



BRB No. 22-0174 BLA

JAMES R. FAINE)

Claimant-Respondent)

v.)

BUCK BRANCH REBUILD &)
MANUFACTURING)

and)

NATIONAL UNION FIRE/CHARTIS)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 12/08/2022

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker and Daniel G. Murdock (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2017-BLA-05729) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on November 7, 2014, and is before the Benefits Review Board for the second time.¹

In his initial Decision and Order Awarding Benefits, the ALJ credited Claimant with twenty-six years of underground coal mine employment and found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits commencing in November 2014, the month in which Claimant filed the claim.

Pursuant to Employer's appeal, the Board affirmed the award of benefits. *Faine v. Buck Branch Rebuild & Manufacturing*, BRB No. 19-0072 BLA, slip op. at 3-9 (Feb. 6, 2020) (unpub.). The Board held, however, that the ALJ erred in determining the commencement date for benefits. *Id.* at 9-10. It therefore vacated the ALJ's commencement date determination and remanded the case for him to reconsider this issue. *Id.*

On remand, the ALJ again found the proper commencement date for benefits is November 2014, the month in which Claimant filed his claim.

On appeal, Employer asserts the ALJ erred in determining the commencement date for benefits. Claimant responds in support of the ALJ's finding. The Director, Office of Workers' Compensation Programs (the Director) has not filed a response brief.

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

¹ We incorporate the procedural history of this case as set forth in *Faine v. Buck Branch Rebuild & Manufacturing*, BRB No. 19-0072 BLA (Feb. 6, 2020) (unpub.).

² Section 411(c)(4) 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

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).

We are not persuaded by Employer’s argument that the ALJ erred in determining the commencement date for benefits. Employer’s Brief at 14-17.

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless evidence the ALJ credits establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

In his initial Decision and Order, the ALJ found he could not determine the month in which Claimant became totally disabled due to pneumoconiosis and thus he set the commencement date as the filing date of the claim, or November 2014. Decision and Order at 31. The Board instructed the ALJ to address whether the opinions of Drs. Rosenberg and Jarboe, along with the pulmonary function testing, establish Claimant was not totally disabled due to pneumoconiosis after the time he filed his claim in November 2014. *Faine*, BRB No. 19-0072 BLA, slip op. at 9-10.

The ALJ acknowledged Drs. Rosenberg and Jarboe opined Claimant became totally disabled by an obstructive respiratory impairment for the first time in 2017 because the pulmonary function testing was previously non-qualifying⁴ but became qualifying in that year. Decision and Order on Remand at 29-30. He also acknowledged the first qualifying pulmonary function testing dates from 2017. *Id.* at 19. However, he noted that Claimant also established he is totally disabled through Dr. Everhart’s medical opinion that was based on his December 2, 2014 examination and arterial blood gas testing of Claimant. Decision and Order on Remand at 31; Director’s Exhibit 14. Dr. Everhart opined Claimant has totally disabling hypoxemia evidenced by *arterial blood gas testing*, dyspnea on exertion, and chronic cough with daily sputum production. Director’s Exhibit 14. Because

³ 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); Director’s Exhibit 3.

⁴ 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).

arterial blood gas studies and pulmonary function studies measure different types of impairment, the results of arterial blood gas studies are not called into question by a contemporaneous pulmonary function testing. *Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984).

Thus, despite the opinions of Drs. Rosenberg and Jarboe with respect to when Claimant's obstructive impairment became totally disabling, or when his pulmonary function testing became qualifying, the ALJ rationally found "Claimant became [totally] disabled at some point prior" to Dr. Everhart's diagnosis of totally disabling hypoxemia in December 2014.⁵ Decision and Order on Remand at 31. Consequently, we conclude substantial evidence supports the ALJ's finding that there is no basis to find Claimant was not totally disabled due to pneumoconiosis at any time subsequent to November 2014 when he filed his claim.⁶ *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990) (the onset date is not established by the first medical evidence of record indicating total disability, as such medical evidence shows only that the miner became totally disabled at some time prior to that date). Thus we affirm the ALJ's finding benefits should commence in November 2014, the month in which Claimant filed his claim. 20 C.F.R. §725.503(b); *see Owens*, 14 BLR at 1-47; Decision and Order on Remand at 31.

⁵ Although Employer now argues Dr. Everhart's total disability opinion is not credible, Employer's Brief at 14-17, it failed to raise this argument before the Board in its prior appeal, and thus the Board's holding that Claimant established total disability, in part, through Dr. Everhart's diagnosis of totally disabling hypoxemia constitutes law of the case. *See Bishop v. Smith*, 760 F.3d 1070, 1082 (10th Cir. 2014); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Faine*, BRB No. 19-0072 BLA, slip. op. at 3 n.4.

⁶ Contrary to Employer's argument, the existence of non-qualifying arterial blood gas testing conducted subsequent to Dr. Everhart's medical examination does not undermine the ALJ's finding that the first evidence of total disability is Dr. Everhart's December 2014 diagnosis of disabling hypoxemia. Employer's Brief at 14-17. Total disability can be established with reasoned medical opinions even in the absence of qualifying pulmonary function or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge