U.S. Department of Labor

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

BRB No. 20-0478 BLA

HENRY HAROLD TURNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	
and	)	
	)	
SUN COAL CORPORATION, INCORPORATED	)	DATE ISSUED: 12/21/2021
	)	
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 of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2017-BLA-05626) rendered on a claim filed on March 17, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 19.75 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further 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 contends the ALJ erred in finding Claimant is totally disabled and invoked the presumption.[2] Claimant did not file a response. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenge to the Section 411(c)(4) presumption.

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.[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).

[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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established 19.75 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 7; Hearing Transcript at 10.

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 (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 4-5. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. 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

To invoke the Section 411(c)(4) presumption, a 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 he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and 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).

Employer alleges the ALJ erred in finding Claimant established total disability based on the pulmonary function study and medical opinion evidence.[4] 20 C.F.R. §718.204(b)(2)(i), (iv); Employer's Brief at 6-13; Decision and Order at 16, 20. We disagree.

Pulmonary Function Study Evidence

The ALJ considered five pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 7-16. The April 30, 2014 study produced non-qualifying pre-bronchodilator values; the February 13, 2016 study produced qualifying pre-bronchodilator

[4] The ALJ found Claimant did not establish total disability based on the 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, 16.

values; the April 11, 2016 study produced qualifying pre-bronchodilator and qualifying post-bronchodilator values; the March 14, 2018 study produced non-qualifying pre-bronchodilator values and qualifying post-bronchodilator values; the June 6, 2019 study produced qualifying pre-bronchodilator values.[5] Director's Exhibits 10, 20; Claimant's Exhibit 2; Employer's Exhibits 4, 5.

The ALJ found the March 14, 2018 study invalid, and the remaining studies valid. Decision and Order at 15. He concluded that the pre-bronchodilator studies better measure Claimant's baseline ability to perform his usual work without medication. *Id*. at 15. He further found Claimant's most recent June 6, 2019 qualifying pre-bronchodilator pulmonary function study indicative of total disability and entitled to controlling weight. *Id*. The ALJ explained:

> The quality standards set forth in 20 C.F.R. Part 718 are not applicable to Claimant's June 6, 2019 PFT because it was administered in connection with Claimant's treatment. Regardless, I have determined that Claimant's June 6, 2019 PFT complies with the quality standards and is sufficiently reliable. Moreover, because Claimant's June 6, 2019 PFT is the most recently administered PFT in evidence, I find it to be the most up to date representation of Claimant's pulmonary condition and afford it the most weight.

Id. at 15-16. Thus, he found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 16.

Employer asserts the ALJ erred in assessing the validity and reliability of the February 23, 2016, April 11, 2016, March 14, 2018, and June 6, 2019 studies. Employer's Brief at 6-13. We need only address Employer's contentions regarding the June 6, 2019 study, however, as it raises no specific challenge to the ALJ's conclusion that the study is entitled to the greatest weight, if it is sufficiently reliable.[6] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] 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).

[6] Affirmance of the ALJ's crediting of the June 6, 2019 study obviates the need to consider his additional findings concerning the other studies, as any error in determining

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;[7] *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).

However, the quality standards 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). But an ALJ must still determine if the results 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). The party challenging the validity of a study has the burden to establish

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their validity is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[7] Appendix B to 20 C.F.R. Part 718, governing the technical quality standards for the administration of pulmonary function studies, lists situations where the miner's effort "shall be judged unacceptable," including where the miner:

> (A) Has not reached full inspiration preceding the forced expiration;
> (B) Has not used maximal effort during the entire forced expiration;
> (C) Has not continued the expiration for at least 7 sec. or until an obvious plateau for at least 2 sec. in the volume-time curve has occurred;
> (D) Has coughed or closed his glottis; or
> (E) Has obstructed the mouthpiece or has a leak around it;
> (F) Has an unsatisfactory start of expiration, one characterized by excessive hesitation (or false starts); or
> (G) Has excessive variability between the three acceptable curves.

20 C.F.R. Part 718, App. B.

the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The technician who administered the June 6, 2019 study reported that Claimant gave "great" effort and that the study met the American Thoracic Society (ATS) standards for reproducibility. Claimant's Exhibit 4 at 3. Dr. Fino stated the study "showed submaximal effort" as Claimant "only exhaled for 7 seconds and there was never an adequate plateauing of expiratory flow." Employer's Exhibit 12 at 2. He further noted that "recent recommendations from the [ATS] state that exhalation should last up to 15 seconds." *Id.* The ALJ permissibly found Dr. Fino's opinion inadequately explained because it is inconsistent with the quality standard criterion indicating a miner's effort is acceptable if he exhales for seven seconds or achieves an expiratory plateau. 20 C.F.R. Part 718, App. B (2)(ii)(C); *see Tenn. 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); *Orek*, 10 BLR at 1-54-55; Decision and Order at 14. We see no error in the ALJ's finding that Dr. Fino's opinion is not adequately explained. *See Vivian*, 7 BLR at 1-361.

Dr. Vuskovich reviewed the June 6, 2019 study and opined that "configurations of [Claimant's] flow volume loops and volume time tracings showed . . . [Claimant] did not put forth the effort to generate valid FVC-FEV1 results." Employer's Exhibit 14 at 1 (emphasis added). He also stated "Claimant "*did not generate three acceptable tracinings*. His deep breath efforts were variable. Not taking an initial deepest breath passible [sic] artificially lowered his FVC and FEV1 result." *Id.* Additionally, he noted that while the technician reported Claimant put forth "great" effort, a pulmonary function study is a "maximum" effort test. *Id.*

Citing Appendix B, paragraph (2)(ii)(G), the ALJ found the variance between Claimant's two largest FEV1 curves was within the five percent, thus complying with the applicable quality standard for measuring "excessive variability between the three acceptable curves." Decision and Order at 14-15. The ALJ found Dr. Vuskovich's summary statements were inadequately explained and that the lack of excessive variance in the FEV1 values, in conjunction with the technician's first-hand observation of Claimant's great effort and ATS reproducibility, was persuasive to show that values obtained during the June 6, 2019 pulmonary function study are "sufficiently reliable." *Id.* at 15.

Employer contends the ALJ erroneously substituted his opinion for that of the medical experts in addressing the variance between the tracings. Employer's Brief at 11-12. We disagree. The ALJ permissibly consulted the quality standards to determine whether the test's curves had excessive variance, as Dr. Vuskovich specifically raised the issue of whether the test had three valid tracings. *See Cox v. Benefits Review Board*, 791

F.2d 445, 446-47 (6th Cir. 1986); *see also Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. Other than arguing the ALJ exceeded his purview, Employer does not explain why the ALJ could not reasonably conclude that Dr. Vuskovich's opinion was undermined by the fact that the results complied with the quality standards for variability, as well as the fact that the technician reported great effort and reproducibility under ATS standards. Nor does Employer identify how the administrative law judge erred in finding Dr. Vuskovich did not adequately explain his conclusion otherwise -- Dr. Vuskovich purported to rely on two scientific articles but did not explain their significance or how they support his finding of invalidity in this case -- and Employer did not submit them into the record for the ALJ to evaluate whether his representation is accurate.[8] We therefore affirm the ALJ's reliance on the June 6, 2019 study as establishing Claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i).

The ALJ also found Claimant established total disability based on Dr. Ajjarapu's opinion and discredited Drs. Fino's and Rosenberg's opinions that Claimant is not totally disabled because they believed Claimant had no valid and qualifying pulmonary function studies.[9] Employer's Exhibits 4, 6, 8, 11. Having affirmed the ALJ's crediting of the June 6, 2019 study, we affirm the ALJ's credibility determinations as they relate to Drs. Fino and Rosenberg.

We therefore affirm the ALJ's overall finding that Claimant is totally disabled as there is no probative contrary evidence to outweigh the qualifying June 6, 2019 study which the ALJ gave the "most weight" as the most recent, "up to date representation of Claimant's pulmonary condition."[10] Decision and Order at 15-16. Thus, we affirm the ALJ's finding

[8] Because the ALJ permissibly found Dr. Vuskovich's opinion not adequately explained, we need not address Employer's contention that the ALJ erred in failing to consider that the qualifications of the administering technician are not of record. *See Larioni,* 6 BLR at 1-1278.

[9] Dr. Fino stated there was "no valid objective evidence of any respiratory impairment present." Employer's Exhibit 6 at 8. He noted Claimant's spirometry was invalid and opined that from "a respiratory standpoint, [Claimant] is neither partially nor totally disabled from returning to his last mining job or a job requiring similar effort." *Id.* Dr. Rosenberg opined Claimant has a normal spirometry and can perform arduous manual labor. Employer's Exhibit 4.

[10] We need not address the ALJ's finding that Claimant established total disability based on Dr. Ajjarapu's opinion at 20 C.F.R. §718.204(b)(2)(iv) because we consider any error by the ALJ to be harmless. *See Larioni,* 6 BLR at 1-1278; *Kozele,* 6 BLR at 1-382 n.4. We reach this conclusion as there is no contrary credible medical opinion establishing

that Claimant established a totally disabling respiratory or pulmonary impairment and therefore invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis, 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 rebut the presumption by either method. Regarding legal pneumoconiosis and disability causation, he found the opinions of Drs. Fino and Rosenberg lacked credibility given their views on the validity of the pulmonary function study evidence. Decision and Order at 25.

Employer raises no specific allegations of error regarding the ALJ's finding that it did not rebut the Section 411(c)(4) presumption, other than its general contention that Claimant does not have a respiratory or pulmonary impairment demonstrated on a valid pulmonary function test. *See Cox*, 791 F.2d at 446-47; *Skrack*, 6 BLR at 1-711; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Having rejected Employer's contention regarding the reliability of the qualifying June 6, 2019 study, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption.

Claimant is not totally disabled. Further, the ALJ correctly observed that Claimant's non-qualifying blood gas study evidence does not outweigh a qualifying pulmonary function study as these tests measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Shedlock*, 9 BLR at 1-198; Decision and Order at 20.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge