U.S. Department of Labor

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

BRB No. 22-0355 BLA

VERNON W. VANDERPOOL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 04/28/2023
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 Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer.

Before: BOGGS, ROLFE, and JONES, Administrative Appeals Judges

ROLFE and JONES, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2017-BLA-05067) rendered on a claim filed 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 August 15, 2014.[1]

The ALJ accepted the parties' stipulation that Claimant has at least fifteen years of qualifying coal mine employment and found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he 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), and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c). He further found Employer did not rebut the presumption and thus awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant totally disabled.[3] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

The Benefits Review Board's scope of review is defined by statute. The ALJ's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

[1] On January 11, 2013, the district director denied Claimant's most recent prior claim, filed on April 20, 2012, for failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. Where 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). Claimant was therefore required to establish total disability to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

[2] 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); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, that Claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3; Hearing Tr. 17.

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).

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.[5] 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 established total disability based on the pulmonary function studies, medical opinion evidence, and the evidence as a whole.[6] Decision and Order at 7-29.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe* v. *Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Tr. at 9-10, 12.

[5] The ALJ found Claimant's usual coal mine employment as a section supervisor required medium to heavy labor. Decision and Order at 3. Employer does not challenge this finding. Thus we affirm it. *See Skrack*, 6 BLR at 1-711.

[6] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies 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 21.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies. *Id.* at 7-20. The July 18, 2014, April 8, 2015, and February 23, 2018 studies produced qualifying[7] pre-bronchodilator values, and the October 29, 2014 and March 16, 2018 studies produced qualifying pre- and post-bronchodilator values. Director's Exhibits 12, 14, 16; Claimant's Exhibit 3; Employer's Exhibit 3. All told, all five pre-bronchodilator results and all three post-bronchodilator results taken over a period of four years were qualifying; there were no non-qualifying results. The ALJ found the July 18, 2014, April 8, 2015, and March 16, 2018 studies invalid, and the October 29, 2014 and February 23, 2018 studies valid. Decision and Order at 9-20. He concluded the two valid and reliable studies are credible and establish total disability. *Id.* at 20.

Employer contends the October 29, 2014 and February 23, 2018 pulmonary function studies are not valid and thus the ALJ erred in relying on them to find the pulmonary function study evidence establishes total disability. Employer's Brief at 5-12. We disagree.

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 asserts the ALJ did not adequately consider the opinions of Drs. Fino and Sargent that, because Claimant did not give maximum effort, the October 29, 2014 and February 23, 2018 studies do not conform to the quality standards. Employer's Brief at 6-11.

The October 29, 2014 pulmonary function study was conducted as part of the Department of Labor's (DOL) complete pulmonary evaluation of Claimant. Director's

[7] 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).

Exhibit 12. The ALJ observed Dr. Fino opined the October 29, 2014 study is invalid because, while it showed a better effort than the study conducted as part of his own examination on April 8, 2015, the flow-volume loop "did not reveal a maximum effort, nor did the patient complete his exhalation before the study terminated." Employer's Exhibits 2, 7 at 14; Decision and Order at 13-14; Director's Exhibit 16. Dr. Sargent did not offer an opinion about the validity of the October 29, 2014 study specifically, stating only that testing done in 2014 is invalid. Employer's Exhibit 3 at 1.

The ALJ found Dr. Ajjarapu, the physician who conducted the DOL's complete pulmonary evaluation, considered the study to be in substantial compliance with the regulations because she relied on it in determining Claimant is totally disabled, and specifically stated the study has "reproducibility, three valid curves, and the effort was maintained beyond the [six] seconds." Decision and Order at 14-15; Director's Exhibits 12, 13. He also found Dr. Ranavaya's validation of the study is credible evidence of its validity and that the technician who conducted the study noted good cooperation. Decision and Order at 15-16; Director's Exhibit 12 at 1. Thus, contrary to Employer's argument, the ALJ considered all of the relevant evidence and permissibly found the opinions of Drs. Fino and Sargent unpersuasive and outweighed by the opinions of Dr. Ajjarapu and Ranavaya. *See 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 16.

With regard to the February 23, 2018 study, the ALJ observed Dr. Fino merely opined it had "the same problems with not exhaling all of the air within the amount of time needed and not exhaling it forcefully." Employer's Exhibit 7 at 12; Decision and Order at 18. He further observed that Dr. Sargent opined "it doesn't seem like he reaches a good plateau, although in this case the Flow Volume Loops are better," which possibly represented a better effort but not a completely valid study. Employer's Exhibit 6 at 14-15; Decision and Order at 18.

The ALJ correctly observed the quality standards do not apply to the February 23, 2018 pulmonary function study because it was conducted as part of Claimant's treatment and addressed whether it is sufficiently reliable to support a finding of total disability. 20 C.F.R. §§718.101, 718.103; 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment); Decision and Order at 17. He found the report from the study states Claimant had good effort and cooperation, and that it was a confirmed report. Decision and Order at 17; Claimant's Exhibit 3. He further found the fact that Dr. Ajjarapu sent the results of the study to Dr. Brockhorst indicates she deemed them sufficiently reliable for use in Claimant's treatment. Decision and Order at 18-19; Claimant's Exhibit 3. The ALJ thus considered all of the relevant evidence and permissibly found the opinions

of Drs. Fino and Sargent unpersuasive to establish the February 23, 2018 study is unreliable. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 19.

As Employer raises no further argument, we affirm the ALJ's finding that the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i).[8]

[8] Our dissenting colleague's confounding argument the ALJ was required to do something more than determine whether the tests were in substantial compliance with the regulations to determine whether they were sufficiently reliable to support disability, and that the ALJ did not sufficiently resolve the conflict in opinion on that matter, is completely belied by both the law on the issue and the facts of this case. *First*, as binding case law unambiguously establishes, the ALJ acknowledged, and Employer does not dispute, an ALJ must determine the validity and reliability of pulmonary function tests -- including whether a miner put forth sufficient effort for the test to be considered valid -- based upon conformity with the regulatory standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If an ALJ determines the test to be in substantial compliance (or if contained in treatment records, sufficiently reliable), as the ALJ found with two of the qualifying tests here, then he must determine its probative force. If the ALJ finds a test is not in substantial compliance -- for example, if a miner does not put forth sufficient effort for a valid result -- then the test is invalid and entitled to no weight, as the ALJ found with the remaining three qualifying tests. So, contrary to our colleague's central contention of error, whether or not a test is so "fundamentally flawed that it could not be a basis for a disability determination," *infra* p. 13, *is* squarely determined by conformity with the regulations -- regulations the ALJ recognized and ably applied in this case.

Second, even a cursory review of the ALJ's decision confirms he adequately weighed the expert opinion on the matter. One third of the ALJ's entire decision is dedicated to weighing the issue. Decision and Order at 6-14. And the one specific argument our colleague appears to make in reweighing that evidence (aside from vague assertions of unidentified remaining conflicts) -- that a "fair effort" cannot meet the regulatory standard's requirement of a "maximum effort" -- appears to be based on a simple misunderstanding of the definition of "fair," which Merriam Webster succinctly defines as "conforming with the established rules." *Fair Definition*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/fair (last visited Mar. 29, 2023).

Medical Opinions

The ALJ next considered the medical opinions of Drs. Ajjarapu, Fino, and Sargent. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order 22-28. Dr. Ajjarapu opined Claimant cannot perform his usual coal mine employment based on his pulmonary function study results. Director's Exhibits 12, 13. Drs. Fino and Sargent opined they could not diagnose a respiratory or pulmonary impairment because there are no valid pulmonary function studies. Director's Exhibit 16; Employer's Exhibits 2, 3, 6, 7, 9, 10. The ALJ credited Dr. Ajjarapu's opinion as consistent with the weight of the pulmonary function study evidence. Decision and Order at 27-28. He discredited the opinions of Drs. Fino and Sargent as not well reasoned or documented, and contrary to his finding that the October 29, 2014 and February 23, 2018 pulmonary function studies are valid. *Id.* Therefore, he concluded the medical opinion evidence establishes total disability under 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer argues the ALJ erred in crediting Dr. Ajjarapu's opinion because it is based solely on invalid pulmonary function studies and non-qualifying blood gas studies. Employer's Brief at 13. Dr. Ajjarapu opined Claimant is totally disabled based on the October 29, 2014 pulmonary function study results from her examination and acknowledged the blood gas study results from the examination are normal. Director's Exhibits 12, 13. The ALJ found her opinion is credible as it is supported by the qualifying and valid October 29, 2014 and February 23, 2018 pulmonary function studies. Decision and Order at 28. Because we have affirmed the ALJ's finding the October 29, 2014 and February 23, 2018 pulmonary function studies are valid, we reject Employer's contention. *Id.* at 16; Employer's Brief at 13.

Employer also argues Dr. Ajjarapu's opinion is not credible because she did not review all of Claimant's medical records. Employer's Brief at 13. Contrary to Employer's assertion, an ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on her own examination of the miner and objective test results. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

Finally, Employer generally argues the ALJ should have credited the opinions of Drs. Sargent and Fino because they are reasoned and documented and because the doctors reviewed all of Claimant's medical records. Employer's Brief at 14-15. Employer's argument is 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).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R.

§718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 29. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305, 725.309(c); Decision and Order at 5, 29. As Employer does not challenge the ALJ's finding that it did not rebut the presumption, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30-37.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully disagree with the majority with respect to the ALJ's consideration of the pulmonary function study evidence and his analysis of the medical opinion evidence as to disability. As Employer contends, the ALJ failed to properly consider and weigh all the evidence, including the contrary probative evidence, and did not adequately explain his reasoning in evaluating that evidence. Employer's Brief at 3-15.

More specifically, Drs. Fino and Sargent opined that Claimant's failure to exert maximum effort rendered the pulmonary function test results of October 29, 2014 and February 23, 2018 unreliable and that a determination as to impairment could not be drawn from the testing. Employer's Exhibits 2, 3; Employer's Exhibit 6 at 11-14; Employer's Exhibit 7 at 10-11. The ALJ failed to consider these criticisms. Instead, he focused on whether the testing complied with the technical requirements of the regulation and found that because the regulation's requirements could be met by substantial compliance the tests

were valid.[9] This was error. The doctors did not merely contend that technical requirements were not met. Rather, they asserted that the testing was so fundamentally flawed that it could not be a basis for a disability determination.[10] The ALJ failed to give consideration to their opinions and explain how he evaluated them. Further, he failed to adequately explain how he resolved the conflicts between Dr. Ajjarapu's opinion and the opinions of Drs. Fino, Sargent, and Renn, in particular, and why Dr. Ajjarapu's opinion outweighed those of the other physicians.[11] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); s*ee Hicks*, 138 F.3d at 533; *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992). In addition, he erred by relying upon Board precedent that has no bearing on this case. Decision and Order at 15 n.2 (citing *Laird v. Freeman United Coal Co.*, 6 BLR 1-1067 (1984)). The caselaw he cited related to the regulation for the interim presumption at 20 C.F.R. §410.430. That regulation, unlike 20 C.F.R. §718.103 which applies here and specifies Claimant must exert maximum effort,[12] did not contain any requirement relating to claimant effort.

[9] I disagree with Employer's contention that the ALJ wholly disregarded Employer's evidence to the extent that he noted it and manifested awareness of it in discussing the substantial compliance requirement; however, I agree that even in his determination of "substantial compliance" the ALJ's analysis was flawed because he failed to consider all of the relevant evidence. *See infra* n.11.

[10] The accuracy of the test result is important because the numeric scores generated by the testing determine whether the pulmonary function study is qualifying and thus can establish Claimant is totally disabled under the Act.

[11] In this regard, even with respect to determining "substantial compliance" with the regulations, the ALJ erred by failing to recognize contrary evidence supplied by Employer's experts. For example, the ALJ relied upon Dr. Ajjarapu's contention that Claimant exhaled for six seconds, although the regulation Appendix specifies seven seconds, as support for finding "substantial compliance" with the regulatory requirements; however, he failed to consider that there was contrary evidence supplied by Dr. Fino that Claimant exhaled for only three seconds. Decision and Order at 15; Employer's Exhibit 7 at 10.

[12] Appendix B states, in pertinent part, "The effort shall be judged unacceptable when the patient: (A) Has not reached full inspiration preceding the forced expiration; or (B) Has not used maximal effort during the entire forced expiration . . . ." 20 C.F.R. Part 718, Appendix B; *see* 20 C.F.R. §718.103(c) (generally incorporating the requirements in Appendix B).

Consequently, the holding on which he relied related to a wholly different regulation without the pertinent requirements and cannot be applied to this case.

Because his errors as to the pulmonary function testing also affected his evaluation of the medical opinion testimony relating to disability, as well as his overall weighing of the evidence relevant to establishing total disability, I would vacate his findings as to the pulmonary function testing and the medical opinion evidence, as well as his ultimate determination with respect to Claimant's establishing total respiratory disability. Thus, I would remand the case for the ALJ to further evaluate the pulmonary function evidence, and weigh all of the evidence relating to total disability together, resolving conflicts in the evidence and providing adequate explanation for his findings and determinations in accordance with the requirements of the APA.

JUDITH S. BOGGS
Administrative Appeals Judge