U.S. Department of Labor

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

BRB No. 21-0345 BLA

ELBERT SIZEMORE, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHRISTINE TRUCKING	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 8/30/2022
	)	
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 on Remand of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits on Remand (2018-BLA-05175) rendered on a subsequent

claim[1] filed on July 30, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-904 (2018) (Act). This case is before the Benefits Review Board for the second time.

In an April 17, 2019 Decision and Order Denying Benefits, the ALJ found Claimant failed to establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found 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).[2] He also found Claimant did not establish complicated pneumoconiosis and therefore 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); 20 C.F.R. §718.304. Because Claimant failed to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.

In consideration of Claimant's appeal, the Board affirmed the ALJ's finding that Claimant did not establish complicated pneumoconiosis. *Sizemore v. Christine Trucking*, BRB No. 19-0370 BLA, slip op. at 6 n.11 (Sept. 28, 2020) (unpub). The Board vacated, however, the ALJ's finding that Claimant failed to establish total disability because he erred in weighing the pulmonary function study and medical opinion evidence.[3] *Id*. at 4-

[1] This is Claimant's second claim for benefits. The district director denied his initial claim on August 1, 2011, because he failed to establish any element of entitlement. Director's Exhibit 1. 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). Because Claimant failed to establish any element in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *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); 20 C.F.R. §718.305.

[3] The Board affirmed the ALJ's findings that Claimant's usual coal mine employment as a truck driver required light manual labor, and Claimant failed to establish total disability based on the arterial blood gas testing or through evidence of

7. Thus the Board vacated his finding that Claimant could not invoke the Section 411(c)(4) presumption and the denial of benefits, and remanded the case for further consideration of the issue of total disability. *Id*.

On remand, the ALJ found Claimant established twenty-four years of coal mine employment both in underground mines and surface mines in conditions substantially similar to underground mines. He also found Claimant is totally disabled. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309. 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 therefore invoked the Section 411(c)(4) presumption.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful 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 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.*

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pneumoconiosis and cor pulmonale with right-sided congestive heart failure. *Sizemore v. Christine Trucking*, BRB No. 19-0370 BLA, slip op. at 4-8 (Sept. 28, 2020) (unpub).

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-four 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, 13-14.

[5] The Board 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) (en banc); ALJ's Exhibit 9 at 17.

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 medical opinions.[6] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order on Remand at 10, 13. Employer contends the ALJ erred in finding this evidence establishes total disability. Employer's Brief at 4-6.

Pulmonary Function Studies

The ALJ considered six pulmonary function studies conducted on June 22, 2015, September 2, 2015, June 20, 2016, May 4, 2017, May 17, 2017, and July 12, 2017. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 4-10; Director's Exhibits 10, 11; Claimant's Exhibits 4, 5; Employer's Exhibits 1, 2. He found all but the May 17, 2017 study produced qualifying[7] values for total disability. Decision and Order on Remand at 4-5, 10. In addition, he found each of the qualifying studies valid. *Id*. at 6-9. Because the record contains five valid, qualifying studies and only one non-qualifying study, he found Claimant established total disability based on a preponderance of the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 10.

Employer contends the ALJ erred in finding the qualifying studies valid. Employer's Brief at 4-6.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[8] 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). In the absence of evidence to the

[6] The ALJ reiterated that the arterial blood gas studies do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 4, 10.

[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).

[8] An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study, and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *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 unreliable); 20 C.F.R. Part 718, Appendix B. 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 quality standards, however, do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *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). An ALJ must still determine, however, if treatment record pulmonary function studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

Employer argues the ALJ erred by mechanically crediting an administering technician's comments about Claimant's observed effort over a medical expert's review of tracings when finding each of the June 22, 2015, June 20, 2016, May 4, 2017, and July 12, 2017 qualifying studies valid.[9] Employer's Brief at 4-6. This argument has no merit in regard to the June 20, 2016 and May 4, 2017 studies.

The ALJ acknowledged Dr. Vuskovich's opinion that the June 20, 2016 study is

[9] Employer does not challenge the ALJ's finding that the September 2, 2015 study is valid. Decision and Order on Remand at 4-6. Thus we affirm this finding. *Skrack*, 6 BLR at 1-711.

invalid[10] and Dr. Jarboe's opinion that the May 4, 2017 study is invalid.[11] Decision and Order on Remand at 7-8. Contrary to Employer's argument, the ALJ did not find the first-hand observations of the administering technician for each study outweighed either Dr. Vuskovich's opinion or Dr. Jarboe's opinion. Rather, he discredited Dr. Vuskovich's opinion regarding the June 20, 2016 study because the doctor "failed to adequately explain how the . . . test fails to conform to the quality standards and how the purported non-compliance renders this study unreliable." Decision and Order at 8; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (party alleging objective study is invalid must "specify in what way the study fails to conform to the quality standards" and "demonstrate how this defect or omission renders the study unreliable"). He discredited Dr. Jarboe's opinion regarding the May 4, 2017 study because he found the doctor's "requirement that [Claimant] produce a tidal volume with each breath that is approximately fifty percent of the vital capacity is inconsistent with the regulations." Decision and Order on Remand at 8; *see Napier*, 301 F.3d at 713-14; *Oreck*, 10 BLR at 1-54.

Employer does not specifically allege error in these credibility findings. *See 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); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b). Thus we affirm the ALJ's discrediting of Dr. Vuskovich's opinion with respect to the June 20, 2016 study and Dr. Jarboe's opinion with respect to the May 4, 2017 study. As Employer raises no additional argument, we affirm the ALJ's finding that these studies are valid. *Keener*,

[10] Dr. Vuskovitch reviewed the June 20, 2016 study performed during Claimant's treatment at St. Charles Breathing Center and assessed its validity. Employer's Exhibit 8. He opined the "flow volume loops and volume time tracings show" Claimant did not put forth the required effort to generate valid pulmonary function study results, his FVC and FEV1 results were artificially lowered due to insufficient effort, and his respiratory rate and tidal volume "were not sufficient to generate a valid MVV result." *Id*. at 3. Further, he stated that the "spirometer computer printout volume-time display scale factor ratio does not comply with ATS standards[,]" and the study equipment "artificially shows poor-initial-effort volume time tracings as maximum effort tracings[.]" *Id*. He also opined that, although the study technician commented Claimant had made "Good effort[,]" spirometry "is a maximum effort test." *Id*.

[11] Dr. Jarboe reviewed the May 4, 2017 study and addressed its validity. Employer's Exhibit 2. He opined the MVV result "is not valid as [Claimant] failed to achieve a tidal volume that was approximately [fifty-percent] of his vital capacity." *Id*. at 7-8.

23 BLR at 1-237; *Vivian*, 7 BLR at 1-361; 20 C.F.R. §718.103(c).

Because we affirm the ALJ's finding that the qualifying June 20, 2016, and May 4, 2017 pulmonary function studies are valid, and Employer does not contest the validity of the qualifying September 2, 2015 study, substantial evidence supports the ALJ's finding that the preponderance of the pulmonary function study evidence establishes total disability.[12] 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 10. Thus we affirm his finding that Claimant established total disability based on this evidence. *Id.*

Medical Opinions

The ALJ also weighed Dr. Ajjarapu's opinion that Claimant is totally disabled and the contrary opinions of Drs. Jarboe and Dahhan that he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 11-13. He found Dr. Ajjarapu's opinion reasoned, documented, and consistent with the objective evidence she reviewed, including the qualifying September 2, 2015 pulmonary function study. Decision and Order on Remand at 11. Conversely, he found the opinions of Drs. Jarboe and Dahhan unpersuasive and contrary to the weight of the objective evidence. *Id*. at 11-13.

Employer raises no specific arguments regarding the medical opinion evidence other than its contention that the pulmonary function studies do not establish total disability, which we have rejected. Employer's Brief at 6. As Employer does not specifically challenge any of the ALJ's credibility findings, we affirm the ALJ's determination that the medical opinions establish total disability. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 12-13.

We further affirm the ALJ's conclusion that the evidence, weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order on Remand at 13. Thus, we affirm the ALJ's finding Claimant invoked the Section 411(c)(4) presumption and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305(b)(1), 725.309(c); Decision and Order on Remand at 14.

[12] Because Claimant established total disability based on the September 2, 2015, June 20, 2016, and May 4, 2017 studies, we need not address Employer's arguments concerning the validity of the qualifying June 22, 2015 and July 12, 2017 pulmonary function studies. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal[13] nor clinical pneumoconiosis, [14] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found that Employer failed to establish rebuttal by either method. [15] Decision and Order on Remand at 21.

To disprove legal pneumoconiosis, Employer must establish Claimant does not have 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), 718.305(d)(1)(A); *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n. 8 (2015). Employer relied on the opinions of Drs. Dahhan and Jarboe, who both opined Claimant has a restrictive lung impairment due to obesity and unrelated to coal mine dust exposure. Employer's Exhibits 1, 2, 5, 7. Further, Dr. Jarboe diagnosed asthma unrelated to coal mine dust exposure. Employer's Exhibits 2, 7. The ALJ found both of their opinions inadequately reasoned and inconsistent with the regulations. Decision and Order on Remand at 18-19.

Employer argues the ALJ impermissibly rejected the opinions of Drs. Dahhan and Jarboe by requiring them to "rule out" coal mine dust exposure as a cause of Claimant's lung disease or impairment, a stricter standard than the regulations require. Employer's Brief at 7; *see* 20 C.F.R. §§718.201(a)(2), 718.305(d)(1)(A). We disagree.

The ALJ correctly stated Employer has the burden to establish that Claimant does not have legal pneumoconiosis, which he properly identified as any "chronic lung disease

[13] "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).

[14] "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).

[15] The ALJ found Employer successfully rebutted the existence of clinical pneumoconiosis. Decision and Order on Remand at 17.

or impairment significantly related to, or substantially aggravated by, dust exposure from coal mine employment." Decision and Order on Remand at 15, 17; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A).

Moreover, the ALJ did not reject the opinions of Drs. Dahhan and Jarboe because they were insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis.[16] Rather, he found both doctors required a positive x-ray for clinical pneumoconiosis in order to diagnose legal pneumoconiosis, contrary to the regulations which provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); 20 C.F.R. §§718.201, 718.202(a)(4), 718.202(b); Decision and Order on Remand at 18-19. He also found both doctors did not adequately explain why Claimant's restrictive lung impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure even if it was caused by obesity. *See Young*, 947 F.3d at 405; 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(A); Decision and Order on Remand at 18-19. Finally, he found Dr. Jarboe's reliance on bronchoreversibility as evidenced by pulmonary function testing unpersuasive. *See Young*, 947 F.3d at 405-09; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order on Remand at 18. As Employer does not challenge these credibility determinations, we affirm them.[17] *Skrack*, 6 BLR at 1-711.

We therefore affirm the ALJ's finding that Employer failed to rebut the presumption of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i).

[16] Although the ALJ indicated in a separate portion of his Decision and Order that the Fourth Circuit has applied a "rule out" standard on the issue of legal pneumoconiosis, Decision and Order on Remand at 14-15, he did not apply such a standard when weighing the opinions of Drs. Dahhan and Jarboe. Thus the ALJ's mischaracterization of Fourth Circuit jurisprudence is harmless. *See Larioni*, 6 BLR at 1-1278.

[17] Employer also argues the ALJ erred in crediting Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis. Employer's Brief at 7-8. Because the ALJ permissibly discredited the opinions of Drs. Dahhan and Jarboe, the only opinions supporting Employer's burden to affirmatively establish the absence of legal pneumoconiosis, Decision and Order on Remand at 18-19, we need not address this argument. *See Larioni*, 6 BLR at 1-1278.

Furthermore, we affirm as unchallenged the ALJ's finding that Employer failed to rebut the presumption by showing no part Claimant's total disability is caused by pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 21. We therefore also affirm his finding that Employer did not rebut the Section 411(c)(4) presumption. Decision and Order at 21.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge