U.S. Department of Labor

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

BRB No. 21-0489 BLA

JERRY CRUSENBERRY Claimant v. POWELL MOUNTAIN COAL COMPANY, INCORPORATED and Self-Insured Through PROGRESS FUELS/DUKE ENERGY, c/o HEALTHSMART CASUALTY CLAIM Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/07/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on a Subsequent Claim of Carrie Bland, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals[1] Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits on a Subsequent Claim (2018-BLA-05848) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on October 7, 2015.[2]

The ALJ found Claimant established 9.37 years of underground coal mine employment and therefore 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). Considering entitlement under 20 C.F.R. Part 718, she found Claimant established clinical and legal pneumoconiosis[4] as well as a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2). She

[1] On April 14, 2022, Employer filed a motion requesting the Benefits Review Board accept its Brief in Support of Petition for Review out of time. Apr. 14, 2022 Motion and Affidavit in Response to Show Cause. Employer's counsel represented it had timely filed a motion for an enlargement of time and that its late filing occurred because efile.dol.gov erroneously failed to send notification upon upload of documents from the Board. *Id.* The Board accepted Employer's late-filed brief as part of the record. *Crusenberry v. Powell Mountain Coal Co.*, BRB No. 21-0489 BLA (Apr. 29, 2022) (Order) (unpub.).

[2] This is Claimant's third claim for benefits. Director's Exhibits 1-3. On June 24, 1986, the district director denied his first claim, filed on February 4, 1986, because Claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant withdrew his second claim. Director's Exhibit 2. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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] "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).

therefore found Claimant established a change in an applicable condition of entitlement,[5] 20 C.F.R. §725.309(c), and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and legal pneumoconiosis.[6] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

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.[7] 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. Failure to establish any one of these elements

[5] When a claimant 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 she 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 the district director denied Claimant's prior claim for failing to establish any element of entitlement, Claimant had to establish at least one element of entitlement to obtain review of the merits of his claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[6] We affirm, as unchallenged on appeal, the ALJ's determination that claimant established 9.37 years of underground coal mine employment, clinical pneumoconiosis, and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.202, 725.309; Decision and Order at 14, 19, 23. Because we affirm the ALJ's finding that Claimant established clinical pneumoconiosis, any error in the ALJ's determination that Claimant established a change in an applicable condition of entitlement by establishing total disability is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 14, 23.

[7] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish the Miner suffered from a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

The ALJ considered the medical opinions of Drs. Ajjarapu, Rosenberg, and Castle. Decision and Order at 20-21. Dr. Ajjarapu diagnosed legal pneumoconiosis in the form of chronic bronchitis caused by a combination of smoking and coal mine dust exposure. Director's Exhibit 18 at 1, 21. Dr. Rosenberg diagnosed shortness of breath due to various health conditions, including a history of stroke, chronic atrial fibrillation, congestive heart failure, and cigarette smoke exposure, but unrelated to coal mine dust exposure.[8] Director's Exhibit 22 at 4; Employer's Exhibits 1 at 9-10; 2 at 4. Dr. Castle diagnosed shortness of breath due to cardiac disease, history of stroke, and smoking history, but unrelated to coal mine dust exposure. Employer's Exhibit 3 at 23-25. The ALJ found Dr. Ajjarapu's opinion well-documented and reasoned, whereas she found Dr. Rosenberg's opinion neither well-reasoned nor documented, and Dr. Castle's opinion poorly reasoned. Decision and Order at 20-21. Crediting Dr. Ajjarapu's opinion over the contrary opinions of Drs. Rosenberg and Castle, she therefore found Claimant established legal pneumoconiosis.

Employer contends the ALJ erred in crediting Dr. Ajjarapu's opinion. Employer's Brief at 8-11. We disagree.

Dr. Ajjarapu diagnosed chronic bronchitis and a totally disabling respiratory or pulmonary impairment. Director's Exhibit 18 at 1, 21. While she acknowledged Claimant has multiple chronic illnesses, she concluded the impairments causing the greatest effect on his lung function are related to his history of smoking and coal mine dust exposure. *Id.* Although she was unable to "pin point or quantify the degree of impairment attributable" to Claimant's history of coal mine dust exposure and cigarette smoke exposure, she nevertheless diagnosed legal pneumoconiosis because research demonstrates smoking and coal mine dust exposure "seem to have an additive effect." Director's Exhibit 18 at 1. The ALJ thus permissibly credited Dr. Ajjarapu's opinion that Claimant's exposure to coal

[8] Dr. Rosenberg initially opined Claimant also has clinical pneumoconiosis but later revised his opinion to exclude the disease after reviewing computed tomography scans. Director's Exhibit 22 at 4; Employer's Exhibits 1 at 9-10; 2 at 5.

mine dust and smoking were additive in causing his chronic bronchitis and impairment reflected on objective testing. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 31-32; Director's Exhibit 18. Further, contrary to Employer's contention, the ALJ permissibly found Dr. Ajjarapu's opinion well-reasoned because she relied on Claimant's occupational history, reported symptoms, and objective testing. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Thus, we reject Employer's assertions that Dr. Ajjarapu's opinion is insufficient to establish the existence of legal pneumoconiosis.

We also reject Employer's contentions that the ALJ erred in discrediting Drs. Rosenberg's and Castle's opinions that Claimant does not have legal pneumoconiosis. Employer's Brief at 12-13. The ALJ found neither physician adequately explained why coal mine dust exposure did not contribute to his respiratory impairment.[9] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017); *Hicks*, 138 F.3d at 530; *Akers* 131 F.3d at 439-40; Decision and Order at 20-21. Employer does not specifically address this finding; while it asserts Drs. Rosenberg and Castle "permissibly excluded coal dust," its arguments largely address the ALJ's total disability findings. Employer's Brief at 12. Employer's assertions with respect to Drs. Rosenberg's and Castle's legal pneumoconiosis opinions constitute a request to reweigh the evidence, which we may not do. *Anderson*, 12 BLR at 1-113.

Thus, we affirm the ALJ's finding that Claimant established the existence of legal pneumoconiosis. 29 C.F.R. §718.202.

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[10] *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

[9] Because the ALJ provided valid bases for discrediting Drs. Rosenberg's and Castle's opinions on legal pneumoconiosis, we need not address Employer's remaining arguments concerning the weight afforded their opinions regarding the existence of legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine employment involved working as a "shuttle car operator" and lifting 100 pounds four to five times per day. *See Skrack*, 6 BLR at 1-711; Decision and Order at 4.

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 and the evidence as a whole.[11] Decision and Order at 15-16.

The ALJ considered three pulmonary function studies dated April 27, 2016, March 8, 2017, and March 26, 2019. Decision and Order at 14-15. The April 27, 2016 study yielded non-qualifying[12] values before and after the administration of a bronchodilator. Director's Exhibit 18 at 6. The March 8, 2017 study produced qualifying pre- and post-bronchodilator values. Director's Exhibit 22 at 17-18. The March 26, 2019 study produced qualifying pre-bronchodilator values but did not include post-bronchodilator results. Claimant's Exhibit 5. The ALJ noted and rejected the opinion of Dr. Vuskovich that the March 26, 2019 study is invalid. Decision and Order at 15; Employer's Exhibit 7. She thus determined the preponderance of the pulmonary function studies establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 15.

Employer contends the ALJ erred in discrediting Dr. Vuskovich's opinion that the March 26, 2019 study is invalid. Employer's Brief at 6-8. We agree.

When considering pulmonary function study evidence, the ALJ must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (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 [regulatory quality standards] shall be presumed." 20 C.F.R. §718.103(c). Thus, the party challenging

[11] The ALJ found Claimant's arterial blood gas studies and the medical opinions do not establish total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(ii)-(iv); Decision and Order at 16-17.

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

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).

As the ALJ observed, Dr. Vuskovich opined the March 26, 2019 pulmonary function study is invalid because Claimant did not put forth sufficient effort to generate valid FVC-FEV1 results, as demonstrated by the flow volume loops and volume time tracings, that his deep breath efforts were variable, his initial efforts were not maximum efforts, thereby artificially lowering his FEV1 result, and his respiratory rate and tidal volume were insufficient to generate a valid MVV result. Decision and Order at 15; Employer's Exhibit 7. In contrast, the ALJ noted the technician performing the study reported "great [patient] effort and cooperation." Decision and Order at 15; Claimant's Exhibit 1. The ALJ stated that, in *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985), the Board held that more weight may be given to the first-hand observations of technicians who administer studies than to physicians who review the tracings. She thus credited the technician's statements over Dr. Vuskovich's opinion because Dr. Vuskovich "failed to adequately explain why his interpretation of the test is entitled to more weight than the impression of the technician present when the test was performed." Decision and Order at 15. As Employer asserts, this was error.

Initially, the ALJ did not accurately characterize the Board's holding in *Revnack*. The Board stated in *Revnack*, a case involving a claim arising under 20 C.F.R. Part 727, that the ALJ must consider a reviewing *doctor's* opinion that a pulmonary function study is unreliable when determining whether total disability is established, and the interim presumption has been invoked pursuant to 20 C.F.R. §727.203(a)(2). *Revnack*, 7 BLR at 1-773. It does not address the weight to which an administering technician's comments are entitled as compared to the opinion of a reviewing physician.

Further, though Dr. Vuskovich did not specifically address the administering technician's statements, he did provide rationale explaining his conclusions that Claimant did not put forth sufficient effort to generate valid results, as the ALJ acknowledges. Decision and Order at 15; Employer's Exhibit 7. A reviewing physician may challenge the validity of a pulmonary function study based on his or her examination of the tracings. *See* 65 Fed. Reg. 79,920, 79,927 (Dec. 20, 2000) ("A party may challenge another party's [pulmonary function] study by submitting expert opinion evidence demonstrating the study is unreliable or invalid."); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *see also Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885 (7th Cir. 1992) (assuming a technician was equally qualified as a reviewing doctor to assess the validity of pulmonary function studies without supporting evidence was error); *Brinkley*, 972 F.2d at 885 (A technician's notations of good effort and cooperation do not amount to substantial evidence a study is valid in the face of competent opinions showing the contrary, as it is

"the interpretation of the tracings" that matters in determining the validity of a pulmonary function study.).

Employer also asserts the ALJ erred in discrediting Drs. Rosenberg's and Castle's opinions that the qualifying March 8, 2017 pulmonary function study is invalid. Employer's Brief at 5, 11-12. We agree.

Dr. Rosenberg administered the March 8, 2017 study and opined it is invalid. Director's Exhibit 22 at 5. He believed Claimant is capable of producing higher values, explaining that Claimant's poor health, including his overall weakness and history of stroke, prevents valid studies from being obtained. Director's Exhibit 22 at 4; Employer's Exhibits 1 at 6-7; 2 at 5. Likewise, Dr. Castle reviewed the March 8, 2017 study and opined the study is "probably technically invalid" because the flow volume loops demonstrate less than maximal effort. Employer's Exhibit 3 at 8, 24. The ALJ discredited Dr. Rosenberg's validity opinion because he did not provide "an official validation study." Decision and Order at 16. However, the regulations do not require any specific "official validation report"; a physician can set forth his opinion regarding the validity of a study in his medical opinion. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener*, 23 BLR at 1-237. The ALJ also discredited Dr. Castle's opinion because he did not specifically refute the technician's comments that Claimant "demonstrated good effort and understanding." Decision and Order at 16 (quoting Director's Exhibit 22). But as we note above, an ALJ must consider the opinion of a reviewing physician and explain why that physician's opinion is not credible or persuasive to undermine the presumption that the study complies with the quality standards. *Brinkley*, 972 F.2d at 885 (technician's notes do not outweigh a competent medical opinion).

Because the ALJ did not provide valid rationale for discrediting Drs. Vuskovich's, Rosenberg's, and Castle's validity opinions, we must vacate her findings with regard to the validity of the March 8, 2017 and March 26, 2019 pulmonary function studies. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); Decision and Order at 14-15. We are not passing judgment on whether these studies are valid. Rather, the ALJ must consider the validity of these studies and render her own credibility findings. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) ("it is the province of the ALJ to evaluate the physicians' opinions"); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (Board must remand when ALJ fails to make necessary factual findings). We therefore vacate the ALJ's determination that the pulmonary function studies and evidence as a whole establish total disability.[13] Further, because we vacate the ALJ's

[13] We agree with Employer that remand is necessary regarding the validity of the March 8, 2017 and March 26, 2019 pulmonary function studies at 20 C.F.R.

finding that Claimant is totally disabled, we must also vacate her finding he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c)(1).

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. 20 C.F.R. §718.204(b)(2). She must reconsider whether the pulmonary function studies support total disability, first resolving the conflicting evidence as to the validity of the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i). Specifically, the ALJ must consider Drs. Rosenberg's and Castle's opinions that the March 8, 2017 pulmonary function study is invalid. Director's Exhibit 22 at 4; Employer's Exhibits 1 at 6-7; 2 at 5; 3 at 8, 24. She must also reconsider Dr. Vuskovich's opinion that the March 26, 2019 pulmonary function study is invalid. Employer's Exhibit 7. If a study does not precisely conform to the quality standards, she must determine if it is in substantial compliance. 20 C.F.R. §718.101(b). The ALJ must then weigh the studies together, undertaking a qualitative and quantitative analysis of the evidence and providing an adequate rationale for how she resolves conflicts in the evidence. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the ALJ finds the evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i), she must weigh all the relevant evidence together, like and unlike, to determine whether Claimant has established the existence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 198.

Because we have affirmed the ALJ's determination that Claimant established legal pneumoconiosis, if Claimant again establishes total disability, the ALJ must further consider whether pneumoconiosis is a substantially contributing cause of Claimant's total disability. 20 C.F.R. §718.204(c)(1). In making her determinations, the ALJ must explain the rationale underlying her findings and conclusions. *See Wojtowicz*, 12 BLR at 1-165.

---

§718.204(b)(2)(i), but decline to remand the claim for the ALJ to reconsider whether the medical opinion evidence supports total disability at 20 C.F.R. §718.204(b)(2)(iv). While Employer at times appears to take issue with the ALJ's weighing of the medical opinions on total disability, its arguments relate largely to the validity of the pulmonary function studies and Employer otherwise agrees "the ALJ permissibly determined the medical opinion evidence is inconclusive" on total disability. Employer's Brief at 8, 11-12.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits on a Subsequent Claim and remand the case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge