U.S. Department of Labor

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

BRB No. 23-0170 BLA

STANLEY W. SHORT Claimant-Respondent v. COALBURG ENTERPRISES INCORPORATED and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/11/2024 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Samantha Steelman (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2020-BLA-06090) rendered on a subsequent miner's claim filed on September 26, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-one years of underground coal mine employment. He further found Claimant has a totally disabling pulmonary or respiratory impairment and established a change in an applicable condition of entitlement.[2] 20 C.F.R. §§718.204(b)(2), 725.309. Thus, he found Claimant 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). He further found Employer failed to rebut the presumption and, therefore, awarded benefits.

On appeal, Employer asserts the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[4] It also generally asserts the ALJ's error on total disability may have influenced his finding that Employer did not rebut

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[1] Claimant filed his prior claim on November 17, 2015, which the district director denied on November 15, 2016, for failing to establish total disability. Decision and Order at 2; Director's Exhibit 1.

[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 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); *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 failed to 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. *Id.*; *see White*, 23 BLR at 1-3; Director's Exhibit 1.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

the presumption. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs.

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.[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. *See* 20 C.F.R. §718.204(b)(1). A miner 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. 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 pulmonary function studies, medical opinions, and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 9, 13. Employer argues the ALJ erred in weighing the pulmonary function studies.

The ALJ considered five pulmonary function studies conducted on May 15, 2017, May 7, 2018, January 14, 2019, January 14, 2020, and March 17, 2020. Decision and Order at 5-10; Director's Exhibits 14; 15 at 12-20; 25; 28 at 6-11. He found all the studies valid except the May 7, 2018 study. Decision and Order at 5-10. The May 15, 2017 and

[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 Transcript at 12, 14; Director's Exhibit 7.

[6] The ALJ found the arterial blood gas 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)(ii), (iii); Decision and Order at 5, 10.

January 14, 2019 studies produced non-qualifying[7] values while the January 14, 2020 and March 17, 2020 studies produced qualifying values. Director's Exhibits 14; 15 at 12-20; 25; 28 at 6-11. The ALJ assigned greater weight to the January 14, 2020 and March 17, 2020 studies – and specifically gave "most weight" to the March 17, 2020 study – because they are more recent and, thus, determined the pulmonary function studies support a finding Claimant established total disability. Decision and Order at 9-10; *see* 20 C.F.R. §718.204(b)(2)(i).

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). 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, as the fact-finder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). "In the absence of evidence to the contrary, compliance with the [quality standards in] Appendix B shall be presumed." 20 C.F.R. §718.103(c). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

Employer argues the ALJ should have found the March 17, 2020 pulmonary function study invalid based on Dr. Dahhan's opinion. Employer's Brief at 4. We disagree.

In his initial and supplemental reports, Dr. Dahhan did not opine the March 17, 2020 study is invalid. Director's Exhibit 28 at 2-3; Employer's Exhibit 1 at 2. In his deposition, he discussed the May 7, 2018, January 14, 2019, January 14, 2020, and March 17, 2020 studies. Employer's Exhibit 6 at 5, 7, 8-11. After discussing each study individually, he explained why Claimant is not totally disabled based on an "entirety of the pulmonary function study evidence." *Id.* at 10-11. He reasoned that because some studies are not qualifying and other studies are, there exists "fluctuation[s]" between each study and Claimant's impairment is not a permanent impairment. *Id.* at 12-13. He generally stated that the presence of fluctuation indicates one "can underestimate . . . true ventilatory capacity with poor effort in a consistent manner." *Id.* at 11. He also stated that, "even though [the testing is] consistent, that does [not] necessarily mean [it is] valid." *Id.* at 11.

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[7] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Because the ALJ found Dr. Dahhan did not specifically identify which pulmonary function study he was potentially invalidating, or "sufficiently identify the circumstances" under which the March 17, 2020 study would be invalid, the ALJ permissibly discredited his opinion as "vague."[8] Decision and Order at 9; *see Tennessee 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). We therefore affirm the ALJ's finding that the March 17, 2020 study is valid.

Employer does not challenge the ALJ's finding that the March 17, 2020 qualifying study is entitled to greater weight than the non-qualifying studies because it is more recent. Decision and Order at 9-10. Thus we affirm this finding. *See 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 12 n.14 (Nov. 17, 2023) ("a factfinder may, consistent with the progressive nature of pneumoconiosis, credit newer evidence showing a deterioration in a miner's condition over older evidence based on chronological order if enough time has passed for the disease to have progressed"); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because it is supported by substantial evidence, we affirm the ALJ's finding that the pulmonary function study evidence supports a determination that Claimant is totally disabled.[9] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9-10.

The ALJ next considered the opinions of Drs. Forehand, Broudy, and Dahhan. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-13; Director's Exhibits 15, 22, 24, 28; Claimant's Exhibit 4; Employer's Exhibits 1, 6. Drs. Forehand and Broudy opined Claimant is totally disabled based on his pulmonary function studies. Director's Exhibits

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[8] Given the ALJ's specific, permissible finding that Dr. Dahhan's validity opinion was "vague" and failed to identify which pulmonary function study or studies he was potentially invalidating, we see no error in the ALJ's subsequent statement that no doctor invalidated the March 17, 2020 study. Decision and Order at 9 n.29; *see Tennessee 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).

[9] Because Claimant established the March 17, 2020 study supports total disability at 20 C.F.R. §718.204(b)(2)(i), we need not address Employer's argument that the ALJ erred in finding the January 14, 2020 qualifying study is valid. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 3-4, 6. Even if the qualifying January 14, 2020 study were found invalid, it would neither contradict the qualifying March 17, 2020 study nor undermine the ALJ's finding the latter study is entitled to the "most weight" of all the studies. 20 C.F.R. §718.103(c) (pulmonary function studies not meeting the quality standards do not constitute evidence of the presence *or absence* of an impairment).

15 at 4; 22 at 2; 24 at 2-4. Dr. Dahhan opined Claimant retains the pulmonary capacity to return to his usual coal mine employment based on the non-qualifying pulmonary function studies. Director's Exhibit 28 at 3; Employer's Exhibit 6 at 12. The ALJ attributed no weight to Dr. Broudy's opinion as it was based on a pulmonary function study that was not submitted into the record due to evidentiary limitations. Decision and Order at 11. He attributed little weight to Dr. Dahhan's opinion as contrary to the pulmonary function evidence, which he found supports a finding of total disability. *Id.* at 13. He further assigned probative weight to Dr. Forehand's opinion as he found it based on "relevant histories, physical examination, and objective testing." *Id.* at 12.

Other than its contention that the ALJ erred in finding the Claimant established total disability based on the pulmonary function studies, Employer does not challenge the ALJ's credibility determinations with respect to the medical opinions. Employer's Brief at 6-7. As Employer raises no other contentions of error, we further affirm the ALJ's finding the medical opinions support total disability and his conclusion that the evidence weighed together establishes total disability. 20 C.F.R. §718.204(b)(2); *see Skrack,* 6 BLR at 1-711; Decision and Order at 13. We thus affirm the ALJ's finding Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant had neither legal nor clinical pneumoconiosis,[10] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

Employer raises no specific allegations of error regarding the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption, other than its general contention that Claimant does not have a respiratory or pulmonary impairment demonstrated on a valid

[10] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

pulmonary function study. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Skrack*, 6 BLR at 1-711; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Having rejected Employer's contention regarding the validity of the qualifying March 17, 2020 study, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption, and the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge