U.S. Department of Labor

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

BRB No. 21-0369 BLA

DONNIE E. RAMEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY LLC	)	
	)	DATE ISSUED: 8/15/2022
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

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

Employer appeals Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Awarding Benefits (2015-BLA-05128) rendered on a claim filed on December 12, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had thirty years of underground coal mine employment, 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,[1] 30 U.S.C. §921(c)(4) (2018). Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding Claimant established total disability and invoked the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, but urges the Benefits Review Board to reject Employer's challenge to the constitutionality of the Section 411(c)(4) presumption.

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).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act

[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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4.

[3] 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); Hearing Tr. at 12.

(ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 13-15. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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. 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 arterial blood gas studies, medical opinions, and evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 14-16.

Employer argues the ALJ erred in finding Claimant established total disability based on the arterial blood gas studies and medical opinions. Employer's Brief at 6-12. We disagree.

The ALJ considered three arterial blood gas studies conducted on January 21, 2014, November 25, 2019, and April 17, 2020. Decision and Order at 6, 14-15. The January 21, 2014 and April 17, 2020 studies produced non-qualifying[5] results, while the November 25, 2019 study produced qualifying results. Director's Exhibit 9 at 26; Claimant's Exhibits 8, 10. The ALJ made no finding regarding the validity of the January 21, 2014 study, but determined the April 17, 2020 study could not be considered because it was administered while Claimant was being treated for acute hypoxemia in a hospital emergency room. Decision and Order at 14-15. He also determined the November 25, 2019 study is valid.

[4] The ALJ found the pulmonary function 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 14.

[5] A "qualifying" arterial blood gas study yields values equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

Id. at 14-15. Giving greatest weight to the November 25, 2019 qualifying study based on recency, he thus found Claimant established total disability based on the preponderance of the blood gas study evidence.[6] 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 15.

Employer argues the ALJ erred in finding the November 25, 2019 blood gas study established total disability because it does not comply with the quality standards. Employer's Brief at 7-12. We disagree.

When weighing arterial blood gas studies developed by any party, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.105(c); 20 C.F.R. Part 718, Appendix C; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc); *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). 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 blood gas studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.105; *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). The record reflects the November 25, 2019 blood gas study was developed as a part of Claimant's treatment and not in anticipation of litigation, and it is thus not subject to the quality standards.[7] Consequently, we reject Employer's assertion that the ALJ erred by not applying the quality standards to the November 25, 2019 blood gas study.

[6] Employer does not challenge the ALJ's finding that the more recent November 25, 2019 study is more probative of Claimant's condition than the January 21, 2014 study; thus we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 15.

[7] The November 25, 2019 blood gas study was conducted at Mountain Comprehensive Health Corporation, where Drs. Breeding and Alam treated Claimant. Director's Exhibit 38 at 33; Claimant's Exhibits 1-3, 5-8, 11; Claimant's Evidence Summary Form. Dr. Breeding treated Claimant on November 18, 2019, for his worsening chronic obstructive pulmonary disease and "black lung." Claimant's Exhibit 5. He referred Claimant to Dr. Alam, who conducted a chest x-ray, pulmonary function study, and blood gas study on November 25, 2019. *Id.*; Claimant's Exhibits 1, 2 at 5, 7, 8. Dr. Rosenberg identified the November 25, 2019 blood gas study as being "reported in the clinical notes." Employer's Exhibit 4 at 4.

We thus affirm the ALJ's finding that the preponderance of the blood gas study evidence established total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 15.

Employer also argues the ALJ erred in finding the medical opinion evidence established total disability. Employer's Brief at 6-7.

The ALJ considered the medical opinions of Drs. Breeding, Alam, Rosenberg, and Mettu. Decision and Order at 15-16. Drs. Breeding and Alam opined Claimant is totally disabled, Dr. Rosenberg opined he is "possibly" totally disabled, and Dr. Mettu opined he is not. Director's Exhibit 38 at 10, 66; Claimant's Exhibits 1-3; Employer's Exhibits 4, 6. The ALJ determined Drs. Breeding and Alam are Claimant's treating physicians in accordance with 20 C.F.R. §718.104(d)[8] and found their opinions reasoned, documented, and consistent with the weight of the blood gas studies. Decision and Order at 15-16. He found Dr. Rosenberg's opinion equivocal and entitled to less weight. *Id*. Further, he found Dr. Mettu's opinion entitled to less weight because he did not have a complete picture of Claimant's health because he did not consider the November 25, 2019 blood gas study.[9] *Id*. The ALJ thus found Claimant established total disability based on the medical opinions of Drs. Breeding and Alam. *Id.*

Employer argues the ALJ erred in crediting the opinions of Drs. Breeding and Alam because they relied on non-qualifying pulmonary function studies. Employer's Brief at 6-7. We disagree. Contrary to Employer's contention, a physician may conclude a miner is disabled even if the objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); 20 C.F.R. §718.204(b)(2)(iv). Moreover, as the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and assign those opinions appropriate weight. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

[8] In weighing the medical evidence of record relevant to whether a miner is totally disabled due to pneumoconiosis, the adjudicator "must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the adjudicator shall take into consideration the following factors: nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4).

[9] We affirm, as unchallenged, the ALJ's discounting of Drs. Rosenberg's and Mettu's opinions. *See Skrack*, 6 BLR at 1-711; Decision and Order at 15-16.

Dr. Breeding opined Claimant is totally disabled based on the moderate restriction indicated on his pulmonary function study.[10] Director's Exhibit 38 at 66; Claimant's Exhibits 1, 5, 6 at 14, 16. He also observed Claimant can only walk fifteen feet before hyperventilating and becoming nauseous, and would be a candidate for oxygen at home if he could afford it. *Id.* Dr. Alam opined Claimant is disabled from a pulmonary perspective based on his qualifying blood gas study and the FEV1 on his pulmonary function study. Claimant's Exhibits 2, 3. The ALJ permissibly found the opinions of Drs. Breeding and Alam well-reasoned and documented based on their treating physician relationship with Claimant and the objective testing they administered, particularly the November 25, 2019 qualifying blood gas study. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 15-16.

We therefore affirm the ALJ's finding that a preponderance of the medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16.

We further affirm the ALJ's finding that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 16. Thus we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1). As Employer has not challenged the ALJ's determination that it did not rebut the presumption, we affirm this finding and therefore the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-24.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The ALJ found the onset date of Claimant's total disability due to pneumoconiosis is not ascertainable from the record and awarded benefits commencing December 2013, the month in which he filed his claim. Decision and Order at 24. Employer maintains the benefits commencement date must be after the non-qualifying January 21, 2014 blood gas

[10] We note Employer does not challenge the validity of the pulmonary function studies.

study. Employer's Brief at 10 n.5. Employer's argument has merit to the extent that the ALJ failed to consider whether the evidence established Claimant was not totally disabled as of a date subsequent to the date of filing, and therefore was not entitled to benefits until a later date. *See Lykins*, 12 BLR at 1-182-83; *Edmiston*, 14 BLR at 1-69; *Owens*, 14 BLR at 1-50.

In finding Claimant totally disabled, the ALJ weighed the conflicting blood gas studies.[11] 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 14-15. The ALJ noted the January 21, 2014 blood gas study produced non-qualifying results, while the November 25, 2019 blood gas study produced qualifying results. *Id*. at 14. He found the qualifying November 25, 2019 blood gas study entitled to greater weight because it was administered more recently. *Id*. Thus he determined Claimant established total disability based on the November 25, 2019 blood gas study, but did not invalidate the January 21, 2014 blood gas study or find it otherwise not credible regarding Claimant's respiratory condition at the time it was administered. *Id.* at 14-15.

Additionally, the ALJ noted Dr. Mettu opined in January 2014 that Claimant was not totally disabled based, in part, on the non-qualifying January 21, 2014 blood gas study. Director's Exhibit 38 at 28. The ALJ found Dr. Mettu's opinion supported by the non-qualifying objective testing administered as part of his examination of Claimant on January 21, 2014. Decision and Order at 15. He assigned the doctor's opinion less weight, however, because it was not based on the most recent objective testing, as Dr. Mettu "did not have an opportunity to review subsequent testing in the record, including the November 25, 2019 [blood gas study] that produced qualifying results." *Id*. at 11.

Because the ALJ did not consider whether the non-qualifying January 21, 2014 blood gas study and Dr. Mettu's opinion constitute credible evidence that Claimant was not totally disabled at a point subsequent to the filing date, we vacate his finding that benefits should commence in December 2013, the month in which Claimant filed his claim. 20 C.F.R. §725.503(b); *see Edmiston*, 14 BLR at 1-69; *Owens*, 14 BLR at 1-47; Decision and Order at 24. On remand, the ALJ should consider whether credible evidence establishes Claimant was not totally disabled subsequent to the filing date of his claim. *See Owens*, 14 BLR at 1-50. Thus we remand this case for the ALJ to reconsider the date from which benefits should commence.

[11] As previously noted, the ALJ found the pulmonary function studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 14.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration as to the date for the commencement of benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

Buzzard, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority opinion, except its decision to remand the claim for the ALJ to redetermine the date benefit payments should begin. A miner is entitled to benefits beginning in the month he became totally disabled due to pneumoconiosis. 20 C.F.R. 725.503(b). If that date cannot be determined, benefits commence in the month he filed his claim. *Id*. If credible evidence establishes the miner was not totally disabled due to pneumoconiosis at any time after filing his claim, however, the miner is not entitled to compensation during that period. *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990).

Dr. Mettu examined Claimant on January 21, 2014 and opined he is not totally disabled. The ALJ first discredited Dr. Mettu's opinion because he did not review the November 25, 2019 blood gas study – which the ALJ found established total disability – and, therefore, did not have a "complete picture" of Claimant's health.[12] Decision and

[12] I also note that Dr. Mettu's opinion is largely conclusory. After first mistakenly relying on another patient's blood gas study to opine that Claimant is "not totally disabled," Director's Exhibits 12 at 14-15; 38 at 5, Dr. Mettu provided the Department of Labor with the correct blood gas study results and updated his opinion by stating, without further elaboration, that Claimant has the pulmonary capacity "to do one year of his last coal mines job." Director's Exhibit 38 at 4.

Order at 15. As for the objective data underlying Dr. Mettu's opinion, including the non-qualifying January 21, 2014 blood gas study, the ALJ next found the objective studies "do not reflect a precipitous decline" from which he could conclude that Claimant "went from being not disabled to being disabled during any particular month." *Id*. at 24; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 669, 578 (6th Cir. 2000) (a non-qualifying objective test "may preclude the performance of the miner's usual duties").

Employer addresses neither finding. The entirety of its argument – three sentences in a footnote – simply claims that because Dr. Mettu's "January 2014 evaluation failed to show disability," "the ALJ err[ed] in claiming no evidence shows when disability presented." Employer's Brief at 10 n.5. But, as noted, the ALJ found Dr. Mettu's opinion was not credible and the objective testing he relied on did not establish that Claimant "went from being not disabled to being disabled" during the pendency of this claim. Decision and Order at 15, 24. As Employer provides no basis to overturn these findings, I would hold the ALJ appropriately determined Claimant is entitled to benefits as of December 2013, the month he filed his claim.[13] *Id*. at 24.

GREG J. BUZZARD
Administrative Appeals Judge

[13] The ALJ's decision resulted in Claimant receiving only two months of benefits during a period of alleged non-disability. *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *see* Employer's Brief at 10 n.5 ("Onset preceding the 2014 evidence is error . . ."). Thus, even if the ALJ were to credit Dr. Mettu's opinion on remand, he must award benefits commencing no later than February 2014.