U.S. Department of Labor

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

BRB No. 21-0389 BLA

GLENNIS C. HATFIELD (o/b/o FONSO HATFIELD)	)	
Claimant-Respondent	)	
v.	)	
KENTLAND ELKHORN COAL CORPORATION	)	DATE ISSUED: 8/29/2022
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2018-BLA-05256) rendered 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 March 14, 2016.[1]

The ALJ accepted the parties' stipulation that the Miner had 36.68 years of coal mine employment with at least fifteen years of it occurring underground and found Claimant[2] established a totally disabling respiratory impairment and a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.204(b)(2), 725.309. He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] The ALJ further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption.[5] Claimant responds in

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[1] This is the Miner's fifth claim for benefits. ALJ J. Michael O'Neill denied his most recent claim, filed March 9, 1995, because he did not establish any element of entitlement. Director's Exhibit 68.

[2] Claimant is the Miner's widow and is pursuing the Miner's claim on his estate's behalf. Decision and Order at 2 n.2.

[3] Where a miner files a claim for benefits more than one year after the denial of a previous claim, 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)(1); *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 Miner did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *Id.*

[4] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response.

The Benefits Review 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.[6] 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, a claimant must establish the miner had "a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if he had a pulmonary or respiratory impairment that, standing alone, prevented him from performing his usual coal mine 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 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).

Employer asserts the ALJ erred in finding Claimant established the Miner was totally disabled based on the pulmonary function study and medical opinion evidence.[7] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 9, 12; Employer's Brief 5-15. We disagree.

Pulmonary Function Study Evidence

The ALJ considered a single pulmonary function study of record dated July 28, 2016. Decision and Order at 6-9; Director's Exhibit 11. He found the study valid,

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 30.

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

produced qualifying values[8] both before and after the administration of bronchodilators, and thus established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-9; Director's Exhibit 11.

Employer asserts the ALJ erred in assessing the validity of the July 28, 2016 study. Employer's Brief at 5-11. We disagree.

When considering pulmonary function studies conducted in anticipation of litigation, an ALJ must determine whether the studies are in substantial compliance with the quality 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). Compliance with the quality standards at 20 C.F.R. Part 718, Appendix B "shall be presumed," unless there is "evidence to the contrary." 20 C.F.R. §718.103(c). 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 must then, in his role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

The ALJ considered the opinions[9] of Drs. Vuskovich and Tuteur that the July 28, 2016 study is invalid. Dr. Vuskovich opined the Miner "did not put forth the effort required to generate valid spirometry results", his initial efforts were sub-maximum "which artificially lowered his FEV1 results", and he "prematurely terminated his expiratory efforts which artificially lowered his FVC results." Employer's Exhibit 9 at 4. He further opined the Miner's non-qualifying arterial blood gas testing confirms the July 28, 2016 pulmonary function study is invalid:

> [The Miner's] ability to maintain normal resting PaO_2 and normal resting $PaCO_2$ and then increasing his PaO_2 and decreasing his $PaCO_2$ with exercise showed that [he] had normal ventilatory capacity and normal lungs. If [the Miner's] spirometry results were true results then with exercise [his] $PaCO_2$ would have increased and his PaO_2 would have fallen, and his exercise A-

[8] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The technician who administered the July 28, 2016 study indicated the Miner's degree of cooperation and ability to understand instructions were good. Director's Exhibit 11. Dr. Gaziano reviewed the study results and determined it is acceptable. Director's Exhibit 15.

> aD02 result would have abnormally substantially widened. [The Miner's] normal resting-exercise [blood gas] results confirmed that [he] did not put forth the effort required to generate valid spirometry results.

Employer's Exhibit 9 at 7.

The ALJ found Dr. Vuskovich did not "explain how he reached his conclusions that the Miner's initial efforts were not maximum efforts or that the Miner prematurely terminated his expiratory efforts." Decision and Order at 7. Moreover, he found Dr. Vuskovich did not identify how "the [pulmonary function study] fails to comply with the quality standards or the standard upon which he relied in determining that the Miner prematurely terminated his expiratory efforts." *Id.* The ALJ thus permissibly found Dr. Vuskovich's opinion unpersuasive for failing to adequately explain his conclusions. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *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").

Furthermore, the ALJ permissibly found Dr. Vuskovich's reliance on the non-qualifying arterial blood gas testing to invalidate the qualifying pulmonary function testing inadequately explained given that the two tests measure different types of impairment. Decision and Order at 8-9; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

Dr. Tuteur initially opined the July 28, 2016 pulmonary function study was "borderline valid." Director's Exhibit 22 at 1. After reviewing Dr. Vuskovich's opinion, however, he opined the study "is not reproducible and therefore not valid." Employer's Exhibit 7 at 2-3. The ALJ concluded Dr. Tuteur based his latest opinion solely on Dr. Vuskovich's assessment, which he had found unpersuasive. Decision and Order at 9. The ALJ further noted Dr. Tuteur failed to identify or explain how the study fails to comply with the quality standards or how the alleged non-compliance renders the results unreliable. *Id.* at 8. Thus, the ALJ permissibly found Dr. Tuteur's opinion entitled to no weight. *See Crisp*, 866 F.2d 179, 185; *Rowe*, 710 F.2d 251, 255.

As Employer failed to establish the July 28, 2016 pulmonary function study does not comply with the quality standards, we affirm the ALJ's finding that the July 28, 2016 pulmonary function study it is valid. Decision and Order at 9. As Employer raises no further argument, we affirm his finding that the study establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9.

Medical Opinion Evidence

The ALJ also found Claimant established total disability based on the well-reasoned and documented opinions of Drs. Forehand and Sood. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-13. He discredited the contrary opinions of Drs. Vuskovich and Tuteur because they believed there were no valid qualifying pulmonary function studies of record, contrary to his finding that the July 28, 2016 pulmonary function study is valid.[10] Director's Exhibit 11, 19; Claimant's Exhibit 6; Employer's Exhibits 3, 7, 9.

With respect to the medical opinions of Drs. Tuteur and Vuskovich, Employer reiterates its arguments that the July 28, 2016 pulmonary study is invalid. Employer's Brief at 10-15. Having affirmed the ALJ's contrary finding, we affirm his discrediting of the opinions of Drs. Tuteur and Vuskovich. *Crisp*, 866 F.2d 179, 185; *Rowe*, 710 F.2d 251, 255; Decision and Order at 11-12.

Employer next argues the ALJ erred in crediting the opinions of Drs. Forehand and Sood. Employer's Brief at 11-12, 13-14. Dr. Forehand diagnosed the Miner with "[a] significant work-limiting respiratory impairment" based on the Miner's qualifying pulmonary function testing. Director's Exhibit 11. At the Department of Labor's request, he reviewed Dr. Tuteur's opinion and authored a supplemental report reaffirming his opinion of total disability. Director's Exhibit 19. Similarly, Dr. Sood opined, based on Miner's July 28, 2016 pulmonary function study values, that the Miner "could no longer do his last coal mining job because of his pulmonary impairment."[11] Claimant's Exhibit 6 at 9. Contrary to the Employer's arguments, the ALJ permissibly found both opinions

[10] Dr. Vuskovich opined the Miner "had the respiratory capacity to return to operating underground mining equipment" after discussing the Miner's x-rays, normal arterial blood gas studies, and allegedly invalid qualifying pulmonary function study. Employer's Exhibit 9 at 2-9. Dr. Tuteur opined the Miner was not disabled as his diagnosis of chronic obstructive pulmonary disease (COPD) and associated "severe obstructive ventilatory abnormality [was] based on numerical data that were considered as invalid as an assessment of maximum function by Dr. Vuskovich." *Id.* 7 at 2-3.

[11] We reject Employer's argument that Dr. Sood's total disability opinion is not credible because he failed to adequately explain how the Miner's total disability was caused by coal mine dust. Employer's Brief at 13-14. The relevant inquiry at disability is whether the Miner had a totally disabling respiratory impairment; the cause of that impairment is addressed at disability causation, or in consideration of rebuttal of the Section 411(c)(4) presumption. *See, e.g., Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

well-reasoned and documented as both were "consistent with Miner's qualifying [pulmonary function study]." Decision and Order at 10-12; *see Crisp*, 866 F.2d 179, 185; *Rowe*, 710 F.2d 251, 255.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-13. We also affirm the ALJ's finding that Claimant established total disability in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm his determinations that 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.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[12] 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 Employer failed to establish rebuttal by either method.[13]

Employer raises no specific allegations of error regarding the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption, other than its general contention that Miner does not have a respiratory or pulmonary impairment demonstrated on a valid pulmonary function study. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Having rejected Employer's contention regarding the

[12] "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).

[13] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 16.

validity of the qualifying July 28, 2016 study, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption, and the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge