U.S. Department of Labor

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

BRB No. 23-0179 BLA

JAMES V. STANLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 11/17/2023
	)	
Employer-Respondent	)	
	)	
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 of William P. Farley, Administrative Law Judge, United States Department of Labor.

James V. Stanley, Clintwood, Virginia.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) William P. Farley's Decision and Order Denying Benefits (2019-BLA-05185) rendered on

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Combs is not representing Claimant on appeal. *See Shelton v.*

a miner's subsequent claim filed on June 12, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ found Claimant established the existence of pneumoconiosis and thus established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.202(a)(4), 725.309(c). Next, the ALJ credited Claimant with 26.16 years of coal mine employment, based on the parties' stipulation, but found Claimant failed to establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Therefore, he concluded that Claimant did not invoke the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[4] or establish entitlement to benefits at 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Neither Employer nor the Director, Office of Workers' Compensation Programs, filed a substantive response.

Claude V. Keene Trucking Co., 19 BLR 1-88 (1995) (Order).

[2] Claimant filed a prior claim on November 28, 1980, which the district director denied on October 8, 1981, for failure to establish any element of entitlement. Director's Exhibit 1. He subsequently filed six additional claims, which he withdrew and therefore are considered not to have been filed, before filing the current claim. *See* 20 C.F.R. §725.306(b); Director's Exhibits 2-7.

[3] 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 "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 any element of entitlement in his prior claim, 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; 20 C.F.R. §725.309(c); Director's Exhibit 9.

[4] 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. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

In an appeal filed without representation, 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 law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act 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

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 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. 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. 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. 20 C.F.R. §718.204(b)(2); Decision and Order at 25-33.

Pulmonary Function Studies

The ALJ considered four[6] pulmonary function studies. Decision and Order at 26-28. Because the studies reported different heights, the ALJ permissibly averaged them to

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 6-7, 14; Director's Exhibits 10, 12.

[6] Employer submitted an April 14, 2015 pulmonary function study that Dr. Emery administered in conjunction with Claimant's treatment. Employer's Exhibit 2. The ALJ determined that Employer had already designated two pulmonary function studies and therefore this study was inadmissible as it would exceed the evidentiary limitations at 20 C.F.R. §725.414(a)(2)(i). Decision and Order at 22. Contrary to the ALJ's determination, treatment records are not subject to evidentiary limitations. 20 C.F.R. §725.414(a)(4). However, as this study was non-qualifying, the ALJ's failure to consider it constituted

find Claimant is 68 inches tall and used the closest greater table height at Appendix B of 20 C.F.R. Part 718 of 68.1 inches, in determining whether each study is qualifying.[7] *See Carpenter v. GMS Mine and Repair Maint., Inc.*, BLR , BRB No. 22-0100 BLA (Sept. 6, 2023); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 27. The July 24, 2017 study produced qualifying values before the administration of a bronchodilator and non-qualifying values after administration.[8] Director's Exhibit 20. The April 18, 2018 study had non-qualifying values before and after the administration of bronchodilators. Director's Exhibit 24. The April 26, 2019 study produced qualifying values and no bronchodilator was administered; the December 11, 2020 study had non-qualifying values and no bronchodilator was administered. Claimant's Exhibit 3; Employer's Exhibit 4.

Because the ALJ permissibly found the results of the pulmonary function study evidence overall were in equipoise, Claimant is unable to satisfy his burden of proof. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 28. Thus, we affirm

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harmless error. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[7] A "qualifying" pulmonary function 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. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii). Because Claimant was over seventy-one years old when he performed all of the pulmonary function studies, the ALJ properly used the maximum table values in Appendix B of 20 C.F.R. Part 718. *Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61, 1-65-66 (2012); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008); Decision and Order at 26, 28. The qualifying values for a seventy-one-year-old miner who is 68.1 inches tall are an FEV1 value equal to or less than 1.73, an FVC value equal to or less than 2.24, an MVV value equal to or less than 69, and a FEV1/FVC ratio equal to or less than 55 percent. 20 C.F.R. Part 718, Appendix B.

[8] The ALJ noted Dr. Fino challenged the validity of the July 24, 2017 pulmonary function study but permissibly determined he did not "provide[] sufficient evidence to conclude that this pulmonary function study should be rejected as invalid." *See Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable); Decision and Order at 27; Director's Exhibits 20, 24.

the ALJ's finding that Claimant did not establish total disability at 20 C.F.R §718.204(b)(2)(i).

Arterial Blood Gas Studies

The ALJ considered four arterial blood gas studies. Decision and Order at 29-30. The August 18, 2016 study produced qualifying values at rest, but non-qualifying values with exercise. Claimant's Exhibit 4. The July 24, 2017 study had non-qualifying values at rest and with exercise.[9] Director's Exhibit 20. The April 18, 2018 and December 11, 2020 studies were non-qualifying at rest and no exercise testing was conducted. Director's Exhibit 24; Employer's Exhibit 4.

The ALJ noted that the three most recent resting values were non-qualifying but ultimately concluded, within his discretion, that the exercise testing was most indicative of Claimant's ability to perform his usual coal mine work. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (exercise studies may be more probative than resting blood gas studies regarding whether a miner is capable of performing his coal mine work); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); Decision and Order at 30. Because the sole exercise study is non-qualifying, we affirm the ALJ's finding that Claimant did not establish total disability at 20 C.F.R §718.204(b)(2)(ii).

Cor Pulmonale

The ALJ correctly found that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 31. Thus, we affirm his determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

Medical Opinions and Evidence as Whole

The ALJ initially determined that Claimant's usual coal mine work as a communicator/section foreman required manual labor at the "medium to heavy exertional levels" as set forth in the Dictionary of Occupational Titles. Decision and Order at 9-10. He then considered the medical opinions of Drs. Ajjarapu, Fino, and Basheda.

Dr. Ajjarapu performed the Department of Labor's (DOL) complete pulmonary evaluation of Claimant on July 24, 2017. Director's Exhibit 20. She diagnosed Claimant

[9] The ALJ noted that Dr. Fino generally questioned the validity of the non-qualifying July 24, 2017 blood gas study but permissibly determined he did not adequately explain why he found the study unreliable or invalid. *Vivian*, 7 BLR at 1-361; Decision and Order at 30; Employer's Exhibit 5 at 16.

with a severe pulmonary impairment based on the pulmonary function study results and indicated the blood gas studies were normal. *Id*. At that time, she opined Claimant was totally disabled from a pulmonary standpoint. *Id*. Drs. Fino and Basheda examined Claimant on April 18, 2018, and December 11, 2020, respectively. They each diagnosed Claimant with a moderate obstructive impairment but opined it would not prevent Claimant from performing his last coal mine job. Director's Exhibit 24; Employer's Exhibits 4, 5. As part of DOL's pilot program, Dr. Ajjarapu was asked to review Dr. Fino's report and objective testing. Director's Exhibit 25. In her supplemental report, Dr, Ajjarapu noted Dr. Fino's pulmonary function study results showed "very little mild impairment" and observed his blood gas testing was also non-qualifying, similar to her testing. *Id*. She altered her opinion to reflect Claimant has a mild to moderate obstructive impairment which would not prevent Claimant from performing his last coal mine job. *Id*.

Because all of the physicians concluded Claimant does not have a respiratory or pulmonary impairment that would preclude the performance of his usual coal mine work, the ALJ permissibly found the evidence did not support establishment of total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); Decision and Order at 32.

Having affirmed the ALJ's findings that the evidence did not support establishment of total disability under any of the subsections at 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm, as supported by substantial evidence, the ALJ's overall finding that Claimant does not have a totally disabling respiratory or pulmonary impairment and therefore did not invoke the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 30.

Claimant has the burden of establishing entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Claimant's failure to establish total disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge