U.S. Department of Labor

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

BRB No. 20-0541 BLA

EDMUND G. EDWARDS[1]	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETTY B COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/21/2021
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Order Amending Decision and Order of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Edmund G. Edwards, Clintwood, Virginia.

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

BOGGS, Chief Administrative Appeals Judge:

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[1] Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order Denying Benefits caption used Claimant's last name, "Edwards," while his Order Amending Decision and Order used "Edward." The Board uses "Edwards" as it is consistent with Claimant's Social Security Administration records and application for benefits. Director's Exhibits 3, 7.

Without the assistance of counsel[2] Claimant appeals ALJ Christopher Larsen's Decision and Order Denying Benefits and Order Amending[3] Decision and Order (2019-BLA-05024) rendered on a miner's subsequent claim filed on December 19, 2016,[4] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found no evidence of complicated pneumoconiosis; therefore, he found Claimant 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). The ALJ accepted the parties' stipulation that Claimant has 29.98 years of underground coal mine employment and pneumoconiosis arising out of such coal mine employment, but found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2). Thus, he found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[5] or establish entitlement under 20 C.F.R. Part 718. He therefore denied benefits.

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

[3] The ALJ amended his decision to read "Employer filed a Closing Brief on May 29, 2020, but the Claimant filed no post-hearing brief." Order Amending Decision and Order at 2.

[4] This is Claimant's second claim for benefits. Director's Exhibits 1, 3. On December 3, 1997, the district director denied Claimant's prior claim because he failed to establish any element of entitlement. Director's Exhibit 1. When 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)(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 the parties stipulated Claimant has pneumoconiosis arising out of coal mine employment, Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

[5] 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.

On appeal, Claimant generally challenges the denial of benefits. Employer did not respond. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

In an appeal a claimant files without the assistance of counsel, 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 Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any one of these elements precludes an award of benefits.[7] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

To invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), 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 his pulmonary or respiratory impairment, 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

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

[7] Because the record contains no evidence of complicated pneumoconiosis, we affirm the ALJ's finding that Claimant is unable to invoke the irrebuttable presumption at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); *see* 20 C.F.R. §718.304; Decision and Order at 4.

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).

Pulmonary Function Studies

The ALJ considered three pulmonary function studies.[8] Decision and Order at 6-8. Dr. Ajjarapu's February 20, 2017 study produced qualifying[9] values, before and after administration of a bronchodilator; Dr. Ajjarapu's July 24, 2017 study produced qualifying pre-bronchodilator values and did not include a post-bronchodilator test;[10] and Dr. Fino's October 18, 2017 study produced non-qualifying values, before and after administration of a post-bronchodilator. Director's Exhibits 12, 15; Employer's Exhibit 6.

Dr. Fino opined both of the qualifying studies were invalid.[11] The ALJ found that Dr. Fino incorrectly identified the pre-bronchodilator FEV1 and FEV1/FVC ratio for the

[8] Because the physicians reported differing heights, the ALJ correctly determined an average height of 68.4 inches and rounded the value to 68.5 inches to conform to the nearest greater height appearing in the tables set forth in Appendix B. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 5. Although Claimant was over eighty years old at the time of each test, the ALJ correctly applied the maximum reported table age of seventy-one years as he found "no credible medical evidence of an extrapolated [table] value[] for the Miner at age 80." Decision and Order at 7; *see Meade*, 24 BLR at 1-46-47.

[9] 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).

[10] With respect to the July 24, 2017 study, the ALJ found the report included only one MVV tracing. Decision and Order at 6; Director's Exhibit 15. He found it impossible to determine if the reported MVV value is valid under the variation requirements of 20 C.F.R. §718.103(b) and, therefore, did not consider that particular MVV. Decision and Order at 6. However, the ALJ correctly found this study is qualifying based on the FEV1 and FVC values despite the lack of two MVV tracings. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6.

[11] Dr. Fino stated:

> The spirometries were invalid because of premature termination to exhalation and a lack of reproducibility in the expiratory tracings. There was also a lack of abrupt onset of exhalation. The values recorded represent at

July 24, 2017 study and failed to identify all the post-bronchodilator values, which undermined the probative value of his opinion regarding the studies' validity. He did not otherwise explain the weight he accorded Dr. Fino's opinion when determining the reliability of these qualifying tests. Rather, the ALJ independently concluded that the February 20, 2017 qualifying post-bronchodilator values do not conform to the qualifying standards because the report of the study indicates the FEV1 values varied by more than five percent. Decision and Order at 6-7, *referencing* 20 C.F.R. Part 718, App. B (2)(ii)(G) (pulmonary function test effort is unacceptable if the variation between the two largest FEV1 measurements exceeds 100 ml or five percent, whichever is greater). Considering the pulmonary function study evidence as a whole, the ALJ gave greater weight to the "more recent" October 18, 2017 non-qualifying study and found Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 8.

In so doing, the ALJ mischaracterized the evidence and did not adequately explain his findings as the Administrative Procedure Act (APA) requires.[12] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). We therefore vacate the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

February 20, 2017 Post-Bronchodilator Study

The regulations provide that, in evaluating the pulmonary function study evidence, the ALJ should first consider 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;[13] *see*

> least the minimal lung function that this individual could perform and certainly not this individual's maximum lung function.

Employer's Exhibit 7 at 16, 25, 35.

[12] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[13] Appendix B to 20 C.F.R. Part 718 sets out the technical quality standards for the administration of pulmonary function studies. In so doing, it lists situations where a miner's effort "shall be judged unacceptable," including where the miner:

> (G) Has excessive variability between the three acceptable curves. The variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater. . . . Failure to meet this standard should be clearly

Keener v. Peerless Eagle Coal Co., 23 BLR 1-229, 1-237 (2007) (en banc). Compliance "shall be presumed" unless there is "evidence to the contrary." 20 C.F.R. §718.103(c). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The ALJ gave the February 2017 qualifying post-bronchodilator results less weight because he found "only two of the three best reported test values (trials numbered 1and 6) were within the 5% or 100 ml variance; the third best tracing was outside the minimal requirements of 20 C.F.R. Part 718, Appendix B, Section (2)(ii)(G)." Decision and Order at 6-7; Director's Exhibit 12. Contrary to the ALJ's finding, however, the report of the study specifically indicates American Thoracic Society reproducibility was met for the post-bronchodilator results and that the two largest FEV1 values, obtained during trial numbers one and five, varied by "12 ml (1%)," which complies with the applicable quality standard. Director's Exhibit 12 at 13. There are no FEV1 variance calculations for trial numbers one and six on the report, and it is unclear how the ALJ made his calculation in finding the post-bronchodilator results non-compliant. Because the ALJ did not adequately set forth the basis for his finding and did not explain his determination, we vacate his finding that the qualifying February 2017 post-bronchodilator study is invalid. *See* 20 C.F.R. §718.103(c); 20 C.F.R. Part 718, App. B; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

October 18, 2017 Study

In assigning determinative weight to the non-qualifying October 18, 2017 study, the ALJ noted Dr. Fino indicated results are effort dependent and "represent at least the minimal lung function that this individual could perform." Decision and Order at 7; Employer's Exhibit 7. The ALJ also noted Dr. McSharry's opinion that Claimant's October 18, 2017 test results are "well above the disability standard" and indicate normal lung function. Employer's Exhibit 8. He gave determinative weight to the October 18, 2017 study and explained:

> Considering the credible testing evidence of record, the qualifications of the physicians involved, and the period of time involved, I give greater weight to the most recent October 18, 2017 pulmonary function test as the proper indication of Mr. Edwards' minimal pulmonary function. Because

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> noted in the test report by the physician conducting or reviewing the test.

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

> the actual FEV1 test values for the October 18, 201[7] [test] were above the qualifying level set forth in the tables of Appendix B, I find Mr. Edwards fails to establish he suffers from a total respiratory or pulmonary disability by pulmonary function testing under 20 C.F.R. §718.204(b)(2)(i).

Decision and Order at 8.

The ALJ failed to adequately explain his crediting of the October 18, 2017 study based on the "period of time involved" or why it is determinative of Claimant's minimal pulmonary function. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) (imputing selective reliability to highest test results among valid pulmonary function tests is speculative); *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level). Given that this non-qualifying study postdated the earlier qualifying studies by only eight and three months, respectively, the ALJ did not explain why it is a more "proper" measure of Claimant's lung function. *See Greer*, 940 F.2d at 90-91 (two months is insignificant when evaluating miner's entitlement and thus court would not apply "later in time" rationale); *Sunny Ridge Min. Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (affirming ALJ's total disability finding where four tests conducted within seven months were "sufficiently contemporaneous" and preponderance of most recent tests qualified for total disability). Moreover, it is error to mechanically credit the non-qualifying October 18, 2017 study over the earlier qualifying studies for no other reason than it is the "most recent." *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis). As two out of three pulmonary function studies obtained within eight months were qualifying, the ALJ did not sufficiently explain why he gave determinative weight to the most recent non-qualifying study.

Because the ALJ did not adequately explain how he resolved the conflict in the pulmonary function study evidence, we vacate his determination that Claimant did not establish total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(iv).

Medical Opinion Evidence[14]

[14] The ALJ correctly noted the only blood gas study, conducted on February 20, 2017, is non-qualifying and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 8-9; Director's Exhibit 12. Therefore,

The ALJ considered three medical opinions. Decision and Order at 9-13. Dr. Ajjarapu opined Claimant is totally disabled from performing his usual coal mine work, while Drs. Fino and McSharry opined he does not have a disabling respiratory or pulmonary impairment. Director's Exhibits 12 at 2, 18 at 9; Employer's Exhibits 7 at 38, 8 at 3. The ALJ discredited Dr. Ajjarapu's opinion because she "did not directly comment on Dr. Fino's October 18, 2017 pulmonary function testing." Decision and Order at 12-13. Conversely, the ALJ found the opinions of Drs. Fino and McSharry consistent with his findings at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 13. As we have vacated the ALJ's weighing of the pulmonary functions studies at 20 C.F.R. §718.204(b)(2)(i), which influenced his weighing of the medical opinion evidence, we also vacate his determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Remand Instructions

The ALJ must reconsider whether Claimant established total disability based on a preponderance of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i). The ALJ must properly characterize the evidence and undertake a quantitative and qualitative analysis of the conflicting results in rendering his findings of fact. *See Thorn*, 3 F.3d at 718; *see also Keathley*, 773 F.3d at 740; *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993).

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must first determine the exertional requirements of Claimant's usual coal mine work and consider the opinions in light of those requirements. *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (a physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). In rendering his credibility findings, he must consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The ALJ must also reweigh the evidence as a whole, and determine whether Claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

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we affirm his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

If Claimant establishes total disability, he will invoke the Section 411(c)(4) rebuttable presumption, and the ALJ must consider whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. In rendering his findings on remand, the ALJ must comply with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

GREG J. BUZZARD
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues that the ALJ's weighing of the pulmonary function studies requires remand. 20 C.F.R. §718.204(b)(2)(i). I would further instruct the ALJ, however, that in resolving the conflict between the studies he cannot credit the non-qualifying study over the qualifying studies, based solely on recency, regardless of the time between the studies.

The United States Court of Appeals for the Fourth Circuit has held it irrational to credit evidence solely because of recency where the miner's condition has improved. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also, Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Woodward v. Director, OWCP*, 991 F.2d 314,

319-20 (6th Cir. 1993). In explaining the rationale behind the "later evidence rule," the Court reasoned that "a later test or exam is a more reliable indicator of the [a]miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *Adkins*, 958 F.2d at 51-52. Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id*. at 52. But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply": one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id*. An ALJ must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id*.

It thus would be error for the ALJ on remand to credit the most recent non-qualifying October 18, 2017 study over the early qualifying studies for no other reason than the dates they were performed. Regardless of the amount of time that has passed between the tests, and all things being equal, it is just as likely that the single non-qualifying result was wrong in comparison to the earlier qualifying results. Therefore, I would specifically instruct the ALJ that he must give a reasoned explanation why the more numerous qualifying studies should not carry the day that does not depend on the dates they were performed. *Adkins*, 958 F.2d at 52 ("'Later is better' is not a reasoned explanation"). Otherwise, he must find total disability established at 20 C.F.R. §718.204(b)(2)(i).

In all other respects, I concur with the holding to vacate the denial of benefits and remand this case for further consideration.

JONATHAN ROLFE
Administrative Appeals Judge