U.S. Department of Labor

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

BRB No. 21-0045 BLA

CHRISTOPHER T. COHENOUR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAXXIM SHARED SERVICES, LLC	)	
	)	
and	)	
	)	
SUMMITPOINT INSURANCE COMPANY	)	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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC) Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2017-BLA-06262) rendered on a claim filed on June 2, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-five years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She 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).[1] The ALJ further found Employer failed to rebut the presumption, and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. It also argues she erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a brief.

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).

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. *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

[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 that Claimant established twenty-five 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, 29.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 14; Hearing Transcript at 35.

right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the 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 the arterial blood gas studies establish total disability, 20 C.F.R. §718.204(b)(2)(ii), while the pulmonary function studies and medical opinions do not.[4] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 8-19. Weighing all the evidence together, she found the evidence establishes total disability. Decision and Order at 19. Employer argues the ALJ erred in finding Claimant established total disability based on the arterial blood gas studies, and in discrediting the contrary medical opinions of Drs. Zaldivar and Spagnolo that Claimant is not totally disabled. 20 C.F.R. §718.204(b)(ii), (iv).

Arterial Blood Gas Studies

The ALJ considered two arterial blood gas studies dated August 10, 2016 and November 1, 2018 that produced qualifying values for total disability[5] and two studies dated April 12, 2017 and November 11, 2018 that produced non-qualifying values. Decision and Order at 11-12; Director's Exhibit 26; Claimant's Exhibits 1; 2; Employer's Exhibits 1, 2, 6, 7. The ALJ found all the studies are valid, and the August 10, 2016 and November 1, 2018 qualifying studies establish Claimant is unable to perform his usual coal mine employment. Decision and Order at 12.

Employer initially contends the ALJ erred in finding the August 10, 2016, November 1, 2018, and November 11, 2018 blood gas studies are reliable. Employer's Brief at 12-14. It specifically argues the ALJ erred in weighing the medical opinion evidence on this issue. We disagree.

When considering arterial blood studies, an ALJ must determine whether they are in substantial compliance with the quality standards. *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987); 20 C.F.R. §§718.101(b), 718.105; Part 718, Appendix C. The party challenging the

[4] The ALJ further found there is no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 8.

[5] A "qualifying" arterial blood gas study yields values that are 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).

validity of a study has the burden to establish the results are invalid or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). An ALJ must consider a reviewing physician's opinion regarding the validity and reliability of an arterial blood gas study. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of an arterial blood gas study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

We first reject Employer's argument that the ALJ erred in discrediting Dr. Zaldivar's opinion when finding the November 1, 2018 and November 11, 2018 blood gas studies reliable. Employer's Brief at 13-14. Dr. Zaldivar opined that, when conducting a blood gas study, an administering doctor or technician needs to put the blood sample on ice unless he or she tests the sample "immediately" after drawing blood. Employer's Exhibit 1 at 4. He indicated the November 1, 2018 and November 11, 2018 blood gas studies were done at Norton Community Hospital. Employer's Exhibit 6 at 43-44. He explained Norton Community Hospital has "poor laboratory techniques" and "[o]bviously, [the icing] procedure was not followed." Employer's Exhibit 1 at 2-4. Thus he opined the results from the November 1, 2018 and November 11, 2018 studies are not accurate. Employer's Exhibit 6 at 43-44.

The ALJ found Dr. Zaldivar did not identify his basis for finding Norton Community Hospital did not put the November 1, 2018 and November 11, 2018 blood samples on ice other than his general belief that the hospital does not follow the above stated procedure. Decision and Order at 11. As the ALJ found no basis in the record to conclude Norton Community Hospital "mishandled" these studies, she permissibly discredited Dr. Zaldivar's opinion as speculative and unsupported by the record, and thus insufficient to establish the November 1, 2018 and November 11, 2018 studies are unreliable. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Vivian*, 7 BLR at 1-361; Decision and Order at 11.

We also reject Employer's argument that the ALJ erred by failing to consider Dr. Zaldivar's opinion with respect to the August 10, 2016 blood gas study. Employer's Brief at 13-14. Dr. Zaldivar generally stated that the blood drawn for this study "was not iced, which is against standard protocol for handling of blood that is going to be analyzed for blood gasses." Director's Exhibit 1 at 2. The ALJ noted, however, that Dr. Gaziano reviewed this study for the Department of Labor (DOL) and validated it. Decision and Order at 30. Thus she permissibly found the study is "acceptable for consideration." *Id*; *see Underwood*, 105 F.3d at 949; *Siegel*, 8 BLR at 1-157; *Vivian*, 7 BLR at 1-361.

Employer contends that the ALJ erred by failing to weigh Dr. Zaldivar's statement addressing Dr. Gaziano's validation of the August 10, 2016 blood gas study. Employer's Brief at 14, *citing* Director's Exhibit 28; Employer's Exhibit 1. Dr. Zaldivar asserted that

Dr. Gaziano did not have "any information regarding icing or not, and time interval between drawing the blood analysis," and consequently he could "state that the results are consistent within themselves, and therefore, technically acceptable, but not necessarily accurate." Employer's Exhibit 1 at 2, 4. But the undisputed record belies those assertions: Dr. Gaziano's validation report includes the August 10, 2016 blood gas test result signed by Dr. Green, stating the sample was collected at 8:46 am, analyzed ten minutes later at 8:56 am, and not iced during the interval. Director's Exhibit 28. Dr. Gaziano thus had access to all the information Dr. Zaldivar identified. Employer's Brief at 14.

Moreover, substantial evidence supports the ALJ's finding that Dr. Zaldivar's opinion is insufficient to establish the August 10, 2016, November 1, 2018, and November 11, 2018 blood gas studies are not reliable. Decision and Order at 30. As discussed above, Dr. Zaldivar generally indicated that the doctors who conducted these studies did not follow "standard protocol" for handling blood samples by not icing them. Employer's Exhibit 1 at 4. Quoting a single passage -- devoid of any context -- from the *Clinical Pulmonary Function Testing, The Manual of Uniform Laboratory Procedures, Second Edition*, by the Intermountain Thoracic Society, he asserted blood gas analysis should be done "as soon as possible" after drawn or "stored anaerobically in an ice water slurry." Employer's Exhibit 1 at 4.

But Dr. Zaldivar did not explain how or why this particular manual establishes a requirement not contained in the DOL quality standards, other than his unexplained contention the Intermountain Thoracic Society creates the "standard protocol" within the Black Lung Program, and Employer did not submit the manual. Employer's Exhibit 1. Thus, the material was not in the record to allow the ALJ to determine its credibility or relevancy. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). Regardless, even if the ALJ were to accept Dr. Zaldivar's bare assertions about the content and significance of the manual, there is nothing definitive in Dr. Zaldivar's report establishing a time frame when un-iced samples become unreliable, other than his vague assertions of needing to perform the analysis "immediately" or "as soon as possible" after blood draw. Employer's Exhibit 1. Thus, the ALJ permissibly determined Dr. Zaldivar failed to provide a rational basis to conclude ten minutes -- the longest interval in the tests performed -- is somehow too long.[6] *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Piney*

[6] The administering doctors indicated the following times for blood drawn/tested with respect to the three blood gas studies: August 10, 2016 (8:46 am/8:56 am); November 1, 2018 (12:19 pm/12:25 pm); November 11, 2018 (1:55 pm/1:59 pm). Director's Exhibit 26; Claimant's Exhibits 1, 2.

Mountain Coal Co. v. Mays, 176 F.3d 753, 756 (4th Cir. 1999) ("In referring to a singular 'reasonable mind,' the Supreme Court has directed us to uphold decisions that rest within the realm of rationality."); Decision and Order at 30; Director's Exhibit 26; Claimant's Exhibits 1, 2.

We agree, however, with Employer's argument that the ALJ erred in resolving the conflict in the blood gas study evidence. Employer's Brief at 10-13.

The ALJ noted that the "results from two tests, August 10, 2016 and November 1, 2018 meet disability criteria, and two other tests, April 12, 2017 and November 11, 2018, do not meet disability criteria." Decision and Order at 12. She further noted the "variation between meeting disability criteria and not meeting criteria appears to change as quickly as between ten days, based on the change from the November 1, 2018 to [the] November 11, 2018 [blood gas study]." *Id.* She acknowledged Dr. Spagnolo's opinion that blood gas study results may vary and, thus, she found Claimant's variable results demonstrate he would be able to perform his previous coal mine job "sometimes, but not other times, [as] his job required him to perform heavy labor daily." *Id.* On this basis she concluded the blood gas study evidence establishes total disability. *Id.*

The ALJ has failed to resolve the conflict in blood gas study evidence or explain why she found the qualifying studies outweigh the non-qualifying studies. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 12. The mere fact that the record contains conflicting qualifying and non-qualifying blood gas studies is not a valid basis to conclude that Claimant has met his burden to establish total disability based on this evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994) (holding true doubt rule contravenes APA's requirement the burden of proof remain with claimants), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. United States Department of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz*, 12 BLR at 1-165.

Further, although Dr. Spagnolo opined a blood gas impairment can be variable, he did not opine that Claimant is totally disabled by the impairment on some days and not totally disabled on other days. Employer's Exhibit 7 at 26-27. He stated that Claimant has no "permanent or fixed abnormality of gas exchange and no evidence of a totally disabling breathing impairment." Employer's Exhibits 2 at 7. To the extent the ALJ interpreted his opinion as stating otherwise, she has substituted her opinion for that of a medical expert. *See Addison*, 831 F.3d at 256-57; *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); Decision and Order at 12.

In light of the foregoing, we vacate the ALJ's determination that Claimant established total disability based on the arterial blood gas study evidence. 20 C.F.R. §718.204(b)(2)(ii). We remand the case for the ALJ to resolve the conflict between the qualifying and non-qualifying studies of record. The ALJ must set forth in detail how she resolves the conflict in the evidence, as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

Medical Opinions

Employer next asserts the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 16-19. The ALJ considered the opinions of Drs. Green, Nader, Zaldivar, and Spagnolo. Drs. Green and Nader opined Claimant is totally disabled based, in part, on his qualifying blood gas study results. Director's Exhibit 26; Claimant's Exhibit 1. Dr. Zaldivar opined Claimant is not totally disabled based, in part, on his belief that the blood gas studies are either not valid or show hypoxemia with "no clinical significance at all." Employer's Exhibit 1. Dr. Spagnolo opined, in part, that the variability in Claimant's blood gas study results show he does not have a totally disabling respiratory impairment. Employer's Exhibits 2; 7 at 27-28.

The ALJ found Drs. Green and Zaldivar are more qualified than Drs. Nader and Spagnolo because of their subspecialties in sleep medicine and Claimant's history of sleep apnea. Decision and Order at 18. She found Dr. Green's opinion reasoned and documented and thus credible. *Id*. at 19. She assigned reduced weight to the opinions of Drs. Nader, Zaldivar, and Spagnolo because she found they are not adequately reasoned or documented. *Id*. Notwithstanding her finding that Dr. Green's opinion is reasoned and documented, and the contrary opinions of Drs. Zaldivar and Spagnolo are not adequately reasoned or documented, the ALJ reduced the weight entitled to Dr. Green's opinion because he considered less evidence of record. *Id*. Thus she concluded all of the medical opinions are entitled to equal weight and in equipoise, and this evidence is insufficient to establish total disability. *Id*.

Because the ALJ's improper assessment of the blood gas study evidence affected the weight she accorded the conflicting medical opinions, we vacate her findings at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19.

Notwithstanding, we note the ALJ failed to properly resolve the conflict in the medical opinions or adequately explain why she found the opinions in equipoise. Decision and Order at 19; *see Wojtowicz*, 12 BLR at 1-165. While a claimant fails to meet his burden of proof when the evidence is equally balanced, *see Ondecko*, 512 U.S. at 279-81, the ALJ must nevertheless explain her rationale for reaching that conclusion. The mere fact that the relevant evidence may be conflicting does not authorize the ALJ to declare Claimant failed to establish total disability. *See generally Gunderson*, 601 F.3d at 1024 ("[ALJ] has a duty to explain, on scientific grounds, why a conclusion cannot be reached"). It is the

ALJ's duty to evaluate conflicting evidence, draw appropriate inferences, and assess probative value. *See Hicks*, 138 F.3d at 533; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc).

The ALJ found Dr. Green's opinion reasoned and documented and the opinions of Drs. Zaldivar and Spagnolo not reasoned or documented. Decision and Order at 19. Yet she then chose to assign equal weight to the opinions of Drs. Green, Zaldivar and Spagnolo because Dr. Green reviewed less evidence than the latter two doctors. *Id*. A medical opinion may be credited and sufficient to establish Claimant's burden if it is based on the doctor's own examination of the miner and objective test results. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Thus, the ALJ has not explained why Dr. Green's failure to consider all of the evidence of record warrants assigning his opinion, which the ALJ found credible, equal weight to the discredited opinions of Drs. Zaldivar and Spagnolo. *Gunderson*, 601 F.3d at 1024; *Wojtowicz*, 12 BLR at 1-165. On remand, the ALJ must adequately explain her basis for resolving the conflict in the medical opinion evidence. *Wojtowicz*, 12 BLR at 1-165.

We further vacate the ALJ's findings that the relevant evidence weighed together establishes total disability, 20 C.F.R. §718.204(b)(2), Claimant invoked the Section 411(c)(4) presumption, and the award of benefits. Decision and Order at 19-20.

Remand Instructions

On remand, the ALJ must reconsider whether the blood gas study and medical opinion evidence establishes total disability in accordance with the above stated instructions. 20 C.F.R. §718.204(b)(2)(ii), (iv). If the ALJ finds total disability established based on either type of evidence or both, she must determine whether Claimant is totally disabled taking into account any contrary probative evidence. *See Shedlock*, 9 BLR at 1-198. If the ALJ determines Claimant is totally disabled, Claimant will have invoked the Section 411(c)(4) presumption. The ALJ would then address whether rebuttal has been established.[7] If Claimant is unable to establish total disability, benefits are precluded. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[7] We decline to address as premature Employer's challenge to the ALJ's findings that it failed to rebut the Section 411(c)(4) presumption.

Accordingly, the ALJ's Decision and Order Awarding 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

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge