21-33. Drs. Werntz, Go, and Forehand opined that the pulmonary function and blood gas studies demonstrate a level of impairment that would prevent the Miner from being able to perform the moderately heavy exertional requirements of his usual coal mine employment regardless of whether they are qualifying. Director's Exhibits 13, 19, 20, 23; Claimant's Exhibits 6, 7. Drs. Zaldivar and Basheda opined the Miner's pulmonary function studies show a mild to moderate reduction in forced vital capacity and air trapping, but ultimately concluded he was not disabled. Employer's Exhibits 1, 2, 3 at 29, 35, 38.

The ALJ discredited Dr. Werntz's opinion because it relied on a non-qualifying blood gas study, and she discredited Dr. Go's opinion because it relied on a non-qualifying pulmonary function study. Decision and Order at 32-33. She further discredited Dr. Forehand's opinion as speculative and because he has "less relevant credentials."[9] *Id.* at 33. She did not address the credibility of Drs. Zaldivar's and Basheda's opinions because they "do not aid [the] Miner in establishing total disability." *Id.* Thus, she determined the medical opinion evidence does not support a finding of total disability. *Id.*

Because the ALJ's error with respect to the pulmonary function studies may have affected her weighing of the medical opinion evidence, we must vacate her finding that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 33.

Moreover, we agree with Claimant's argument that the ALJ erred to the extent she discredited the opinions of Drs. Werntz and Go for relying on non-qualifying pulmonary function and blood gas studies.[10] Claimant's Brief at 2-7. The ALJ explicitly discredited

[9] We affirm, as unchallenged on appeal, the ALJ's discrediting Dr. Forehand's opinion. *See Skrack*, 6 BLR at 1-711; Decision and Order at 33.

[10] Additionally, there is no medical opinion of record to support the ALJ's finding that the blood gas study Dr. Werntz relied on "was significantly shortened due to Claimant's non-pulmonary issues, and thus reliance on it was improper." Order Denying Reconsideration at 2; Decision and Order at 32. As the ALJ improperly substituted her opinion for that of a medical expert, we further vacate her discrediting of Dr. Werntz's opinion. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Dr. Werntz's opinion because the Miner's blood gas studies were non-qualifying before and after exercise, and Dr. Go's opinion because he relied on the non-qualifying March 11, 2019 pulmonary function study. Decision and Order at 32-33.

The regulations provide that despite non-qualifying pulmonary function studies or blood gas studies, total disability may be established if a physician, exercising reasoned medical judgment based on medically acceptable diagnostic techniques, concludes the miner's respiratory or pulmonary condition prevented him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Thus, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

Because we vacate the ALJ's weighing of Drs. Werntz's and Go's opinions, we need not address Employer's cross-appeal argument that the ALJ erred in "according the opinions of Drs. Go and Werntz little, instead of no, probative weight on the issue of total disability." Employer's Brief at 18.

We therefore vacate the ALJ's finding the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and that the evidence overall does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 33-34. Thus, we vacate her finding Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits.

Remand Instructions

On remand, the ALJ must first reconsider whether the pulmonary function studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i). She must then reconsider whether the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). In rendering her credibility findings, she should weigh all of the medical opinions and consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). In reaching her credibility determinations, the ALJ must set forth her findings in detail and explain her

rationale in accordance with the Administrative Procedure Act.[11] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If the ALJ determines total disability is demonstrated by the pulmonary function studies or medical opinions, or both, she must weigh all the relevant evidence together to determine whether the Miner was totally disabled. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will have invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and the ALJ must then determine whether Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I write to clarify a point with the regard to the March 11, 2019 blood gas study because it is important to the weighing of the blood gas studies and physicians' opinions on remand. There is a significant conflict among the opinions of Drs. Basheda, Zaldivar

[11] The Administrative Procedure Act provides that 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).

and Werntz as to the import of the study and the degree of reliance that should be placed on it. *See* Director's Exhibit 19 at 2; Employer's Exhibits 2 at 18-20, 3 at 32-35. The ALJ resolved the issue improperly by summarily finding the study too short and therefore unreliable (thereby substituting her own opinion for that of the physicians), rather than by addressing the conflicting opinions and resolving the conflict taking into consideration the physicians' qualifications and reasoning, the documentation underlying their medical judgments and the sophistication and bases for their conclusions – and setting forth her findings and determinations in accordance with the requirements of the Administrative Procedure Act in order to properly weigh the evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). On remand, I would require her to do so.

JUDITH S. BOGGS
Administrative Appeals Judge