U.S. Department of Labor

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

BRB No. 22-0045 BLA

PAUL FARRINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 01/26/2023
PEABODY ENERGY CORPORATION	)	
	)	
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 Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Tighe A. Estes and H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), 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:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2019-BLA-05110) 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 subsequent claim filed on November 23, 2015.[1]

The ALJ found Eastern Associated Coal LLC (Eastern), self-insured through Peabody Energy Corporation (Peabody), is the responsible operator liable for the payment of benefits. She accepted the parties' stipulation that Claimant has twenty-eight 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). Therefore, she 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), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.204(b)(2), 725.309(c). She further found Employer did not rebut the presumption and thus awarded benefits.

[1] This is Claimant's third claim for benefits. The ALJ noted the district director denied his most recent prior claim, filed on September 18, 2013, because he did not establish any element of entitlement. Decision and Order at 2, 31; Director's Exhibits 1, 2.

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

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Decision and Order at 2, 31.

On appeal, Employer contends the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the U.S. Constitution, art. II § 2, cl. 2.[4] It also asserts the duties that the district director performs create an inherent conflict of interest that violates its due process rights. Finally, it contends the ALJ erred in finding it liable for the payment of benefits. On the merits, it argues the ALJ erred in finding Claimant is totally disabled and invoked the Section 411(c)(4) presumption, and in determining the commencement date for benefits.[5]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's Appointments Clause and conflict of interest arguments, and affirm the ALJ's determination that Employer is liable for benefits.

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 (1965).

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[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-eight years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 6.

[6] 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); Hearing Tr. at 30.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and it was self-insured by Peabody on the last day Eastern employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 10-11. 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 (Trust Fund).[7]

Patriot was initially another Peabody subsidiary. Director's Exhibit 32. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody transferred a number of its other subsidiaries, including Eastern, to Patriot. *Id*. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 34. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. Director's Exhibit 35. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody of liability for paying benefits to miners last employed by Eastern when Peabody owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 10-11.

Employer raises several arguments to support its contention that Peabody was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Peabody, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 24-56 (unpaginated). It argues the ALJ erred in finding Peabody liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause[8]; (2) the regulatory scheme requiring the district director

[7] Employer also states it intends to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 56 (unpaginated). Generally, Employer argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act. *Id*. Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of these issues. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

[8] Employer raised this argument for the first time at the hearing before the ALJ. Hearing Tr. at 10; Director's Reply at 8.

to determine the liability of a responsible operator and its carrier when, at the same time, the DOL administers the Trust Fund creates a conflict of interest that violates its due process right to a fair hearing;[9] (3) 20 C.F.R. §725.495(a)(4) precludes Peabody's liability; (4) before transferring liability to Peabody, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5) the DOL released Peabody from liability; (6) the Director is equitably estopped from imposing liability on the company; and (7) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to monitor Patriot's financial health.[10] *Id.* at 13-59 (unpaginated). It maintains that a separation agreement – a private contract between Peabody and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022), *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.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus we affirm the ALJ's determination that Eastern and Peabody are the responsible operator and carrier, respectively, and are liable for this claim.

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

[9] Employer also argues 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act, the BLBA, and the APA. Employer's Brief at 58-59 (unpaginated). That regulation specifies "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). Employer has not identified any documentary evidence relevant to liability that the ALJ excluded. We thus decline to address this argument as Employer has failed to identify any action or finding by either the ALJ or the district director pertinent to this case which implicates the issue it raises. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[10] Employer also states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 54 (unpaginated). Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

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.[11] 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 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).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinion evidence, and the evidence as a whole.[12] Decision and Order at 16-31.

Pulmonary Function Studies

The ALJ considered six pulmonary function studies. Decision and Order at 16-18. The January 5, 2016, March 22, 2017, and May 22, 2019 studies produced non-qualifying[13] pre- and post-bronchodilator values. Director's Exhibits 20, 24; Employer's Exhibit 5. The July 24, 2019 study produced qualifying pre-bronchodilator values but non-qualifying post-bronchodilator values, while the September 30, 2019 and November 4, 2019 studies produced qualifying values pre- and post-bronchodilator. Claimant's Exhibits 3, 5; Employer's Exhibit 15. The ALJ found that "[b]ased on the [] two most recent studies, as well as the qualifying pre-bronchodilator studies at Dr. Green's July 24, 2019 study . . . Claimant has established total disability by the pulmonary function study evidence." Decision and Order at 17-18.

Employer contends the July 24, 2019, September 30, 2019, and November 4, 2019 pulmonary function studies are not valid and thus the ALJ erred in relying on them to find

[11] The ALJ found Claimant's usual coal mine employment as a track motorman and fire boss required heavy to very heavy labor. Decision and Order at 9. Employer does not challenge this finding. Thus we affirm it. *Skrack*, 6 BLR at 711

[12] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies 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 at 18-19.

[13] 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).

the pulmonary function study evidence establishes total disability. Employer's Brief at 10-12 (unpaginated). We disagree.

When considering pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229, 1-237 (2007) (en banc). 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, as the fact-finder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). "In the absence of evidence to the contrary, compliance with the [quality standards in] Appendix B shall be presumed." 20 C.F.R. §718.103(c). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

We are not persuaded by Employer's argument that the July 24, 2019 and September 30, 2019 studies are not valid. Employer's Brief at 11-12 (unpaginated). It alleges they are unreliable because they lack "the three required [MVV] trials for reproducibility." *Id*. The regulations state, however, that if "the MVV is reported, two tracings of the MVV whose values are within 10% of each other shall be sufficient." 20 C.F.R. § 718.103(b). Employer does not allege that the respective two MVV tracings for each study are not within 10% of each other or identify a physician's opinion interpreting this study to support such an argument.[14] *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

Further, as the ALJ recognized, the September 30, 2019 study produced qualifying FEV1, FVC, and MVV values. Decision and Order at 17; Claimant's Exhibit 5. Thus it supports a finding of total disability regardless of the MVV results. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Claimant's Exhibit 5.

Employer further contends the ALJ erroneously credited the observations of the technician who conducted the November 4, 2019 pulmonary function study and explained that Claimant gave "good effort," over Dr. Rosenberg's opinion that the study is invalid.[15]

[14] For the same reason, we reject Employer's argument Dr. Green's opinion is not credible because it relies, in part, on Claimant's MVV values. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984); 20 C.F.R. §718.101(b); Employer's Brief at 12 (unpaginated).

[15] The technician who conducted the study made a note of Claimant's performance on each portion of the pulmonary function study, observing that Claimant demonstrated

Employer's Brief at 10-11 (unpaginated); Employer's Exhibit 15. We disagree. Dr. Rosenberg opined that the "volume-time curves revealed incomplete efforts," and inspection of the "generated spirometric curves, [shows] inconsistent and/or incomplete efforts were provided." Employer's Exhibits 15 at 5, 16 at 12. Contrary to Employer's argument, the ALJ did not summarily credit a technician's notation over a medical professional, but permissibly found Dr. Rosenberg's statements inadequately explained. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 17. As Employer raises no further argument, we affirm the ALJ's finding that the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ next considered the medical opinions of Drs. Green, Habre, Zaldivar, and Rosenberg. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order 20-31. Dr. Green opined Claimant cannot perform his usual coal mine employment based on his pulmonary function study results. Claimant's Exhibit 3. Dr. Habre opined Claimant is totally disabled based on his pulmonary function and blood gas studies. Director's Exhibits 20, 27. Dr. Zaldivar opined Claimant has a moderate irreversible airway obstruction but is not totally disabled. Director's Exhibit 24. Dr. Rosenberg initially opined Claimant has no obstruction or restriction and thus is not totally disabled. Employer's Exhibit 15. In his deposition, however, he conceded that if the September 30, 2019 pulmonary function study is valid, then Claimant is totally disabled. Employer's Exhibit 16 at 41-42.

The ALJ credited Dr. Green's opinion as well-reasoned and documented. Decision and Order at 29-31. Because she found the September 30, 2019 pulmonary function study valid, she concluded Dr. Rosenberg's opinion supports Dr. Green's opinion and a finding of total disability. *Id.* She discredited Dr. Habre's opinion as contradictory and found Dr. Zaldivar's opinion unpersuasive because he did not review the qualifying pulmonary function studies. *Id.* Therefore, the ALJ concluded the medical opinion evidence establishes total disability under 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer argues the ALJ erred in crediting Dr. Green's opinion. Employer's Brief at 12 (unpaginated). Dr. Green opined the July 24, 2019 pulmonary function study conducted as part of his examination demonstrates a moderate degree of chronic airflow obstruction and a mildly reduced diffusing capacity. Claimant's Exhibit 3 at 5. He further

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good effort and understanding on the forced vital capacity test, diffusion capacity test, plethysmography test, maximum voluntary ventilation test, and that he "generated good effort in terms of depth and rate of breathing." Employer's Exhibit 15 at 12.

opined Claimant is totally disabled based on his qualifying FEV1 and MVV results, and that he would not be able to perform his usual coal mine employment which required heavy labor due to his significant ventilatory impairment. *Id.* at 3, 6. Contrary to Employer's contentions, the ALJ permissibly credited Dr. Green's opinion as consistent with the qualifying pulmonary function studies and because he considered the exertional requirements of Claimant's usual coal mine employment in opining he is totally disabled.[16] *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); Decision and Order at 29-31. Further, Employer does not challenge the ALJ's decision to reject Dr. Zaldivar's contrary opinion. Decision and Order at 29-31. Thus we affirm that finding. *See Skrack*, 6 BLR at 711.

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); Decision and Order at 31. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305, 725.309(c); Decision and Order at 31-32. As Employer does not challenge the ALJ's finding that it did not rebut the presumption, we affirm it. *See Skrack*, 6 BLR at 711; Decision and Order at 41-42.

Commencement Date for Benefits

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).

The ALJ found the record does not contain any medical evidence establishing when Claimant first became totally disabled due to pneumoconiosis and thus awarded benefits

[16] We reject Employer's argument Dr. Green's opinion is not credible because he did not consider the "numerous and recent non-qualifying studies." Employer's Brief at 12 (unpaginated). As discussed above, the ALJ found the more recent qualifying studies outweigh the older non-qualifying studies. Decision and Order at 17-18. Further, 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 his own examination of the miner and objective test results. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

commencing November 2015, the month the claim was filed. Decision and Order at 42-43. Employer argues the July 24, 2019 pulmonary function study is the first evidence of total disability and thus the ALJ erred in awarding benefits before that date. Employer's Brief at 13 (unpaginated). We disagree. Medical evidence of total disability does not establish the onset date of disability; it only shows Claimant became totally disabled at an earlier time. *See Owens*, 14 BLR at 1-50; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). As the ALJ found the medical evidence does not reflect the date Claimant became totally disabled due to pneumoconiosis, benefits are payable from the month in which he filed his claim. 20 C.F.R. §725.503(b). Therefore, we affirm the ALJ's conclusion that benefits commence November 2015. *Owens*, 14 BLR at 1-49; Decision and Order at 42-43.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge