U.S. Department of Labor

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

BRB No. 21-0562 BLA

RONDAL R. COSBY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
T AND T FUELS, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 02/09/2023
	)	
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry[1] (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

[1] After the briefing scheduling in this appeal closed, Employer's counsel, Attorney Denise Hall Scarberry, filed a Motion to Withdraw as Counsel and Request an Extension of all Deadlines. She states she "will be transitioning into a new role at a new company. Thus, the Employer will begin the process to obtain new counsel." Dec. 7, 2022 Motion. She further requests "an extension of all pending deadlines, telephone conferences, hearings, briefs, etc., by at least 45 to 60 additional days so that the Employer

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order on Remand Awarding Benefits (2016-BLA-05818) rendered on a claim filed on July 27, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2] This case is before the Benefits Review Board for the second time.

In an initial Decision and Order Denying Benefits, ALJ Morris D. Davis credited Claimant with 19.56 years of surface coal mine employment, but found he failed to establish at least fifteen of those years occurred in conditions substantially similar to an underground mine. He therefore found Claimant could not invoke the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Considering the claim without the benefit of the Section 411(c)(4) presumption, ALJ Davis found Claimant established clinical pneumoconiosis arising out of coal mine employment, but failed to establish legal pneumoconiosis or a totally disabling respiratory or pulmonary impairment, and denied benefits. 20 C.F.R. §§718.202(a), 718.203, 718.204(b)(2).

Pursuant to Claimant's appeal, the Board vacated ALJ Davis's finding that Claimant did not establish at least fifteen years of qualifying coal mine employment because he did not consider all of the relevant evidence. The Board further vacated his finding that the pulmonary function studies and medical opinions do not establish total disability because he mischaracterized this evidence and did not make a finding regarding the exertional

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may obtain additional counsel and the new counsel will have time to familiarize themselves with the case." *Id*. Although we grant the motion to withdraw as counsel, we deny the request to extend the deadlines in this case. The briefing schedule has long since closed and Employer has not explained why an extension of the deadlines is necessary. Employer filed a brief; however, no brief was filed by any other party.

[2] Claimant filed a prior claim that he withdrew. Director's Exhibit 10 at 280. A withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

requirements of Claimant's usual coal mine employment. Finally, a majority of the Board's three-member panel vacated ALJ Davis's finding Claimant did not establish legal pneumoconiosis because he did not adequately consider Dr. Ajjarapu's opinion.[4] Thus, the Board remanded the case for further consideration. *Cosby v. T and T Fuels, Inc.*, BRB No. 19-0314 BLA, slip op. at 4, 6-9 (June 30, 2020) (unpub.).

On remand, the case was reassigned to ALJ Swank (the ALJ). Decision on Remand at 5. He found Claimant established 19.80 years of surface coal mine employment in conditions substantially similar to an underground mine, and that the pulmonary function studies, medical opinions, and evidence as a whole establish total disability. 20 C.F.R. §718.204(b)(2)(i), (iv). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 20 C.F.R. §718.305. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant's coal mine employment is qualifying and erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption.[5] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response.

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.[6] 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, 362 (1965).

[4] Chief Administrative Appeals Judge Judith S. Boggs would have affirmed the ALJ's finding that the medical opinion evidence does not establish legal pneumoconiosis. *Cosby v. T and T Fuels, Incorporated*, BRB No. 19-0314 BLA, slip op. at 10-11 (June 30, 2020) (unpub.).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 19.80 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7.

[6] 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; Hearing Transcript at 34.

Invocation of the Section 411(c)(4) Presumption

Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he had at least fifteen years of "employment in one or more underground coal mines," or surface coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). 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); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. 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).

Employer does not dispute Claimant was regularly exposed to coal mine dust when he was employed by T and T Fuels, Inc. (T and T Fuels) for nine years, but argues the ALJ erred in finding Claimant was regularly exposed to coal mine dust in any of his other employment. Employer's Brief at 6-8. We disagree.

The ALJ considered Claimant's hearing and deposition testimony, employment history form, and answers to Employer's interrogatories. Decision and Order on Remand at 8-10; Director's Exhibits 3, 4, 6. He acknowledged that Claimant's testimony focused primarily on the nine years he was employed as a truck driver for T and T Fuels. Decision and Order on Remand at 9. However, he noted Claimant "confirmed dust exposure with each of his coal mine employers on his" Employment History Form CM-911a. *Id*. at 9-10; *see* Director's Exhibit 4. The ALJ also found Claimant "confirmed that he was exposed to dust on all of his coal mining jobs" in his answers to Employer's interrogatories. Decision and Order on Remand at 9-10; *see* Director's Exhibit 7. Finally, the ALJ noted Claimant testified that he was exposed to coal mine dust in the other jobs he had with operators other than T and T Fuels and that the conditions were even dustier than when he worked for T and T Fuels. Decision and Order on Remand at 9-10; *see* Hearing Transcript at 17, 19-20; Director's Exhibits 3, 4, 6 at 11-14. The ALJ permissibly found Claimant was regularly exposed to coal mine dust for at least fifteen years of his surface coal mine employment. *See Kennard*, 790 F.3d at 664-65; *Sterling*, 762 F.3d at 490; *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1343-44 n.17 (10th Cir. 2014); 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); Decision and Order on Remand at 10. As it is supported by substantial evidence, we affirm the ALJ's finding Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b).

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful 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 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2). In this case, the ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and the evidence as a whole.[7] 20 C.F.R. §718.204(b)(i), (iv).

Pulmonary Function Studies

Employer contends the ALJ erred in finding the pulmonary function study evidence establishes total disability. Employer's Brief at 8-10. We disagree.

The ALJ considered five pulmonary function studies dated July 25, 2014, July 6, 2015, August 24, 2015, January 27, 2016, and August 4, 2016. Decision and Order on Remand at 13-15; Director's Exhibits 11, 14, 16; Claimant's Exhibits 3, 4. He found all of the studies valid except for the July 6, 2015 study, which he found invalid. Decision and Order on Remand at 14-15. Furthermore, he found the July 25, 2014, August 24, 2015, and January 27, 2016 studies are qualifying,[8] while the August 4, 2016 study is non-qualifying. *Id.* at 13-14. He determined the preponderance of the valid pulmonary function study evidence is qualifying and therefore establishes total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 14-15.

Initially, we reject Employer's argument that the ALJ erred in finding the January 27, 2016 pulmonary function study is valid.[9] Employer's Brief at 8-10. When addressing

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

[8] 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. *See* 20 C.F.R. §718.204(b)(2)(i).

[9] Employer also argues the ALJ erred in not considering Dr. Sargent's testimony about the validity of the pulmonary function studies. Employer's Brief at 10. We disagree,

a pulmonary function study conducted in anticipation of litigation, an ALJ must determine whether it is in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. 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 also* 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). The ALJ must then, in his role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *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 suspect or unreliable).

The ALJ observed that Dr. Dahhan did not mention any issue with regard to the validity of the January 27, 2016 study in his medical report.[10] Decision and Order on Remand at 3-4. However, the doctor testified during his deposition that the MVV portion of this study is invalid. Employer's Exhibit 5 at 8. When asked why it is invalid, Dr. Dahhan answered that "[a]n MVV is [a] completely effort-dependent test. Individual has to breathe deep and fast for twelve seconds and then calculate that into a minute. That test is tiring and patients don't continue the maneuver during the entire period. Hence, the test will be invalid." *Id.* at 9. The ALJ found Dr. Dahhan discussed MVV procedures generally but did not provide any specific information as to why the specific MVV portion of the January 27, 2016 study is invalid. Decision and Order on Remand at 14. Thus, he permissibly found Dr. Dahhan's testimony insufficient to invalidate the MVV value on the January 27, 2016 study. *See Tenn. Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order on Remand at 14.

Employer next argues the ALJ should have credited the August 4, 2016 pulmonary function study over the other studies because it is the most recent. Employer's Brief at 10.

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as there is no testimony from Dr. Sargent in the record. Further, he stated in his report interpreting the results of the August 4, 2016 study his office conducted, that they were acceptable and reproducible and revealed "partially reversible obstructive ventilatory impairment that is mild post bronchodilator in addition to a mild restrictive impairment" – but he did not discuss the validity of any of the other studies. Employer's Exhibit 1 at 3, 16.

[10] The technician that administered the study noted Claimant's cooperation and comprehension during his pulmonary function study were good. Director's Exhibit 16 at 8, 11.

Employer's argument again amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As Employer raises no other argument, we affirm the ALJ's determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i).

Medical Opinion Evidence

Employer also challenges the ALJ's weighing of the medical opinion evidence. Employer's Brief at 10-11.

The ALJ considered the opinions of Drs. Ajjarapu, Dahhan, and Jarboe. Decision and Order at 17-22. Dr. Ajjarapu opined Claimant has a totally disabling pulmonary impairment based on his pulmonary function study results and moderate resting hypoxemia evidenced by arterial blood gas testing. Director's Exhibits 14, 19, 20. Drs. Dahhan and Jarboe opined Claimant is not totally disabled because his pulmonary function and arterial blood gas study results are not qualifying. Director's Exhibit 16; Employer's Exhibits 4, 5 at 12, 8 at 23-24. The ALJ found Dr. Ajjarapu's opinion reasoned and documented. Decision and Order on Remand at 22. He accorded less weight to the opinions of Drs. Dahhan and Jarboe because, even had they been correct that the overall weight of Claimant's pulmonary function testing was non-qualifying,[11] they did not explain how Claimant can perform the specific exertional requirements of his usual coal mine employment, which included moderate labor generally and intensive labor on occasion, in light of the restrictive defect several physicians diagnosed. *Id.* at 20-22. Furthermore, he discredited Dr. Jarboe's opinion because it is based on an inaccurate assessment that the January 27, 2016 pulmonary function study is non-qualifying. *Id.* at 21. Thus, he found the medical opinion evidence supports a finding of total disability. *Id*. at 22.

Employer argues the ALJ erred in crediting Dr. Ajjarapu's opinion because she did not review the entirety of the medical evidence. Employer's Brief at 10. Contrary to Employer's argument, an ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on her own examination of the miner, objective test results, and recorded exposure histories. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Because Employer does not otherwise challenge the ALJ's finding Dr. Ajjarapu's opinion is well-reasoned and documented, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 22.

[11] As noted, contrary to Drs. Jarboe's and Dahhan's assessments, the ALJ permissibly found the pulmonary function studies preponderantly qualifying and supportive of a finding of total disability.

Employer next generally alleges the opinions of Drs. Dahhan and Sargent are entitled to more weight than Dr. Ajjarapu's opinion because they reviewed all of the medical evidence and explained why Claimant is not totally disabled. Employer's Brief at 10-11. Employer's argument again amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Moreover, the ALJ did not weigh Dr. Sargent's opinion on total disability because he did not give one. Employer's Exhibit 1.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305. Additionally, because Employer does not challenge the ALJ's finding it failed to rebut the presumption, we affirm that determination. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 32, 34. We therefore affirm the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge