U.S. Department of Labor

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

BRB No. 21-0373 BLA

KENNETH M. WALLACE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
E & B COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
Self-Insured Through ASHLAND COAL, INCORPORATED, c/o ARCH COAL, INCORPORATED	)	DATE ISSUED: 12/09/2022
	)	
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 on Remand of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits on Remand (2017-BLA-05823) rendered on a claim filed on September 25, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-904 (2018) (Act). This case is before the Benefits Review Board for the second time.

In consideration of Claimant's prior appeal, the Board vacated the ALJ's findings that Claimant failed to establish at least fifteen years of coal mine employment and a totally disabling respiratory or pulmonary impairment. *Wallace v. E & B Coal Co., Inc.*, BRB No. 19-0078 BLA (Mar. 23, 2020) (unpub); 20 C.F.R. §718.204(b)(2). Thus the Board vacated his finding that Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018), as well as the denial of benefits, and remanded the case for reconsideration.

On remand, the ALJ found Claimant established 15.34 years of underground coal mine employment and total disability. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the Section 411(c)(4) presumption. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding at least fifteen years of coal mine employment and total disability established and thus finding Claimant invoked the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so.

The 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.[2] 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 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.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15.

Invocation of the Section 411(c)(4) Presumption - Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's hearing testimony and Social Security Administration (SSA) earnings record, and found the evidence establishes 15.34 years of coal mine employment spanning the years 1976 to 1996. Decision and Order on Remand at 4-5; Director's Exhibits 6, 7; Hearing Transcript at 23-39.

Employer argues the ALJ erred in calculating Claimant's pre-1978 coal mine employment. Employer's Brief at 5-6. We disagree. Applying the Board's decision in *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984) for the years 1976 and 1977, the ALJ credited Claimant with a full quarter-year of coal mine employment for each quarter in which he had at least $50.00 in earnings from coal mine operators as reflected in his SSA earnings record. Decision and Order on Remand at 4-5. However, he only applied this method if Claimant had only coal mine related earnings in a given quarter. *Id*. In any quarter in which Claimant had earnings from both coal mine and non-coal mine employment, the ALJ applied the calculation method at 20 C.F.R. §725.101(a)(32)(iii).[3] Decision and Order on Remand at 4-5. He divided Claimant's quarterly SSA-reported coal mine earnings by the coal mine industry's average yearly earnings for 125 days of employment set forth in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*, to ascertain a fractional year that Claimant worked in any given quarter.[4] Decision and Order on Remand at 4-5. The ALJ thus credited Claimant with 0.98 years of pre-1978 coal mine employment. *Id*.

[3] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.* 20 C.F.R. §725.101(a)(32)(iii).

[4] The "average yearly earnings" figures appear in the center column of Exhibit 610 and reflect multiplication of the "average daily wage" by 125 days.

Contrary to Employer's argument, the ALJ's dual method is consistent with the United States Court of Appeals for the Sixth Circuit's decision in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019) (ALJ may apply the *Tackett* method for pre-1978 coal mine employment unless "the miner was not employed by a coal mining company for a full calendar quarter"). As Employer identifies no error in the ALJ's specific calculations, we affirm his finding of 0.98 years of pre-1978 coal mine employment. Decision and Order on Remand at 4-5.

For Claimant's coal mine employment from 1978 onwards, the ALJ again applied the calculation method at 20 C.F.R. §725.101(a)(32)(iii). For each year in which Claimant's earnings met or exceeded the Exhibit 610 average yearly earnings for 125 days of employment, the ALJ credited Claimant with a full year of coal mine employment. Decision and Order on Remand at 4-5. For the years in which Claimant's earnings fell short of 125 days, the ALJ credited him with a fractional year, calculated by dividing his annual earnings by the Exhibit 610 average yearly earnings. *Id*. Applying this formula, the ALJ credited Claimant with an additional 14.36 years of coal mine employment. *Id.*

Employer argues the ALJ erred in calculating Claimant's coal mine employment from 1978 onwards by rounding-up when calculating the fractional portions of a year and by crediting Claimant with coal mine employment based on his earnings from Thunder Ridge Mining in 1996. Employer's Brief at 6-7. It asserts Claimant testified that he could not recall working for this operator. Employer's Brief at 6-7; Hearing Transcript at 38. However, the ALJ's decision to round-up added only 0.09 years to Claimant's total coal mine employment, and the $188 Claimant earned from Thunder Ridge Mining in 1996 added only 0.01 years. *See* Decision and Order at 5, Director's Exhibit 6 at 9. Even removing these sums from the ALJ's finding of 15.34 years, Claimant would still establish the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(b)(1)(i). Any error in the ALJ's calculation of Claimant's coal mine employment on these grounds is therefore harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer also contends the ALJ's determination of the length of Claimant's coal mine employment does not satisfy the Administrative Procedure Act (APA)[5] because he

[5] The Administrative Procedure Act provides that 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).

did not specify how long Claimant worked for each individual coal mine operator. Employer's Brief at 5. Employer's argument lacks merit.

The identified the method he used to calculate Claimant's coal mine employment, noted that he based his calculations on Claimant's SSA earnings record and Exhibit 610, and set forth the data from his calculations as a table in his decision. Decision and Order at 4-5. Claimant's SSA earnings record reflects each coal mine operator that employed Claimant and the earnings with each operator. Director's Exhibits 6, 7. Because the ALJ set forth the information needed to discern how he found 15.34 years of coal mine employment, we reject Employer's argument that his finding does not satisfy the APA. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied).

Finally, Employer does not challenge the ALJ's finding that all of Claimant's coal mine employment took place in underground mines. Decision and Order on Remand at 3. Thus we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. Decision and Order on Remand at 4-5.

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). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of 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).

The ALJ found Claimant established total disability based on the pulmonary function studies.[6] 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 10.

[6] The ALJ found the arterial blood gas studies do not establish total disability, there was no evidence that Claimant has cor pulmonale with right-sided congestive heart failure, and the medical opinion evidence is inconclusive. 20 C.F.R. §718.204(b)(2)(ii)-(iv); Decision and Order on Remand at 7, 9-10.

Employer argues the ALJ erred in finding this evidence establishes total disability. Employer's Brief at 7. We disagree.

The ALJ considered five pulmonary function studies dated August 21, 2015, November 2, 2015, July 19, 2016, April 27, 2017, and June 1, 2017. Decision and Order on Remand at 7-9. The August 21, 2015 and November 2, 2015 studies produced qualifying[7] values pre-bronchodilator and did not include any post-bronchodilator testing, the June 1, 2017 study produced qualifying pre-bronchodilator and post-bronchodilator results, and the July 19, 2016 and April 27, 2017 studies produced non-qualifying pre-bronchodilator and post-bronchodilator results. Director's Exhibits 13, 19; Claimant's Exhibit 3; Employer's Exhibits 4, 7. The ALJ found each of the tests to be valid, and because three of the five pre-bronchodilator studies are qualifying, including the most recent study, he found the pulmonary function studies established total disability. Decision and Order at 9; 20 C.F.R. §718.204(b)(2)(i).

Employer argues the ALJ erred in finding the November 2, 2015 pulmonary function study to be valid. Employer's Brief at 7. We disagree.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[8] 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B. 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).

[7] 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).

[8] An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function 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).

Dr. Ajjarapu conducted the November 15, 2015 pulmonary function study as part of Claimant's Department of Labor (DOL)-sponsored complete pulmonary examination. Director's Exhibit 13. Dr. Gaziano reviewed the results of the study and indicated they were valid and the "[v]ents are acceptable." Director's Exhibit 14. Dr. Vuskovitch reviewed the study and opined Claimant had insufficient respiratory rate and tidal volume to generate a valid MVV result, and Claimant did not put forth the effort required for valid FVC and FEV1 results. Director's Exhibits 21 at 4, 29 at 9-10; Employer's Exhibit 1 at 4. He also opined Claimant prematurely terminated his expiratory efforts artificially lowering his FVC result. *Id*. Moreover, he found the study did not generate three acceptable trials with sets of tracings. *Id*.

In a supplemental report, Dr. Ajjarapu responded to Dr. Vuskovitch's opinion, stating in relevant part that Dr. Vuskovitch used an outdated formula to reach his conclusion that Claimant did not put forth sufficient effort. Director's Exhibit 62. She stated "Dr. Vuskovitch always uses Knudson['s] [1976 equation] and recalculates and reports that the miner did not put forth a valid FVC and FEV1 results." *Id*. at 2. But she explained that the Knudson equation Dr. Vuskovich uses "was revised in 1983" and "re-analyzed . . . to conform to ATS recommendations." *Id*. Thus she opined "analyzing data using a different model almost inevitably would give a different answer." *Id*.

The ALJ permissibly found Dr. Vuskovich's invalidation of the November 15, 2015 pulmonary function study was "based on outdated metrics" in light of Dr. Ajjarapu's explanation. Decision and Order on Remand at 8; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Thus we affirm his finding Dr. Vuskovich's opinion is not credible. Because Employer, as the party challenging the validity of this study, has the burden to establish the results are unreliable and failed to do so through Dr. Vuskovich's opinion, we affirm the ALJ's finding that the November 15, 2015 study is valid. *Vivian*, 7 BLR at 1-361; 20 C.F.R. §718.103(c).

We therefore affirm the ALJ's finding that the preponderance of the pulmonary function study evidence establishes total disability because three of the five pre-bronchodilator studies are qualifying.[9] 20 C.F.R. §718.204(b)(2)(i). Furthermore, we

[9] Employer argues the ALJ erred in assigning greater weight to the most recent qualifying pulmonary function study Claimant performed on June 1, 2017, because a non-qualifying study was performed approximately two months earlier on April 27, 2017. Employer's Brief at 8. Because the ALJ found the pulmonary function study evidence establishes total disability based on a preponderance of the qualifying pre-bronchodilator studies, we need not address this alleged error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

affirm his finding that the evidence, weighed together, establishes total disability, and that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order on Remand at 10.

Finally, because it is unchallenged on appeal, we affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 15. We thus affirm the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge