U.S. Department of Labor

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

BRB No. 21-0099 BLA

GEORGE E. KINDER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL INCORPORATED	)	
	)	
and	)	
	)	
HEALTHSMART CASUALTY CLAIMS	)	DATE ISSUED: 4/11/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Kathleen H. Kim (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order Awarding Benefits (2018-BLA-05988) rendered on a claim filed on February 8, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 32.47 years of underground coal mine employment, which the parties had stipulated to, and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked 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). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal. In a footnote to his letter to the Benefits Review Board, however, he urges rejection of Employer's contention that the ALJ erred in discrediting the arterial blood gas studies contained in Claimant's treatment notes.

[1] Claimant filed a prior claim that he withdrew. Director's Exhibit 2. A withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b).

[2] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has 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)

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 32.47 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 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.[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 (1965).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine 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. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the 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 blood gas studies and the evidence as a whole.[5] Decision and Order at 19.

The ALJ considered the results of four blood gas studies developed in connection with this claim, dated February 20, 2017, August 3, 2017, November 13, 2018, and January 4, 2019. Decision and Order at 11, 17. The November 13, 2018 and January 4, 2019 studies, administered at rest, produced qualifying values,[6] while the February 20, 2017 and August 3, 2017 studies, administered at rest and during exercise, did not. Director's Exhibits 13 at 17; 14 at 23; Claimant's Exhibits 1 at 19; 2 at 61. The ALJ further considered the results of three treatment record blood gas studies dated February 28, 2018, May 10, 2018, and July 15, 2019, each of which produced non-qualifying values. Employer's Exhibits 5; 6; 11.

[4] 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. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6-9; Hearing Transcript at 29.

[5] The ALJ found the pulmonary function studies did not establish total disability, there is no evidence of cor pulmonale with right-sided congestive heart failure, and the medical opinion evidence establishes neither the absence nor presence of total disability. 20 C.F.R. §718.204(b)(2)(i), (iii)-(iv); Decision and Order at 17, 19.

[6] A "qualifying" blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

The ALJ noted the treatment record blood gas studies do not contain certain information related to whether the studies comply with the quality standards contained in 20 C.F.R. §718.105(c). Decision and Order at 18 n.62. He determined the lack of this information rendered the treatment record blood gas studies incomplete and decreased their "legitimacy." *Id.* at 17-18. He thus found them entitled to "no probative weight." Decision and Order at 17-18. Considering the remaining blood gas studies, the ALJ gave greater weight to the qualifying November 13, 2018 and January 4, 2019 studies as more probative of Claimant's disability status. *Id.* at 17. He therefore found the blood gas study evidence established total disability. *Id.*

Employer contends the ALJ erred in discrediting the treatment record blood gas studies. Employer's Brief at 4-7. Employer's arguments have merit.

It is within the ALJ's discretion, as the trier of fact, to determine the weight and credibility to be accorded the medical evidence. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The quality standards contained in 20 C.F.R. §718.105(c) do not apply to objective tests contained in treatment notes, *see* 20 C.F.R. §718.101(b), however, the ALJ must still address whether the tests are sufficiently reliable. *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). An otherwise reliable and probative blood gas study must not be rejected for failing to satisfy a non-critical quality standard. *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987). Here, the ALJ provided no explanation or rationale for rejecting the treatment record blood gas studies except to note the reports do not comply fully with the quality standards. *See* Decision and Order at 17-18. Because the ALJ did not consider whether the studies were reliable and explain how omission of the particular information relating to the quality standards renders the treatment record blood gas studies unreliable, we cannot affirm his finding that they are entitled to no probative weight.[7] *See*

[7] As examples of incompleteness, the ALJ noted they did not include the name of the technician who performed the study, the signature of the supervising physician, Claimant's heart rate at the time the blood sample was drawn, and whether the equipment used to evaluate the study was calibrated before each use. Decision and Order at 18 n.62. Our dissenting colleague contends Employer bore the burden of persuading the ALJ of the studies' reliability and he provided adequate justification for rejecting them by citing the absence of information required by the quality standards. However, in accordance with the APA, the ALJ must do more than simply identify missing information, he must explain why the omission of the information justifies giving the evidence no consideration. *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); 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). Although the ALJ may have to be persuaded of the evidence's reliability, that does not relieve him of the responsibility to provide an adequate explanation for his

Sterling Smokeless Coal Co. v. Akers, 131 F.3d 438, 441 (4th Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Orek*, 10 BLR at 1-54; 65 Fed. Reg. at 79,928. We therefore vacate the ALJ's finding that the blood gas studies establish total disability at 20 C.F.R. §718.204(b)(2)(ii), that a preponderance of the evidence as a whole establishes total disability at 20 C.F.R. §718.204(b)(2), and that Claimant invoked the Section 411(c)(4) presumption.[8]

On remand, the ALJ must reconsider the treatment record arterial blood gas studies, determine whether they are sufficiently reliable to constitute credible evidence of Claimant's pulmonary function, and explain his rationale for his conclusions. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165; *Orek*, 10 BLR at 1-54-55; 65 Fed. Reg. at 79,928. The ALJ must then reconsider whether the blood gas study evidence as a whole establishes total disability at 20 C.F.R. §718.204(b)(2)(ii). After considering whether the blood gas study evidence establishes total disability, the ALJ must weigh all the relevant evidence together to determine whether Claimant established total disability at 20 C.F.R. §718.204(b). *See Rafferty*, 9 BLR at 1-232.

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determination that the evidence is insufficiently reliable to warrant consideration. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Wojtowicz*, 12 BLR at 1-165 (1989); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987).

[8] Employer further contends the ALJ erred in affording the medical opinions of Drs. Raj and Green some probative value because neither physician reviewed the non-qualifying treatment record blood gas studies. Employer's Brief at 8-9. An ALJ is not required to discredit a physician who did not review all of a miner's medical records if the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner and objective test results. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984). The ALJ permissibly afforded Drs. Raj's and Green's opinions some probative weight because they were consistent with the blood gas studies obtained during their examinations. Decision and Order at 18. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Church*, 20 BLR at 1-13; *Hess*, 7 BLR at 1-296.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. The sole issue in this case is whether the ALJ erred in finding Claimant totally disabled. In support of its appeal, Employer raises two related arguments. First, the ALJ erroneously discredited three blood gas studies found in Claimant's treatment records that were non-qualifying for total disability. Second, his improper weighing of the blood gas studies effected his analysis of the medical opinions on the issue of total disability. Employer's arguments are without merit. The ALJ's decision is consistent with law and supported by substantial evidence. It therefore must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

In finding Claimant totally disabled, the ALJ considered four blood gas studies developed by the parties for litigation: the February 20, 2017 and August 3, 2017 studies were non-qualifying at-rest and with exercise, *see* Director's Exhibits 13, 14, while the November 13, 2018 and January 4, 2019 studies were qualifying for total disability at-rest,

see Claimant's Exhibits 1, 2.[9] Decision and Order at 10-11, 17. The ALJ gave greatest weight to the two qualifying studies because they are more recent and, therefore, "more probative of the Claimant's disability status." *Id.* at 17; *see Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (because pneumoconiosis is a latent and progressive disease, more recent evidence may be rationally credited where it shows a miner's condition has progressed or worsened); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). This finding must be affirmed as Employer does not challenge it on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ also considered three blood gas studies found in Claimant's treatment records and submitted into evidence by Employer: the February 28, 2018, May 10, 2018, and July 15, 2019 studies were non-qualifying for total disability, *see* Employer's Exhibits 5, 6, 11. Decision and Order at 17-18. He found these studies were "[in]complete," which "reduce[d] [their] legitimacy" and entitled them to "no probative weight." *Id.* Referencing the regulatory quality standards at 20 C.F.R. §718.105, the ALJ noted "all three [treatment record blood gas studies] fail to name the technician, the signature of the physician supervising the study, the Claimant's pulse rate at the time the blood sample was drawn, or whether the equipment was calibrated before and after each use." *Id.* at 18, n.62. He further observed that "[n]one of Claimant's treating physicians explicitly expressed an opinion whether he was disabled by a pulmonary or respiratory impairment." *Id.* at 17.

Employer argues the ALJ erred in rejecting the non-qualifying treatment record blood gas studies for failing to comply with the regulatory quality standards. Employer's Brief at 5-7. Employer is correct that the requirement for blood gas studies to "substantially comply" with the regulatory quality standards applies only to those "developed . . . in connection with a claim." *See* 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). However, when considering studies performed as part of a miner's treatment records, *i.e.*, not developed in connection with a claim, the ALJ nevertheless "must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue." 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Employer concedes the ALJ had a "duty to delve into the [blood gas study] evidence to determine if it 'constitute[s] evidence of the fact for which it is proffered,'" Employer's Brief at 7, *quoting* 20 C.F.R. §718.101(b), but it fails to identify any legal authority that would preclude him from consulting the quality standards as a relevant factor in making a reliability determination. *Director, OWCP, v. Siwiec*, 894 F.2d 635, 636 (3d Cir. 1990)

[9] Blood gas studies must first be conducted at rest. An exercise study must be offered to the miner only if the resting study does not qualify for total disability. 20 C.F.R. §718.2015(b).

(quality standards established to ensure the objective testing is "reliable"); *Cannelton Indus., Inc. v. Frye*, 93 F. App'x 551, 561 (4th Cir. 2004) ("At the very least, the quality standards embodied in §718.105 identify the types of information that are indicative of a reliable arterial blood gas test.").

In asserting "there is no medical evidence of record to support the ALJ's finding that the [treatment record blood gas studies] had no probative value," Employer misstates the record. The ALJ appropriately "delved into" (using Employer's parlance) the results of the blood gas studies Employer submitted and discovered they lack basic information, such as whether the equipment had been calibrated. The test results with missing information constitute evidence supporting his determination that the blood gas studies are not "complete," as does his finding that none of the treating physicians offered an opinion as to whether the miner was disabled. Decision and Order at 17-18; Employer's Exhibits 5-6, 11; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir 1997); *Newport News Shipbldg. and Dry Dock Co. v. Ward*, 326 F.3d 434, 438 (4th Cir. 2003) (substantial evidence is "more than a scintilla but less than a preponderance") (citations omitted).

Employer elaborates that the lack of medical evidence regarding the studies' reliability "renders it difficult, if not impossible, for the ALJ to determine which quality standard is critical or noncritical [to a reliability determination] and why." Employer's Brief at 6. But even if true, Employer's failure to put forward sufficient evidence for the ALJ to make such a determination is not a basis for overturning his decision in Employer's favor. Treatment record blood gas studies are not presumed reliable as Employer seems to suggest. Like most evidence submitted in black lung litigation, the party offering treatment record blood gas studies—in this case Employer—bears the risk an ALJ will discredit that evidence if the record is incomplete or insufficient to establish their reliability.[10] 65 Fed. Reg. at 79,928 (ALJ must be "persuaded" that the evidence is reliable); *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 185 (4th Cir. 1999) (ALJ has "duty to 'evaluate the evidence, weigh it, and draw his own conclusions'"), *quoting Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Employer does not contest the ALJ's determination

[10] The only exception relates to pulmonary function studies which, "in the absence of evidence to the contrary," are presumed to be in substantial compliance with the quality standards and thus "constitute evidence of the presence or absence of a respiratory or pulmonary impairment." 20 C.F.R. §718.103(c).

that the studies lack complete information; and, aside from presuming the studies are reliable, it does not attempt to identify any evidence that would support such a finding.[11]

In sum, the ALJ explained the non-qualifying treatment record blood gas studies are missing information, this missing information rendered them incomplete, and due to this incompleteness they are entitled to less weight than the more detailed, preponderantly qualifying blood gas studies performed in anticipation of litigation. Decision and Order at 17-18. That Claimant's treating physicians did not offer an opinion on total disability, or lack thereof, reinforced his determination that studies are less reliable. *Id*. at 17. Thus, contrary to Employer's assertion, the ALJ did not discredit the treatment record blood gas studies simply because they are not in compliance with the quality standards. He permissibly explained that the blood gas studies are incomplete without the information identified. *See Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the Administrative Procedure Act (APA) is satisfied if the reviewing tribunal can discern what the ALJ did and why he did it).

I would further affirm the ALJ's finding that the medical opinions neither establish nor weigh against a finding of total disability and thus do not undermine the qualifying blood gas studies. 20 C.F.R. §718.204(b); Decision and Order at 18. Employer's challenge to the ALJ's evaluation of the medical opinions is premised upon its assertion, which I

[11] As the Director notes, two of the three treatment record blood gas studies—those dated May 10, 2018 and July 15, 2019—indicate the miner was on supplemental oxygen, not room air, at the time the studies were conducted, which further supports the ALJ's decision they are not reliable indicators of whether the miner has a blood gas impairment. *Oppenheim v. Finch*, 495 F.2d 396, 397 (4th Cir. 1974) (Although appellate tribunals do not consider cases *de novo*, "they must not abdicate their traditional functions; they cannot escape their duty to scrutinize the record as a whole to determine whether the conclusions reached are rational."); 20 C.F.R. §718.105(a) (purpose of blood gas studies is to detect impairment in "alveolar gas exchange," primarily manifested as "a fall in arterial oxygen tension"); 20 C.F.R. Part 718, Appendix C (disability is measured in terms of partial pressure of carbon dioxide (pCO2) and partial pressure of oxygen (pO2) in the blood); Director's Response at 1 n.1; Employer's Exhibits 6, 11.

have rejected, that the ALJ erred in weighing the blood gas studies. *See* Employer's Brief at 8.

I would thus affirm the ALJ's conclusion that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii) and is entitled to benefits.

I therefore dissent.

GREG J. BUZZARD
Administrative Appeals Judge