U.S. Department of Labor

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

BRB No. 21-0560 BLA

CHARLES H. SPECK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FOX KNOB COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/06/2023
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits of Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer.

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

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

Employer appeals Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order on Remand Granting Benefits (2016-BLA-05579) rendered on a claim filed on

October 24, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.

Initially, ALJ William T. Barto accepted the parties' stipulation that Claimant had twenty-nine years of coal mine employment. ALJ Barto found there was no evidence of complicated pneumoconiosis and thus that Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018). He further found Claimant failed to establish total disability, an essential element of entitlement, and thus denied benefits. 20 C.F.R. §718.204(b)(2).

Upon review of Claimant's appeal, the Board vacated ALJ Barto's finding that Claimant did not establish complicated pneumoconiosis because ALJ Barto did not consider all of the relevant evidence. *Speck v. Fox Knob Coal Co.*, BRB No. 18-0545 BLA, slip op. at 3 (Nov. 13, 2019) (unpub.); 20 C.F.R §718.304. The Board also held he failed to explain his weighing of certain pulmonary function studies, which undermined his findings regarding the medical opinions; thus, the Board also vacated his finding that Claimant did not establish total disability. *Speck*, BRB No. 18-0545 BLA, slip op. at 6-7; 20 C.F.R. §718.204(b)(2). Therefore, the Board vacated ALJ Barto's finding that Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[1] and vacated the denial of benefits. *Speck*, BRB No. 18-0545 BLA, slip op. at 7-8. The Board directed ALJ Barto to reconsider the pulmonary function study evidence as well as the medical opinion evidence to determine if Claimant established total disability.[2] *Id.* at 8. In addition, the Board instructed ALJ Barto to address whether Claimant's twenty-nine years of coal mine employment was qualifying for purposes of invoking the Section 411(c)(4) presumption. *Id.* If Claimant invoked the presumption, ALJ Barto was then to consider whether Employer rebutted it. *Id.*

On remand, the case was reassigned to ALJ Leslie (the ALJ) because ALJ Barto was no longer available. Notice of Assignment and Order Inviting Briefs on Remand; Decision and Order on Remand at 2 n.3. On July 19, 2021, the ALJ issued a Decision and

[1] 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.

[2] The Board affirmed ALJ Barto's findings that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii)-(iii). *Speck v. Fox Knob Coal Co.*, BRB No. 18-0545 BLA, slip op. at 7 n.11 (Nov. 13, 2019) (unpub.).

Order on Remand Granting Benefits. Initially, she found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption. 20 C.F.R. §718.304. Next, the ALJ determined Claimant established 28.76 years of qualifying coal mine employment and a totally disabling impairment, thus invoking the Section 411(c)(4) presumption. 20 C.F.R. §718.305. She concluded Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in concluding Claimant established at least fifteen years of qualifying coal mine employment and total disability and thus erred in finding Claimant invoked the Section 411(c)(4) presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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.[3] 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).

Invoking the Section 411(c)(4) Presumption – Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015). The parties stipulated to twenty-nine years of coal mine employment. Decision and Order on Remand at 10; Hearing Transcript at 6.

On remand, the ALJ considered Claimant's employment history form, hearing testimony, Social Security Administration (SSA) earnings statements, and annotated W-2 records. Decision and Order on Remand at 9-14; Director's Exhibits 3, 5-6; Hearing Transcript. Because Claimant testified to having both underground and surface employment, the ALJ considered whether the evidence established he was regularly exposed to coal mine dust in his surface employment. Decision and Order on Remand at 11; Hearing Transcript at 12. The ALJ found the evidence established that Claimant's

[3] We 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); Decision and Order on Remand at 2; Hearing Transcript at 6.

surface employment operating an auger was substantially similar to underground conditions. Decision and Order at 12-13. Considering this qualifying surface employment together with his underground employment, the ALJ found Claimant established 28.76 years of qualifying coal mine employment. *Id.* at 11-14.

Employer argues the ALJ erred because there is no "direct evidence" of dust conditions in Claimant's surface employment and further argues the ALJ erred in attributing Claimant's testimony regarding his employment as an auger operator with Employer to his employment with J&T Coal Incorporated (J&T Coal). Employer's Brief at 4-5. However, Employer has waived these arguments.[4]

The ALJ invited the parties to file briefs to address the issues the Board instructed her to consider on remand. Notice of Assignment and Order Inviting Briefs on Remand. Employer filed a brief on remand in which it argued that "although establishing the requisite amount of coal mines [sic] employment," Claimant failed to establish total disability and thus could not invoke the Section 411(c)(4) presumption. Employer's Brief on Remand at 3; Decision and Order on Remand at 14 n.22. Thus, Employer conceded before the ALJ that Claimant established sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption and cannot now raise this argument. *See Nippes v. Florence Mining Co.*, 12 BLR 1-108, 1-109 (1985) (a party is bound by its stipulations and concessions).

Moreover, even if Employer's concession below did not preclude consideration of its arguments on appeal, we would still find them unpersuasive. Initially, Employer does not contest the ALJ's findings regarding Claimant's underground coal mine employment, which totals 14.36 years;[5] thus, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6

[4] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1 (2017) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

[5] The ALJ found Claimant worked underground with Dean Trucking Company (Dean Trucking) for 7.86 years. Decision and Order on Remand at 11-12. While the ALJ indicated this employment totaled 6.86 years, there is a scrivener's error in her chart leading to this calculation, as the year 1976 is listed as crediting Claimant with "0.00" years, even though the ALJ determined Claimant established 238.80 days of coal mine employment with Dean Trucking that year. Decision and Order on Remand at 11-12; *see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019). The ALJ also credited Claimant's testimony that half of his employment with J&T Coal Incorporated was

BLR 1-710, 1-711 (1983); Decision and Order on Remand at 11. That leaves less than a year of his surface employment for which Claimant must prove he was regularly exposed to coal mine dust. 20 C.F.R. §718.305(b)(2). Even assuming Employer is correct that there is insufficient evidence to demonstrate Claimant worked as an auger operator during his surface employment for J&T Coal, it does not contest the ALJ's finding that Claimant was an auger operator while working in surface coal mining for Employer, or that Claimant established 8.9 years of employment with Employer.[6] Decision and Order on Remand at 13-14; Employer's Brief at 4-5. Thus, these findings are also affirmed. *See Skrack*, 6 BLR at 1-711.

Further, contrary to Employer's argument that there is no "direct evidence" that Claimant was exposed to dust "at [a] rate substantially similar to that of an underground coal mines [sic]," Employer's Brief at 5, Claimant is not required to demonstrate he was exposed to dust comparable to those in underground conditions. *See Duncan*, 889 F.3d at 304 (rejecting argument that the claimant must provide evidence of "the actual dust conditions" and citing with approval the Department of Labor's position that "dust exposure evidence will be inherently anecdotal"). Rather, Claimant need only establish he was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).

The ALJ permissibly credited Claimant's uncontradicted testimony that he operated an open-cab auger without wearing a respirator, and bored holes into the mountain and into the coal seam. *See Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-45 (1984) (ALJ may rely on a miner's testimony, especially if the testimony is not contradicted by any documentation of record); Decision and Order at 11-13. Based on this testimony, the ALJ permissibly inferred that drilling holes into the mountain and underlying coal seam created dust,[7] which Claimant was exposed to, particularly given that he worked in an open cab and did not wear a respirator.[8] *See Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983)

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underground, which constitutes 6.5 years of qualifying employment. Decision and Order on Remand at 12.

[6] While Claimant initially testified that he worked both underground and on the surface for Employer, he indicated on cross-examination that all his employment was on the surface. Hearing Transcript at 10-12, 18.

[7] Claimant's CM-911a form also provides that he was exposed to "dust, gases, or fumes" during his coal mine employment. Director's Exhibit 3.

[8] Employer seems to have misread Claimant's testimony on this issue, as it argued that "the mere fact that the Claimant wore a respirator does not directly or indirectly

(ALJ has discretion to draw inferences from the evidence); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (same). Thus, the ALJ permissibly determined that Claimant's 8.90 years with Employer constituted qualifying coal mine employment.[9] *See Duncan*, 889 F.3d at 304; *Kennard*, 790 F.3d at 663; Decision and Order on Remand at 12-14.

Therefore, we affirm, as supported by substantial evidence, the ALJ's conclusion that Claimant established over fifteen years of qualifying coal mine employment. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Elkins v. Sec'y of HHS*, 658 F.2d 437, 439 (6th Cir. 1981); Decision and Order on Remand at 14.

Invoking the Section 411(c)(4) Presumption- Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must also establish he is totally disabled by a 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 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 evidence as a whole. 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order on Remand at 16, 18.

On remand, the ALJ considered the three pulmonary function studies of record, conducted on September 24, 2014, March 9, 2015, and August 26, 2015. Decision and Order on Remand at 14-16; Director's Exhibits 11, 17; Claimant's Exhibit 3. The

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indicate dust condition." Employer's Brief at 5. However, Claimant testified he did not wear a respirator. Hearing Transcript at 11; Decision and Order at 13.

[9] Employer also argues the ALJ erroneously equated the exertional requirements of Claimant's coal mining work with his coal mine dust exposure. Employer's Brief at 5. While the ALJ addressed the exertional requirements of Claimant's usual coal mine employment contemporaneously with her findings regarding the conditions of Claimant's surface employment, these were separate findings. *See* Decision and Order on Remand at 12-13.

September 24, 2014 study produced qualifying[10] values before the administration of a bronchodilator and did not include post-bronchodilator testing, the March 9, 2015 study produced qualifying values before and after the administration of a bronchodilator, and the August 26, 2015 study produced non-qualifying values before and after the administration of a bronchodilator.[11] Director's Exhibits 11, 17; Claimant's Exhibit 3.

The ALJ noted the Board had affirmed ALJ Barto's decisions to reject the March 9, 2015 study and to accord diminished weight to the August 26, 2015 study, as the validity and reliability of both were questioned. Decision and Order at 15-16. Thus, the ALJ also gave no weight to the March 9, 2015 study and "diminished weight" to the August 26, 2015 non-qualifying study. *Id.* Because the September 24, 2014 qualifying study was the only one whose reliability or validity was not questioned, the ALJ found it to be the most probative. *Id.* at 16. Further, given the "short amount of time" between the September 24, 2014 and August 26, 2015 studies, she declined to accord more weight to the more recent study of "questionable validity." *Id.*

Employer argues the ALJ erred in finding Claimant totally disabled based on the pulmonary function studies when Claimant produced a later study with higher values with less-than-optimal effort. Employer's Brief at 2, 6. We disagree.

Given the Board's prior affirmance of ALJ Barto's discounting of the August 26, 2015 pulmonary function study, the ALJ reasonably accorded the September 24, 2014 study more probative weight. *See Crisp*, 866 F.2d at 185; Decision and Order on Remand at 15-16. Moreover, the ALJ permissibly declined to apply the "later evidence rule" to accord additional weight to the undermined August 2015 study given the ALJ's finding that the time between the two tests was insignificant. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); *Conley v. Roberts & Shaefer Co.*, 7 BLR 1-309, 1-312 (1984) (A more recent study may not provide the most accurate information if the testing is not separated by a significant amount of time.); Decision and Order on Remand at 16.

[10] 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. 20 C.F.R. §718.204(b)(2)(i).

[11] While the ALJ indicated the pre-bronchodilator result for the August 26, 2015 study is qualifying, only its FEV1 value is qualifying; thus, it is not a qualifying study under the regulations. Decision and Order at 15; Director's Exhibit 17; 20 C.F.R. §718.204(b)(2)(i).

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the ALJ's conclusion that Claimant established total disability by a preponderance of the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); *see Crisp*, 866 F.2d 179, 185; Decision and Order on Remand at 16.

Employer does not challenge the ALJ's finding that the medical opinion evidence supports a finding of total disability; thus, it is affirmed. 20 C.F.R. §718.204(b)(2)(iv); *see Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 18.

Next, the Employer generally argues the ALJ failed to "appropriately explain his [sic] finding as to why he [sic] found the Claimant to be totally disabled from a pulmonary or respiratory standpoint." Employer's Brief at 7. Employer does not explain this argument or point to any findings or evidence to support its contention; therefore, we decline to address it as inadequately briefed. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983). Thus, we affirm the ALJ's finding that Claimant established total disability by a preponderance of the evidence and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order on Remand at 18.

Moreover, as Employer failed to raise any arguments regarding the ALJ's findings that it failed to rebut the presumption, we also affirm that determination.[12] Decision and Order on Remand at 20, 22.

[12] In a single sentence at the conclusion of its brief, Employer states the ALJ erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 8. We decline to address this argument as Employer fails to specify any error in the ALJ's rebuttal findings. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983).

Accordingly, we affirm the ALJ's Decision and Order on Remand Granting Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues that the more reliable September 24, 2014 qualifying study established total disability over the more recent non-qualifying study for the same reason I stated in my original concurrence: the United States Court of Appeals for the Sixth Circuit has held it irrational to credit evidence solely because of recency where the miner's condition has improved. *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993). Given the progressive nature of pneumoconiosis, the amount of time between tests may be relevant in deciding whether to credit a newer test based on recency when a miner's condition purportedly deteriorates, but an ALJ must resolve conflicting tests when a miner's condition purportedly improves "without reference to their chronological relationship." *Woodward*, 991 F.2d at 319-20; *see also* 20 C.F.R. § 718.201(c) (recognizing that for purposes of administering the Act "pneumoconiosis is a progressive and latent disease[.]").

It therefore would have been error for the ALJ to credit the newer test based solely on the date it was conducted regardless of the amount of time that has passed between the two tests. *Id.*

JONATHAN ROLFE
Administrative Appeals Judge