U.S. Department of Labor

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

BRB Nos. 22-0329 BLA
and 22-0330 BLA

BONNIE OWENS (o/b/o and Widow of JOHN A. OWENS) Claimant-Petitioner v. LODESTAR ENERGY, INCORPORATED and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 8/24/2023 DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Bonnie Owens, Auxier, Kentucky.

Tighe A. Estes and H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.[1]

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

PER CURIAM:

Claimant appeals, without representation,[2] Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Benefits (2017-BLA-05152 and 2018-BLA-05445) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[3] This case involves a miner's claim filed on December 22, 2014, and a survivor's claim filed on October 30, 2017.

[1] Paul E. Jones and Denise Hall Scarberry of the Jones & Jones Law Office, PLLC, Pikeville, Kentucky, filed a motion to withdraw as counsel on December 7, 2022, after filing Employer's response brief, which the Benefits Review Board accepted as part of the record. *Owens v. L[ode]star Energy, Inc.*, BRB Nos. 22-0329 BLA and 2[2]-0330 BLA (Aug. 9, 2022) (Order) (unpub.). Subsequently, on December 14, 2022, the counsel who appear in the party identification block filed a motion to substitute as Employer's counsel and requested an extension of all outstanding procedural or evidentiary deadlines. We grant the motion to withdraw as counsel filed by Jones & Jones, and grant the motion to substitute Employer's counsel filed by Reminger Co., L.P.A. As the case was fully briefed by Employer's former counsel and there are no outstanding procedural or evidentiary deadlines, Employer's request for an extension of time is moot.

[2] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of Claimant, that the Board review the ALJ's decision, but is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Claimant is the widow of the Miner, who died on September 15, 2017. Director's Exhibit S-7. Claimant's appeal in the miner's claim was assigned BRB No. 22-0329 BLA, and her survivor's claim appeal was assigned BRB No. 22-0330 BLA. The Board has consolidated these appeals for purposes of decision. *Owens v. Lo[de]star Energy, Inc.*, BRB Nos. 22-0329 BLA and 22-0330 BLA (June 14, 2022) (unpub.). We incorporate the ALJ's identification of some exhibits with the letters "A", "B", "M", or "S" before them. Decision and Order at 2.

The ALJ noted Employer stipulated to twenty-six years of surface coal mine employment. In the miner's claim, the ALJ found Claimant did not establish the Miner was totally disabled,[4] a requisite element of entitlement.[5] In the survivor's claim, the ALJ found Claimant failed to establish that the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the ALJ denied benefits in both claims.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are 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).

Miner's Claim - 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

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that the Miner was totally disabled due to pneumoconiosis if he had 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. The ALJ did not mention this presumption; however, his finding that Claimant did not establish total disability precluded Claimant from invoking it.

[5] Employer contested whether the Miner performed his twenty-six years of surface coal mine employment in conditions substantially similar to underground coal mines and its designation as the responsible operator. January 14, 2021 Hearing Transcript at 7-8; Employer's Post-Hearing Brief at 5-7, 12. However, the ALJ did not resolve these issues in his decision.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; January 14, 2021 Hearing Transcript at 33-34.

qualifying[7] pulmonary function studies, qualifying arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[8] 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 failed to establish total disability under any of the subsections at 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 13. We vacate the ALJ's findings regarding the pulmonary function study and medical opinion evidence.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies.[9] Decision and Order at 5-7. The March 9, 2015 and October 15, 2015 studies produced qualifying pre-bronchodilator

[7] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The ALJ correctly found that the three arterial blood gas studies, dated March 9, 2015, October 15, 2015, and December 9, 2016, are non-qualifying for total disability, and that that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 5, 8; Director's Exhibits A-13, A-22; Employer's Exhibit 4. Thus, we affirm the ALJ's determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). The ALJ also correctly observed the Miner's treatment records do not diagnose total disability or specify any degree of respiratory or pulmonary impairment. Decision and Order at 8; Director's Exhibits A-19, A-20. Moreover, the ALJ correctly found no evidence of complicated pneumoconiosis and thus Claimant is not entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). 30 U.S.C. §921(c)(3); Decision and Order at 5.

[9] Because the administering physicians of the five pulmonary function studies reported Claimant's height as 68.50, 69, and 69.25 inches, the ALJ averaged the recorded heights as 68.95 inches and determined whether the pulmonary function studies were qualifying using the closest greater table height of 69.3 inches set forth in Appendix B of 20 C.F.R. Part 718. *See Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 756 (6th Cir. 2019); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 6.

values but non-qualifying post-bronchodilator values. Director's Exhibits A-13 at 13; A-22 at 10. The November 21, 2016 treatment study produced qualifying values and no bronchodilator was administered. Claimant's Exhibit M-4. The December 9, 2016[10] study yielded qualifying pre-bronchodilator values but Dr. Dahhan, who conducted the study, indicated the results were invalid; the post-bronchodilator values were non-qualifying. Employer's Exhibit 4. The August 30, 2017 treatment study produced non-qualifying pre-bronchodilator values and no bronchodilators were administered. Claimant's Exhibit M-3.

The ALJ found the pre-bronchodilator studies were more probative of the Miner's respiratory condition and gave them greater weight than the post-bronchodilator studies. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (use of a bronchodilator does not provide an adequate assessment of the miner's disability, although it may aid in determining the presence or absence of pneumoconiosis); Decision and Order at 7. Weighing the pre-bronchodilator results, the ALJ stated:

> The Miner's pre-bronchodilator FEV1 results are consistently qualifying although they wax and wane, they demonstrative an overall improvement from 1.54 to 1.74. The Miner's pre-bronchodilator FEV1/FVC ratio improved to non-qualifying on and after the November 21, 2016 PFT. Neither the Miner's FVC nor FEV1/FVC ratio was qualifying on or after the November 21, 2016, PFT. Additionally, the Miner's 2 most recent PFTs are non-qualifying. And, the Miner's most recent PFT yielded the highest of all the pre-bronchodilator MVV values. Considering the improvement from qualifying to non-qualifying on the more recent PFTs, I find the preponderant weight of the PFT evidence insufficient to prove that the Miner was totally disabled by a respiratory or pulmonary impairment.

Decision and Order at 7.

We vacate the ALJ's weighing of the pulmonary function studies as he failed to adequately explain his rationale. The ALJ initially erred in concluding the Miner was not totally disabled because the two most recent studies are non-qualifying when he

[10] The ALJ misidentified the date of this pulmonary function study as December 19, 2016. Decision and Order at 5; Employer's Exhibit 4 at 47.

specifically found the December 9, 2016 pre-bronchodilator MVV values invalid[11] and only the August 30, 2017 study had valid and non-qualifying pre-bronchodilator values. Employer's Exhibit 4; Claimant's Exhibit M-3. Because the three valid and qualifying pulmonary function studies have qualifying FEV1 and MVV values, the ALJ failed to rationally explain how the December 9, 2016 study, with an invalid MVV, can dispute or outweigh them. 20 C.F.R. §718.103(c) (pulmonary function study results that fail to meet the quality standards "shall [not] constitute evidence of the presence or absence of a respiratory or pulmonary impairment").

Moreover, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held it is irrational to credit evidence solely on the basis of recency where it shows the miner's condition has improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (given the progressive nature of pneumoconiosis, a fact-finder must evaluate evidence without reference to its chronological order when the evidence shows a miner's condition has improved) (citing *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (when the evidence shows improvement in condition, as opposed to deterioration, "[e]ither the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier")); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 10 (June 27, 2023); Decision and Order at 7. The ALJ's reliance on the most recent study showing an improvement in Claimant's pulmonary function study results and his reference to the waxing and waning of the results as a basis to find Claimant is not totally disabled is contrary to *Woodward*. *See Woodward*, 991 F.2d at 319-20; *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins*, 958 F.2d at 51-52; *Smith*, BRB No. 21-0329 BLA, slip op. at 10.Of the four *valid* pre-bronchodilator tests, three were qualifying (March 9, 2015, October 15, 2015, and November 21, 2016) and only one was non-qualifying (August 30, 2017). Because the ALJ failed to adequately explain his conclusion that a preponderance of the pulmonary function study evidence does not support a finding of total disability, we vacate it. 20 C.F.R §718.204(b)(2)(i); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence that a reasonable mind could accept as adequate to support a conclusion); *Woodward*, 991 F.2d at 319-20; Decision and Order at 7.

Medical Opinions and Evidence as a Whole

The ALJ considered three medical opinions as to whether the Miner was totally disabled. Decision and Order at 9-13. Dr. Ajjarapu evaluated the Miner on behalf of the

[11] The ALJ found the December 9, 2016 study "is not indicative of total disability as neither the pre-bronchodilator FVC nor FEV1/FVC ratio yielded qualifying values," and "the MVV is not reliable." Decision and Order at 7; Employer's Exhibit 4 at 9, 13.

Department of Labor on March 9, 2015. Director's Exhibit A-13. She opined the Miner was totally disabled based on the qualifying pulmonary function values she obtained that showed a severe pulmonary impairment and an arterial blood gas study that showed resting hypoxemia. *Id*. at 3. In addition, she opined that the Miner was totally disabled from performing the exertional requirements of an end-loader operator. Director's Exhibit A-27 at 2-3. The ALJ found Dr. Ajjarapu's opinion was not well-reasoned to the extent she relied on qualifying pulmonary function studies, contrary to the ALJ's weighing of the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 12.

Dr. Jarboe examined the Miner on October 15, 2015, and opined he "retain[ed] the functional pulmonary capacity to perform his last coal mining job of operating an end loader," which "does not require heavy manual labor." Director's Exhibit A-23 at 7. The ALJ gave little weight to Dr. Jarboe's opinion because the physician did not specifically address the exertional requirements of the Miner's usual coal mine employment while generally stating the Miner was not totally disabled. Decision and Order at 12.

Dr. Dahhan examined the Miner on December 9, 2016, and reviewed the record evidence. He opined the Miner was totally disabled from a respiratory standpoint and did not retain the capacity to return to his previous coal mine job, which included "heavy lifting of 50-60 pounds 5-6 times per day." Employer's Exhibit 4 at 3, 5. The ALJ discredited Dr. Dahhan's opinion because the physician had an inaccurate understanding of the exertional requirements of the Miner's usual coal mine work[12] and his opinion was "inconsistent with the preponderant weight" of the pulmonary function study evidence. Decision and Order at 12.

Having discredited all of the medical opinions, the ALJ concluded that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 13. To the extent the ALJ's erroneous findings regarding the pulmonary function study evidence at C.F.R. §718.204(b)(2)(i) influenced his discrediting of Dr. Ajjarapu's opinion, we vacate his finding.

[12] The ALJ found Dr. Dahhan's "determination that the Miner's usual coal mine work required 'lifting 50-60 pounds 5-6 times per day' is inconsistent with the Miner's indication that his usual coal mine work required 'NO' lifting . . . and is unsupported by the evidence of record." Decision and Order at 12 (quoting Director's Exhibit A 4 at 2). The ALJ permissibly discredited Dr. Dahhan's opinion because the physician had an inaccurate understanding of the exertional requirements of the Miner's usual coal mine work. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); Decision and Order at 12.

Moreover, even if total disability cannot be established by pulmonary function or arterial blood tests, it "may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents" him from performing his usual coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (explaining a claimant can establish total disability despite non-qualifying objective tests).

The ALJ specifically found Dr. Ajjarapu had an accurate understanding of the Miner's usual coal mine work[13] and explained the physical demands of operating an end loader:

> Let us look at the body parts that are involved in doing this particular job. Neck-front end loaders have to repeatedly . . . turn their head to the side, when moving backwards. Shoulders-front end loaders have to repeatedly use controls with the arm away from their body. Wrist-front end loaders have to continuously grip controls when maneuvering controls. Back-have to sit for long periods of time driving over rough surfaces. Knees-must continuously activate with foot pedals with knees bent. So, all these activities require energy and stamina. . . .

[13] The ALJ noted the Miner reported on his Employment History Form CM-911a that he worked as a loader operator and his Description of Coal Mine Work Form CM-913 indicated his job required sitting for nine hours each day and standing but did not require crawling or lifting. Decision and Order at 9; Director's Exhibits A-3, A-4. The ALJ noted the Miner described his last "*non-coal mine employment*" was shoveling the belt line and running a loader at a "black top plant," which required "sitting, standing, *lifting* and carrying for 'varied' times each day.'" Decision and Order at 9 n.28; Director's Exhibit A-4 at 3 (emphasis added). In addition, the ALJ took official notice of the fourth edition of the Dictionary of Occupational Titles (DOT) and its description of the exertional requirements of a Loading Machine Operator. The ALJ observed that the position required "a medium level of exertion, defined as exerting 20-50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects." Decision and Order at 9-10. Relying on the DOT and Dr. Ajjarapu's opinion, the ALJ found the Miner's work involved a medium level of physical exertion. *Id.* at 10.

Director's Exhibit A-27 at 2; *see* Decision and Order at 9. Dr. Ajjarapu also specifically opined that the Miner would not have been able to perform the work of an end-loader operator from a respiratory or pulmonary standpoint prior to his death. Director's Exhibit A-27 at 3.

Because the ALJ failed to properly address whether Dr. Ajjarapu's opinion is sufficient to establish that the Miner was totally disabled regardless of whether the preponderance of the pulmonary function study evidence is qualifying, we vacate the ALJ's rejection of her opinion. 20 C.F.R. §718.204(b)(2)(iv); *Cornett*, 227 F.3d at 577. We therefore vacate the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) and the denial of benefits in the miner's claim. Decision and Order at 13.

Survivor's Claim

Having vacated the ALJ's denial of benefits in the miner's claim, we also vacate his denial of benefits in the survivor's claim as Claimant's entitlement to derivative survivor benefits under Section 422(*l*) of the Act remains to be determined.[14] 30 U.S.C. §932(*l*); 20 C.F.R. §725.212(a). Thus, at this time, we decline to consider the merits of Claimant's appeal of the ALJ's finding that she failed to affirmatively establish the Miner's death was due to pneumoconiosis under 20 C.F.R. Part 718, as that finding would be moot if the ALJ awards benefits in the miner's claim and derivative benefits in the survivor's claim. However, if the ALJ again denies benefits in the miner's claim on remand and reinstates his denial of benefits in the survivor's claim, the Board will consider the merits of those denials upon the filing of a timely appeal by Claimant.

Remand Instructions

The ALJ must reconsider the pulmonary function study evidence and determine whether it supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). He must then reconsider Dr. Ajjarapu's opinion to determine if it is sufficient to establish that the Miner was totally disabled from performing his usual coal mine work at 20 C.F.R. §718.204(b)(2)(iv). If the evidence at either subsection supports a finding that the Miner was totally disabled, the ALJ must weigh the evidence as a whole and reach a conclusion as to whether Claimant established total disability. 20 C.F.R. §718.204(b)(2). If the ALJ

[14] Section 422(*l*) of the Act provides that the survivor of a miner determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

finds the Miner was totally disabled, he must determine whether the Miner had at least fifteen years of qualifying coal employment for invocation of the rebuttable presumption of total disability at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), and further resolve whether Employer is the responsible operator. 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018). If Claimant invokes the Section 411(c)(4) presumption, the ALJ must then consider whether Employer rebutted it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

If Employer fails to rebut the presumption, Claimant is entitled to benefits in the miner's claim and derivative survivor's benefits pursuant to Section 422(*l*).[15] 30 U.S.C. §932(*l*). However, if the ALJ finds Claimant did not establish total disability, an essential element of entitlement, he may reinstate the denial of benefits in both claims.[16] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[15] There is no indication Employer challenges that Claimant qualifies as a survivor of the Miner or otherwise meets the criteria at Section 422(*l*) if benefits are awarded in the miner's claim.

[16] A finding of no total disability precludes invocation of the Section 411(c)(4) presumption in either claim, 20 C.F.R. §718.305, while a denial of the miner's claim precludes automatic entitlement to survivor's benefits under Section 422(*l*).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits in both the miner's and survivor's claims, and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge