U.S. Department of Labor

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

BRB No. 21-0503 BLA

DELFORD W. HUBBARD Claimant-Petitioner v. I C G HAZARD, LLC and ARCH COAL, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/28/2022 DECISION and ORDER

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

Delford W. Hubbard, London, Kentucky

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Benefits (2019-BLA-05493) rendered on a

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St.

miner's claim filed on February 23, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found no evidence of complicated pneumoconiosis; therefore, 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). He credited Claimant with 34 years of surface coal mine employment but found Claimant did not establish total disability. He therefore found Claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] or establish entitlement to benefits at 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.[3]

On appeal, Claimant generally challenges the ALJ's denial of benefits. Neither Employer nor the Director, Office of Workers' Compensation Programs, filed a substantive response.[4]

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with law.[5] 33 U.S.C. §921(b)(3), as

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Charles, Virginia, requested, on behalf of Claimant, that the Benefits Review 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).

[2] Under Section 411(c)(4) of the Act, a miner is presumed 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.

[3] Because the ALJ found Claimant is not totally disabled, he did not reach the issue of whether Claimant's coal mine employment was qualifying for the purpose of invoking the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1).

[4] We affirm the ALJ's finding that Claimant had thirty-four years of surface coal mine employment as Employer does not challenge it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3 (citing Director's Exhibit 3).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment in Kentucky. *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 14.

incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Irrebuttable Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The ALJ accurately observed the record contains no evidence of complicated pneumoconiosis. Decision and Order at 3. Thus, Claimant is unable to 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).

Invocation of the Section 411(c)(4) Presumption –Total Disability

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 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.[6] 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*

[6] The ALJ found Claimant's usual coal mine employment as a dozer operator required very heavy labor. Decision and Order at 5.

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 four pulmonary function studies.[7] Decision and Order at 4-5. The January 16, 2014 treatment study produced non-qualifying[8] values without bronchodilation and did not report post-bronchodilator results. Director's Exhibit 22. The January 25, 2018 treatment study produced qualifying values without bronchodilation; it also did not include post-bronchodilator results. Claimant's Exhibit 5. The March 26, 2018 study produced qualifying pre- and post-bronchodilator values, while the August 22, 2018 study produced non-qualifying pre-bronchodilator values but qualifying post-bronchodilator values. Director's Exhibits 12, 23.

Based on the comments to the regulations, the ALJ permissibly found the post-bronchodilator pulmonary function studies less probative for total disability than the pre-bronchodilator ones. *See* 45 Fed. Reg. 13, 678, 13682 (Feb. 29, 1980) (the 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); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 5. However, in weighing the pre-bronchodilator values, the ALJ stated only that he gave greatest weight to the most recent non-qualifying study because it better represented Claimant's current respiratory status. Decision and Order at 5. Contrary to the ALJ's analysis, 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 the miner's condition has improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (citing *Adkins v. Director, OWCP*, 958 F.2d 49, 51-

[7] Because three administering physicians reported Claimant's height as 70 inches and one reported it as 69 inches, the ALJ permissibly found 70 inches a more reliable measurement for Claimant's height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 4. He further permissibly determined whether the pulmonary function studies were qualifying using the nearest greater height of 70.1 inches 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 4.

[8] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

52 (4th Cir. 1992)); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th 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 [a] miner's condition than an earlier one" where a "miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. 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 current condition." *Id.* But if "the later test 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.*; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJs must perform a qualitative analysis of conflicting tests when they indicate a miner's condition has improved). Because the ALJ improperly applied the "later evidence rule" to conclude the pulmonary function studies do not establish total disability, we vacate his determination at 20 C.F.R §718.204(b)(2)(i). *See Woodward*, 991 F.2d at 319; *see also Adkins*, 958 F.2d at 52; Decision and Order at 5-6.

Medical Opinions and Evidence as a Whole[9]

The ALJ considered three medical opinions.[10] Decision and Order at 6-7. Dr. Ajjarapu evaluated Claimant on behalf of the Department of Labor on March 26, 2018. Director's Exhibit 12. She initially opined Claimant is totally disabled based on the qualifying pulmonary function values she obtained. *Id*. at 7. However, after considering Dr. Dahhan's August 22, 2018 examination report and non-qualifying pulmonary function study, and treatment records from St. Charles Breathing Center, she concluded Claimant does not have a totally disabling respiratory impairment. Director's Exhibit 21 at 1-2. Dr. Dahhan examined Claimant on August 22, 2018; he did not diagnose Claimant with a

[9] The ALJ correctly found that the two arterial blood gas studies, dated March 26, 2018, and August 22, 2018, 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 6. Thus, we affirm the ALJ's determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

[10] The ALJ correctly observed Claimant's treatment records do not diagnose total disability, do not specify any degree of respiratory impairment, and do not address whether Claimant has the respiratory capacity to return to his usual coal mine employment. Decision and Order at 7-8.

pulmonary disease or impairment and opined he could return to his usual coal mine work. Director's Exhibit 23 at 4-5. Dr. Jarboe conducted a records review and issued a report dated July 31, 2020. Employer's Exhibit 6. He diagnosed mild-to-moderate airflow obstruction and chronic bronchitis. *Id.* at 8. Noting Claimant's most-recent pulmonary function study was "above the disability standards," Dr. Jarboe opined Claimant is not totally disabled. *Id.* As Dr. Ajjaarpu did not discuss in either report whether Claimant could perform the exertional requirements of his usual work based on the values of Dr. Dahhan's pulmonary function study, which the ALJ found most probative, the ALJ afforded her disability diagnosis "no weight." Decision and Order at 7. Conversely, the ALJ found Dr. Ajjarapu's supplemental opinion and the opinions of Drs. Dahhan and Jarboe merit probative weight as they are consistent with the weight of pulmonary function and blood gas study evidence. *Id.* He therefore found the preponderance of medical opinions do not establish total disability at 20 C.F.R. §718204(b)(2)(iv). *Id.*

Because the ALJ's finding at 20 C.F.R. §718.204(b)(2)(i), which we have vacated, affected his weighing of the medical opinion evidence, we also vacate his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), or in consideration of the evidence as a whole. Decision and Order at 7-8. We therefore vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption. Decision and Order at 8.

Remand Instructions

On remand, the ALJ first must reconsider the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i) and resolve the conflict in the evidence. *See Woodward*, 991 F.2d at 319-20. The ALJ must then reconsider the credibility of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and whether the record as a whole establishes a totally disabling respiratory or pulmonary impairment. *Defore*, 12 BLR at 1-28-29; *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198 (1986). If he finds Claimant has established total disability, he must also determine whether Claimant established at least fifteen of his 34 years of surface coal employment s were in conditions substantially similar to those in an underground coal mine.[11] 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v.*

[11] The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Director, OWCP [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

If Claimant establishes both fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, he will invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. The ALJ must then consider whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(1). However, if the ALJ finds Claimant did not establish total disability, an essential element of entitlement, he may reinstate the denial of benefits. *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).

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.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

I concur in result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge