U.S. Department of Labor

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

BRB No. 20-0454 BLA

WILLIAM T. ADKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAUREL RUN MINING COMPANY	)	
	)	
and	)	DATE ISSUED: 01/24/2022
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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.

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

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law (ALJ) Judge Drew A. Swank's Decision and Order on Remand Awarding Benefits (2016-BLA-05281) rendered on a subsequent claim filed on November 4, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In a Decision and Order Awarding Benefits issued on January 30, 2018, ALJ Richard A. Morgan credited Claimant with twenty-two years of coal mine employment, at least fifteen of which were underground, and found he has a totally disabling respiratory or pulmonary impairment. He therefore found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.204(b)(2), 718.305. ALJ Morgan further found Employer failed to rebut the presumption and awarded benefits.

Upon review of Employer's appeal, the Board affirmed, as unchallenged, ALJ Morgan's determination that Claimant established at least fifteen years of underground coal mine employment and that Employer failed to rebut the Section 411(c)(4) presumption. *Adkins v. Laurel Run Mining Co.*, BRB No. 18-0198 BLA, slip op. at 2 (April 29, 2019) (unpub.). The Board vacated, however, ALJ Morgan's finding that the arterial blood gas study and medical opinion evidence established total disability. *Id.* at 4-5. The Board held ALJ Morgan failed to consider all of the blood gas studies in the record and did not properly evaluate Dr. Vuskovich's opinion concerning the validity of the May 12, 2016 study. *Id.* The Board further held ALJ Morgan's errors in evaluating the blood gas study evidence impacted his evaluation of the total disability opinions of Drs. Green and Silman. *Id.* at 6. Consequently, the Board vacated ALJ Morgan's determination that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. *Id.* at 6-7.

On remand, the case was reassigned to ALJ Swank (the ALJ), who found the blood gas study and medical opinion evidence established total disability. He therefore found Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption, and thus he awarded benefits.

[1] Section 411(c)(4) of the Act 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); *see* 20 C.F.R. §718.305.

In the present appeal, Employer contends the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file 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 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 Associates, Inc.*, 380 U.S. 359 (1965).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). At this juncture, Claimant may establish total disability based on arterial blood gas studies or medical opinions. 20 C.F.R. §718.204(b)(2)(ii), (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). On remand, the ALJ determined the blood gas study evidence, medical opinions, and evidence as a whole establish total disability. Decision and Order on Remand Awarding Benefits (Decision and Order) at 10, 16.

The ALJ considered the results of five blood gas studies, dated December 2, 2014, June 24, 2015, May 12, 2016, June 2, 2016, and August 18, 2016, the parties identified on their evidence summary forms. Decision and Order at 7-9. The December 2, 2014, May 12, 2016, and June 2, 2016[3] studies, administered by Drs. Green and Silman, produced

[2] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[3] Dr. Vuskovich opined the June 2, 2016 blood gas study is invalid, asserting the technician tested venous blood instead of arterial blood. Employer's Exhibit 17 at 13. The ALJ rejected Dr. Vuskovich's opinion as unexplained and speculative because Dr. Vuskovich did not explain how he determined the technician drew venous blood. Decision and Order at 8-9. Employer does not challenge this determination on appeal, and we therefore affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9.

qualifying values,[4] while the June 24, 2015 and August 18, 2016 studies, administered by Drs. Zaldivar and Gaziano, did not. Director's Exhibits 12-13; Claimant's Exhibits 1-2; Employer's Exhibit 19. The ALJ further considered the results of three treatment record blood gas studies dated June 2, 2014, January 31, 2016, and February 24, 2016. Decision and Order at 9. The February 24, 2016 study produced qualifying values while the June 2, 2014 and January 31, 2016 studies did not. Claimant's Exhibit 3 at 1, 8, 19.

The ALJ gave "great weight" to the qualifying December 2, 2014, May 12, 2016, and June 2, 2016 blood gas studies, noting Drs. Green and Silman performed the studies as part of their Department of Labor sponsored complete pulmonary examinations and explained why the abnormal results rendered Claimant totally disabled. Decision and Order at 9. He further noted Dr. Zaldivar opined the June 24, 2015 blood gas study produced abnormal, though not qualifying, values. Decision and Order at 9; *see* Employer's Exhibit 12 at 79. The ALJ also gave weight to the qualifying February 24, 2016 study from Claimant's treatment records, noting the results were consistent with Claimant's need for continuous supplemental oxygen as documented in his treatment records. Decision and Order at 9-10. In contrast, the ALJ gave less weight to the non-qualifying August 18, 2016 study, explaining that Dr. Gaziano noted Claimant performed the test thirty minutes after ceasing to use supplemental oxygen but did not explain whether that period of time was sufficient to prevent the supplemental oxygen from affecting the study's results. Decision and Order at 9; Employer's Exhibit 19 at 3. Thus, having given the most weight to the December 2, 2014, February 24, 2016, May 12, 2016, and June 2, 2016 qualifying blood gas studies, the ALJ concluded the blood gas study evidence established total disability. Decision and Order at 10.

Employer contends the ALJ erroneously discredited the August 18, 2016 blood gas study, asserting that, in finding Dr. Gaziano did not explain whether Claimant's supplemental oxygen use impacted the study or explain how long a person would need to be off supplemental oxygen to obtain an accurate reading, the ALJ improperly shifted the burden to Employer. Employer's Brief at 4-6. We disagree. Contrary to Employer's argument, the ALJ did not shift the burden to Employer to demonstrate that Claimant's supplemental oxygen use did not affect the blood gas study. Rather, the ALJ permissibly gave less weight to the August 18, 2016 study because, although Dr. Gaziano noted the amount of time Claimant had been off of supplemental oxygen, he did not did not explain whether that supplemental oxygen use would impact the results of the study. *See*

[4] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

Underwood v. Elkay Mining, Inc., 105 F.3d 946, 949 (4th Cir. 1997); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); Decision and Order at 9.

Employer further contends the ALJ improperly "[drew] a medical opinion" in weighing the non-qualifying August 18, 2016 study. We disagree. Comparing the results with other evidence, the ALJ permissibly found Dr. Gaziano did not sufficiently explain the basis for concluding the study is a reliable measure of Claimant's functioning. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 9. Moreover, he explained Drs. Green and Silman better articulated their rationale for concluding the blood gas study evidence, qualifying and non-qualifying, supported their diagnoses of total disability. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 15-16. The ALJ thus appropriately weighed the evidence in the same category and interrelated it with the evidence from the other categories before finding Claimant disabled. *Rafferty*, 9 BLR at 1-232.

We likewise reject Employer's argument that the ALJ improperly considered Claimant's supplemental oxygen use in crediting the qualifying February 24, 2016 study.[5] Employer's Brief at 6-7. The ALJ did not determine that Claimant's supplemental oxygen use would affect the blood gas study results; instead, he determined the qualifying February 24, 2016 study is consistent with Claimant's need for supplemental oxygen. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Employer seeks a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the trier-of-fact, the ALJ has the discretion to assess the credibility of the evidence and to draw his own conclusions, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 173 (4th Cir. 1997); *Underwood*, 105 F.3d at 949; *Anderson*, 12 BLR at 1-113.

We therefore affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. We further affirm, as unchallenged, the ALJ's determination that the medical opinion evidence

[5] Contrary to Employer's contention, the ALJ did not conclude Dr. Marzouk's non-qualifying June 2, 2014 and January 31, 2016 studies, and qualifying February 24, 2016 blood gas study, *together* support a finding of total disability. Employer's Brief at 6. He acknowledged that the June 2, 2014 and January 31, 2016 studies were non-qualifying, but nevertheless explained why he gave greater weight to the qualifying February 24, 2016 study. Decision and Order at 9-10; Employer's Brief at 6.

establishes total pulmonary disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15. We also affirm his finding that all of the relevant evidence, when weighed together, establishes total disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock,* 9 BLR at 198; Decision and Order at 15-16. Further, we affirm his finding that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

Because we have affirmed the ALJ's findings that Claimant established at least seventeen years of underground coal mine employment and a totally disabling respiratory impairment, we affirm his determination Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 16. As the Board previously affirmed the finding that Employer failed to rebut the Section 411(c)(4) presumption, we affirm the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge