U.S. Department of Labor

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

BRB Nos. 21-0452 BLA
and 21-0452 BLA-A

LAWRENCE A. COLEMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
ARCH COAL COMPANY	)	DATE ISSUED: 02/23/2023
	)	
Employer/Carrier-Respondents/Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest/Cross-Respondent	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for Claimant.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Denying Benefits (2019-BLA-05121) 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 December 16, 2015.

The ALJ found Apogee Coal Company (Apogee) is the responsible operator and Arch Coal Company (Arch Coal) is the responsible carrier. He found Claimant established 15.40 years of qualifying coal mine employment. He further found Claimant did not establish a totally disabling respiratory or pulmonary impairment, and thus 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).[1] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established clinical and legal pneumoconiosis arising out of coal mine employment but could not establish total disability due to pneumoconiosis as he did not establish total disability. Accordingly, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability, and thus did not invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), did not file a response to Claimant's appeal.

On cross-appeal, Employer argues the ALJ erred in finding Arch Coal is the liable insurance carrier. It further argues the ALJ erred in finding Claimant suffers from pneumoconiosis. The Director filed a limited response, urging the Benefits Review Board

[1] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

to affirm the ALJ's determination that Employer is the responsible operator and Arch Coal is liable for the payment of benefits. Employer filed a reply brief reiterating its arguments.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Employer's Cross-Appeal: Responsible Carrier

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator and was self-insured by Arch Coal on the last day Apogee employed Claimant; thus, we affirm these findings.[4] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 9-12. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

In 2005, after Claimant ceased his employment with Apogee, Arch Coal sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Director's Brief at 2; Employer's Cross-Appeal Brief at 25. On March 4, 2011, the Department of Labor (DOL) authorized Patriot to insure itself and its subsidiaries, retroactive to 1973. Director's Brief at 2; Employer's Cross-Appeal Brief at 25. Although Patriot's self-

[2] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[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 3.

[4] Employer argues there is no insurance policy or self-insurance agreement establishing Arch Coal's liability. Employer's Cross-Appeal Brief at 22. However, the Notice of Claim specifically identifies Arch Coal as Apogee's self-insurer, Director's Exhibit 34, and Employer's other arguments tend to acknowledge that Arch Coal was the self-insurer of Apogee at the time of Claimant's last date of employment. *See, e.g.*, Employer's Cross-Appeal Brief at 22-26 (framing the decision to name Arch Coal liable instead of Patriot as involving a choice between Apogee's last insurer or its insurer on the date of Claimant's last exposure to coal mine dust).

insurance authorization made it retroactively liable for the claims of miners who worked for Apogee, Patriot later went bankrupt and can no longer provide for those benefits. Director's Brief at 2; Employer's Cross-Appeal Brief at 26. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch Coal owned and provided self-insurance to that company. Decision and Order at 7; Director's Brief at 2.

Employer raises several arguments to support its contention that Arch Coal was improperly designated the responsible carrier in this claim and thus that the Trust Fund, not Arch Coal, is responsible for the payment of benefits following Patriot's bankruptcy: (1) the DOL released Arch Coal from liability; (2) the ALJ evaluated Arch Coal's liability for the claim as a responsible operator or commercial insurance carrier rather than a self-insurer; (3) the Director changed its policy in naming Arch Coal as the responsible carrier; (4) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01[5] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the Administrative Procedure Act (APA); and (5) the ALJ abused his discretion and deprived it of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01. Employer's Cross-Appeal Brief at 20-34. Employer maintains that the sale of Apogee to Magnum released Arch Coal from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. Employer's Cross-Appeal Brief at 20-34.

The Board considered these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus, we affirm the ALJ's determination that Apogee and Arch Coal are the responsible operator and carrier, respectively, and are liable for this claim.

Claimant's Appeal: Merits of Entitlement

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a

[5] The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the Department of Labor issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

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 a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award 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 (1986) (en banc).

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 qualifying pulmonary function studies, qualifying arterial blood gas studies,[6] 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 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).

Claimant contends the ALJ erred in finding he failed to establish total disability based on the blood gas studies, medical opinions, and in consideration of the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(ii), (iv); Claimant's Brief at 3-7. We agree.

Arterial Blood Gas Studies

Claimant's last coal mine job was as a truck driver, which primarily involved hauling overburden off the top of the coal seam and down in the pit. Decision and Order at 6 (citing Hearing Transcript at 23-24). The ALJ further found, "[i]ncidental to his job, Claimant had to beat the ice off the truck during the winters, climb up the ladder to enter the truck [five or six times per day], and fold up the ladder." *Id.* (citing Hearing Transcript

[6] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not establish total disability through pulmonary function studies or evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27-28.

at 29-30). He concluded, "Claimant's last coal mine job required low-to-medium exertion." *Id.*

The ALJ considered three arterial blood gas studies. Decision and Order at 27-28. Dr. Celko's May 20, 2016 study produced non-qualifying values at rest and qualifying values with exercise. Director's Exhibit 18. Dr. Rosenberg's January 16, 2017 study and Dr. Zaldivar's October 31, 2018 study produced non-qualifying values at rest and did not include any exercise blood gas testing. Employer's Exhibits 2, 3. Because Dr. Zaldivar's non-qualifying resting study is "two years newer" than Dr. Celko's qualifying exercise study, the ALJ framed the relevant inquiry as "whether the May 20, 2016 exercising study or the October 31, 2018 resting study is more indicative and probative of Claimant's ability to perform his last coal mine job." Decision and Order at 27. He thereafter found Claimant's resting studies more probative of his ability to perform the low-to-medium exertion of his usual coal mine employment than his exercise study. We agree with Claimant's arguments that none of the three reasons the ALJ provided in support of his finding are valid.

First, the interpretation of numerical test results requires medical expertise. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993) (interpretation of medical data is for the medical experts); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (same); *see also Castle v. E. Associated Coal Co.*, 12 BLR 1-105, 1-106-07 (1988) (ALJ may not reevaluate the numerical test results of a pulmonary function study). Although the ALJ found the "increase [in resting pO2 values across blood gas studies[8]] is not typical and suggests that the more recent studies may better reflect Claimant's ability to perform his last coal mine job," no physician interpreted the test values in this manner. Decision and Order at 28. As the record does not contain a medical opinion necessary to support the ALJ's interpretation of Dr. Celko's exercise study as less reliable based on increases in pO2 values during the resting studies, the ALJ erred in discounting it. *See Schetroma*, 18 BLR at 1-23-24; *Marcum*, 11 BLR at 1-24; Claimant's Brief at 4-5.

Second, we agree with Claimant that the ALJ erred in finding Dr. Celko's exercise study less reliable than the resting studies of Drs. Zaldivar and Rosenberg because it

[8] The ALJ accurately observed Claimant's resting pO2 values increased from 69 during Dr. Celko's resting study to 86 during Dr. Rosenberg's study and 81 during Dr. Zaldivar's study. Decision and Order at 28; Director's Exhibit 18 at 18; Employer's Exhibits 2 at 8, 3 at 15.

required greater exertion than Claimant's last coal mine work.[9] Decision and Order at 27-28; Claimant's Brief at 4. The ALJ explained:

> [I]t appears that Claimant biked for seven minutes during Dr. Celko's exercise exam. (DX 18). Meanwhile, Claimant's job duties of climbing a ladder suggest minimal exertion of less than a minute. Thus, Claimant engaged in biking during the exercise portion of the arterial blood gas examination that required more exertion for longer duration than that of his last job as a truck driver.

Decision and Order at 28. However, substantial evidence does not support this finding as no physician explained the degree of exertion required of Claimant during Dr. Celko's exercise study and the ALJ did not explain his basis for finding it more strenuous than climbing a fifteen-foot ladder multiple times a day or beating ice off it with a club.[10] *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997) (substantial evidence is that which a reasonable mind could accept as adequate to support a conclusion); Decision and Order at 6; Hearing Transcript at 29-30; Claimant's Brief at 4.

Finally, we also agree with Claimant's argument that recency is not a valid basis for crediting the non-qualifying resting studies over the earlier qualifying exercise study. Claimant's Brief at 6. In finding the newer study more probative, the ALJ held that newer studies are intrinsically more reliable than older studies, and their reliability increases as the time between tests grows. Decision and Order at 27 ("As the temporal proximity widens, however, the probative value of older exercising blood gases [sic], compared to newer non-qualifying gases [sic] diminishes."). Contrary to the ALJ's analysis, however, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held it is irrational to credit evidence solely on the basis of recency unless

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[9] Dr. Celko's report notes Claimant exercised on a stationary bike, exerting "40-60 watts" for "over 7 minutes." Director's Exhibit 18 at 18.

[10] To the extent the ALJ found Claimant's "incidental" duty of having to beat ice off of the ladder in winter months need not be factored into his total disability assessment, we agree with Claimant's position that the ALJ's finding is in error. *See Eagle v. Armco, Inc*, 943 F.2d 509, 512 n.4 (4th Cir. 1991) (ALJ cannot base a denial of benefits solely on the least demanding aspects of a miner's usual coal mine work). Claimant's Brief at 4. Although Claimant contends his work beating ice off of the ladder required significant "heavy labor," we decline to address this contention as it is unbriefed. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983); Claimant's Brief at 4.

it shows the miner's condition has worsened. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).

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. *Adkins*, 958 F.2d at 51. 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*. Since the blood gas studies show an improvement in the Claimant's condition, the ALJ's reasoning cannot stand. *Id.*

Moreover, as Claimant correctly notes, Drs. Sood and Krefft indicated that exercise blood gas tests measure gas exchange impairment with exercise while resting studies do not.[11] Claimant's Brief at 5 (citing Claimant's Exhibits 3 at 10, 3a at 2, 4a at 2). As these opinions are uncontradicted,[12] the qualifying exercise test is not comparable to the later

[11] Drs. Sood and Krefft explained that the later non-qualifying resting studies of Drs. Rosenberg and Zaldivar provide an incomplete assessment of Claimant's exercise tolerance and do not contradict Dr. Celko's qualifying exercise study. Claimant's Exhibits 3 at 10, 4a at 2.

[12] Dr. Zaldivar predicated his disability opinion on his own examination and test results; he did not conduct an exercise blood gas study and did not address the comparability of resting and exercise studies. Employer's Exhibit 3. Although Dr. Rosenberg reviewed all blood gas studies of record and opined Claimant "is not disabled from a pulmonary perspective," his opinion does not directly contradict those of Drs. Sood and Krefft as to the comparability of resting and exercise blood gas studies. Employer's Exhibit 2 at 4. Dr. Rosenberg conceded Dr. Celko's exercise study produced qualifying values and opined Claimant's impairment is "probably related to cardiac dysfunction." Director's Exhibit 25 at 15; Employer's Exhibit 2 at 4, 29. He explained that Claimant's resting blood gas study values improved between Dr. Celko's and Dr. Rosenberg's own study and "such improvement is not expected in the setting of CWP." Director's Exhibit 25 at 15.

non-qualifying resting tests for drawing any conclusions regarding improvement in Claimant's exercise tolerance.[13]

Because the ALJ did not provide a valid reason for resolving the conflict in blood gas study evidence, we vacate his determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); Decision and Order at 28.

Medical Opinions

The ALJ considered four medical opinions. Decision and Order at 28-29. Drs. Sood and Krefft diagnosed total disability, while Drs. Rosenberg and Zaldivar did not. Director's Exhibit 29; Claimant's Exhibits 3, 4; Employer's Exhibits 2, 3. The ALJ found the opinions of Drs. Rosenberg and Zaldivar better reasoned because they relied on the more recent resting blood gas evidence and their opinions are more consistent with the ALJ's finding at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 28-29. As we have vacated the ALJ's weighing of the blood gas studies at 20 C.F.R. §718.204(b)(2)(ii), 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 blood gas studies at 20 C.F.R. §718.204(b)(2)(ii). In resolving the conflict in evidence, the ALJ may not credit the more recent, non-qualifying resting studies over the earlier exercise study on the basis of recency alone. *Adkins*, 958 F.2d at 51-52. Rather, he must independently weigh the reliability of each piece of evidence and provide a reasoned explanation for his findings. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); *Gray v. Director, OWCP*, 943 F.2d 513, 520-21 (4th Cir. 1991). Although the ALJ has discretion to draw reasonable inferences from the blood gas study evidence, he may not reach conclusions that are within the purview of the medical experts. *See Schetroma,* 18 BLR at 1-23-24; *Marcum*, 11 BLR at 1-24.

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must reconsider the physicians' conclusions on total disability and determine whether the

[13] We, however, reject Claimant's contention that an exercise study is necessarily more probative than a resting study. Claimant's Brief at 6. While the ALJ may give greater weight to exercise study results, he is not required to do so. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (it is within the ALJ's discretion to find a particular study more probative than another study).

degree of Claimant's respiratory impairment or any physical limitations they identify would preclude Claimant from performing his usual coal mine work. *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (physician who asserts a claimant is capable of performing assigned duties should state his or her 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.

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.[14] *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.[15] 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[14] We thus need not reach Employer's challenges to the ALJ's findings that Claimant established clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a). Employer's Brief on Cross-Appeal at 16-20.

[15] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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).

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

MELISSA LIN JONES
Administrative Appeals Judge