U.S. Department of Labor

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

BRB No. 23-0015 BLA

WAYNE A. YURICICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 01/30/2024
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for Claimant.

Ann Marie Scarpino (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: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits on Remand (2018-BLA-06026) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a

request for modification of a subsequent claim[1] filed on October 4, 2011, and is before the Benefits Review Board for the third time.

In an October 21, 2015 Decision and Order Denying Benefits, ALJ Theresa C. Timlin found Claimant established 2.25 years of coal mine employment and therefore could not invoke 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); 20 C.F.R. §718.305. She further found Claimant established the existence of clinical pneumoconiosis and thus a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.202(a), 725.309(c). ALJ Timlin found, however, Claimant did not establish his clinical pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(a), or that he is totally disabled by a respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2). She thus denied benefits. On Claimant's appeal, the Board affirmed Judge Timlin's finding that he failed to establish total disability and thus affirmed the denial of benefits. *Yuricich v. Director, OWCP*, BRB No. 16-0109 BLA, slip op. at 5 (Dec. 21, 2016) (unpub.).

Claimant timely requested modification and the case was assigned to ALJ Morris (the ALJ). In his February 18, 2020 Decision and Order Denying Benefits Upon Request for Modification, the ALJ summarily found no mistake in a determination of fact with respect to ALJ Timlin's denial of benefits. 20 C.F.R. §725.310. He also found the new evidence on modification insufficient to establish total disability or a change in conditions.

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[1] This is Claimant's second claim for benefits. Director's Exhibit 1. On February 8, 2006, the district director denied Claimant's prior claim, filed on June 9, 2005, for failure to establish any element of entitlement. *Id.* at 383.

[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); 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 deny the subsequent claim unless they find 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)(1); *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 failed to establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element to obtain review of the merits of this claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

20 C.F.R. §§718.204(b)(2), 725.310. Thus, he found no basis for granting modification and denied benefits.

Pursuant to Claimant's appeal and the Director's arguments in response, the Board vacated the ALJ's denial of benefits. *Yuricich v. Director, OWCP*, BRB No. 20-0232 BLA, slip op. at 3-8 (May 27, 2021) (unpub.). The Board held he did not adequately explain his basis for finding no mistake of fact with respect to ALJ Timlin's length of coal mine employment, legal pneumoconiosis, and disease causation findings. *Id.* at 3-4. In addition, the Board held he erred in weighing the newly submitted evidence, as he failed to properly determine whether a December 8, 2018 pulmonary function study is valid and erred in weighing Dr. Kraynak's opinion that Claimant is totally disabled. *Id.* at 4-6. The Board thus vacated the denial of benefits and remanded the case for further consideration. *Id.* at 7-8.

In his September 20, 2022 Decision and Order Denying Benefits on Remand that is the subject of this appeal, the ALJ again found Claimant failed to establish total disability, an essential element of entitlement, and denied the request for modification. 20 C.F.R. §§718.204(b)(2), 725.310.

On appeal, Claimant asserts the ALJ erred in finding he failed to establish total disability. The Director, Office of Workers' Compensation Programs (the Director),[4] responds, urging the Board to reject Claimant's arguments and affirm the denial of 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.[5] 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, 361-62 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation

[4] The district director explained in the Schedule for the Submission of Additional Evidence in Claimant's initial claim that the Federal Black Lung Disability Trust Fund is liable for this claim because no responsible operator could be identified. Director's Exhibit 1 at 392, 395.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 161, 374, 450.

(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 claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of them 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).

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or 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 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). 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).

The ALJ found Claimant failed to establish total disability by any method. Decision and Order on Modification at 8-9. Claimant argues the ALJ erred in weighing the pulmonary function study and medical opinion evidence.[7] Claimant's Brief at 17-23.

Pulmonary Function Studies

On remand, the ALJ considered the newly submitted December 8, 2018 pulmonary function study administered by Dr. Kraynak that produced qualifying values, as well as the three studies that ALJ Timlin had considered, dated September 8, 2005, February 23, 2012,

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

[7] As it is unchallenged, we affirm the ALJ's finding Claimant did not establish total disability based on arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order on Modification at 9.

and April 30, 2012, that produced non-qualifying values. Decision and Order on Modification at 5; Director's Exhibit 1 at 238, 341, 417; Claimant's Exhibit 3. He found the December 8, 2018 qualifying study is the most probative of Claimant's current condition based on its recency. Decision and Order on Modification at 5. However, he determined the study is invalid due to excessive variability in the FEV1 results and therefore found the pulmonary function study evidence does not support a finding of total disability. *Id.*

Claimant argues the ALJ erred in finding the December 8, 2018 pulmonary function study is invalid. Claimant's Brief at 17-23. We agree.

When considering pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the quality standards. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987); 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B. In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984); 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 fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *See Vivian*, 7 BLR at 1-361.

The regulations state that a patient's pulmonary function study effort shall be deemed unacceptable if there is excessive variability between the three acceptable curves as follows:

> The variation between the two largest FEV1's of the three acceptable tracings should not exceed [five] percent of the largest FEV1 or 100 [milliliters], whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test.

20 C.F.R. Part 718, Appendix B at para. (2)(ii)(G).

Although no physician opined that the December 8, 2018 study is invalid, the ALJ observed that the two largest FEV1 values varied by fifteen percent or 210 milliliters. Decision and Order on Modification at 5; *see* Claimant's Exhibit 3. He then summarily

concluded the excessive variability renders the study not in substantial compliance with the quality standards and thus entitled to little probative weight. Decision and Order on Modification at 5.

We are unable to affirm the ALJ's finding regarding the validity of the December 8, 2018 pulmonary function study. Notwithstanding whether the study precisely conforms to the quality standards based on excessive variability, there is no medical opinion of record challenging the validity of the study and no evidence establishing it is not in substantial compliance. *See Vivian*, 7 BLR at 1-361; 20 C.F.R. Part 718 Appendix B. Nor did the ALJ explain his finding in light of the regulatory instruction that "tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits." 20 C.F.R. Part 718 Appendix B at para. (2)(ii)(G).

Rather, Dr. Kraynak noted Claimant had good effort, comprehension, and cooperation, and he considered the study sufficiently reliable to base his total disability opinion, in part, on it. Claimant's Exhibits 1, 3. Thus the only evidence addressing the validity of the study supports a finding that it is in substantial compliance with the quality standards and reliable. In finding the study is invalid and not in substantial compliance with the quality standards, the ALJ substituted his opinion for that of a medical expert. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986); Decision and Order on Modification at 5. Thus, we vacate his finding the study is invalid and, consequently, vacate his finding that Claimant failed to establish total disability and the denial of benefits.

Despite the ALJ's error, it is not necessary to remand this case for further consideration of whether the pulmonary function study evidence supports total disability. While factual determinations are the province of the ALJ, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 397 (3d Cir. 2002) (reversal appropriate where the record supports only one conclusion); *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversing denial, with directions to award benefits without further administrative proceedings); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (denial of benefits reversed where "only one factual conclusion is possible"); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same).

The ALJ has rendered the necessary findings in this case. His finding that the December 8, 2018 pulmonary function study is qualifying and entitled to the most weight is both permissible and unchallenged. Decision and Order on Modification at 5. Thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Mullins v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 12 n.14 (Jan 17, 2024) ("a factfinder may, consistent with the progressive nature

of pneumoconiosis, credit newer evidence showing a deterioration in a miner's condition over older evidence based on chronological order if enough time has passed for the disease to have progressed"). Further, as the only medical opinion of record addressing the validity of the study supports a finding that it is in substantial compliance with the quality standards, there is no factual basis to satisfy the Director's burden to establish the study is invalid.[8] *See Vivian*, 7 BLR at 1-361; Claimant's Exhibits 1, 3. Consequently, we reverse the ALJ's findings that the study is invalid and the pulmonary function study evidence does not support total disability. *See Balsavage*, 295 F.3d at 397; *Collins*, 751 F.3d at 187; *Scott*, 289 F.3d at 269-70.

Medical Opinions

Next, the ALJ considered the opinions of Drs. Talati, Kraynak, and Rashid that were before ALJ Timlin. Decision and Order on Modification at 7-8. Dr. Talati opined Claimant is not totally disabled based on his February 23, 2012 examination of Claimant, while Drs. Kraynak and Rashid opined he is. Director's Exhibit 1 at 196-97, 233, 245, 287, 334, 410. The ALJ found no mistake in fact in ALJ Timlin's finding that Dr. Talati's opinion is entitled to "normal probative weight" while the opinions of Drs. Kraynak and Rashid are entitled to "little probative weight." Decision and Order on Modification at 7-8.

The ALJ also considered Dr. Kraynak's December 12, 2017 and December 20, 2018 medical opinions that Claimant submitted on modification. Decision and Order on Modification at 6-8. Dr. Kraynak again opined Claimant is totally disabled based, in part, on his December 8, 2018 pulmonary function study. Director's Exhibit 3 at 26; Claimant's Exhibit 1. The ALJ found his opinion is not documented because the pulmonary function study he relied on is invalid and he did not adequately explain his opinion. Decision and

[8] It is well-established that pulmonary function studies need not precisely conform with the quality standards; "substantial compliance" is all that is required. 20 C.F.R. §718.101(b). Our dissenting colleague does not explain why not meeting *one* of the quality standards means the study is not in "substantial compliance" with the quality standards as a whole. Such an explanation is particularly necessary in this claim, where the quality standard at-issue specifically provides that because "individuals with obstructive disease or rapid decline in lung function will be less likely to achieve [the required] degree of reproducibility, tests not meeting this criterion *may still be submitted for consideration in support of a claim for black lung benefits*." 20 C.F.R. Part 718, Appendix B at para. (2)(ii)(G) (emphasis added). Given that provision, the presumption of compliance with the quality standards, and the lack of any evidence that the remaining quality standards have not been met, we do not agree with our dissenting colleague's assessment that the study does not constitute relevant, creditable evidence.

Order on Modification at 6-8. He thus found Dr. Kraynak's new opinion is not credible and that the medical opinion evidence overall does not support a finding of total disability. *Id.*

Claimant argues the ALJ erred in weighing the medical opinion evidence. Claimant's Brief at 19-23. However, we need not address the ALJ's weighing of the medical opinions because they cannot outweigh the qualifying pulmonary function study evidence.

Drs. Kraynak and Rashid opined Claimant is totally disabled consistent with the qualifying pulmonary function study evidence, Director's Exhibits 1 at 196-97, 233, 245, 410; 3 at 26; Claimant's Exhibit 1. Thus their opinions do not constitute contrary probative evidence at 20 C.F.R. §718.204(b)(2). Dr. Talati's opinion is insufficient to outweigh the qualifying pulmonary function study evidence because he based his opinion that Claimant is not totally disabled on his February 23, 2012 examination without reviewing the qualifying December 20, 2018 pulmonary function study, which the ALJ found is the most probative of Claimant's current condition. Director's Exhibit 1 at 287, 334. Further, as discussed above, that study establishes total disability at 20 C.F.R. §718.204(b)(2)(i). *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Director's Exhibit 1 at 287, 334; Decision and Order on Modification at 5. As there is no contrary probative evidence to outweigh the qualifying pulmonary function study evidence, Claimant has established total disability at 20 C.F.R. §718.204(b)(2)(i). Remand for further consideration of the medical opinion evidence is thus unnecessary. *See Balsavage*, 295 F.3d at 397; *Collins*, 751 F.3d at 187; *Scott*, 289 F.3d at 269-70; *Adams*, 886 F.2d at 826. We therefore reverse the ALJ's finding Claimant did not establish total disability.

Given that Claimant established total disability, we remand this case for the ALJ to address whether Claimant has established that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203, 718.204(c). Although the ALJ summarily found no mistake of fact in ALJ Timlin's findings on these issues, his finding does not satisfy the explanatory requirements of the Administrative Procedure Act (APA) and may have been influenced by his erroneous findings on total disability.[9] Decision and Order on Modification at 9. Thus we vacate this finding.

[9] The APA requires every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

On remand, the ALJ must consider the new evidence submitted on modification and Claimant's contentions that ALJ Timlin made mistakes in fact concerning the length of his coal mine employment, clinical pneumoconiosis causation, and legal pneumoconiosis as the Board previously instructed him to do. 20 C.F.R. §§718.202, 718.203; *Yuricich*, BRB No. 20-0232 BLA, slip op. at 7; Claimant's Brief at 23-29. He must explain his findings as the APA requires. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004); *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013).

Accordingly, the ALJ's Decision and Order Denying Benefits on Remand is affirmed in part, reversed in part, and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully disagree with my colleagues and agree with the position of the Director regarding the pulmonary function study and medical opinion evidence.

Whether a pulmonary function study substantially complies with the quality standards is a question of fact that lies within the purview of the ALJ, not this Board. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B. As the Director contends, the ALJ correctly found there was excessive variability between the two largest FEV1 values the December 8, 2018 pulmonary function study produced and, consequently, he permissibly found it is not in substantial compliance with the quality standards. *See Siwiec*, 894 F.2d at 638; 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; Decision and Order on Modification at 5; Director's Reply Brief at 3. He thus permissibly determined the study is invalid and unreliable, and the pulmonary function study evidence does not support a

finding Claimant is totally disabled. *See Siwiec*, 894 F.2d at 638; Decision and Order on Modification at 5.

Additionally, the weighing of conflicting medical opinions is the responsibility of the ALJ and not within the Board's authority. *See Consolidation Coal Co. v Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); *see also Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3d Cir. 1979). Therefore, I agree with the Director's argument that the ALJ permissibly discredited Dr. Kraynak's opinion on total disability because he did not address the excessive variability seen on the December 8, 2018 pulmonary function study. *See Kramer*, 305 F.3d at 211; *Kertesz*, 788 F.2d at 163; Decision and Order on Modification at 6; Director's Reply Brief at 3; Claimant's Exhibit 1. Further, he permissibly found Dr. Kraynak's opinion unpersuasive because it is based on the invalid pulmonary function study and did not identify any other valid objective medical evidence to support his opinion that Claimant is totally disabled. *See Kramer*, 305 F.3d at 211; *Kertesz*, 788 F.2d at 163; Decision and Order on Modification at 6-7; Claimant's Exhibit 1.

Because the ALJ acted within his discretion in finding the pulmonary function study and medical opinion evidence do not support total disability, and that Claimant thus did not meet his burden to establish total disability, an essential element of entitlement, I would affirm the denial of benefits. It is not within the authority of the Benefits Review Board to reweigh the evidence and make determinations that lie within the province of the ALJ.

JUDITH S. BOGGS
Administrative Appeals Judge