U.S. Department of Labor

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

BRB No. 22-0301 BLA

PAUL J. JENKINS (deceased)[1]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREENWICH COLLIERIES COMPANY c/o TALEN ENERGY	)	
	)	
and	)	
	)	
PENNSYLVANIA MINES CORPORATION c/o SMART CASUALTY CLAIMS	)	DATE ISSUED: 6/06/2023
	)	
Employer-Petitioner	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Ralph J. Trofino, Johnstown, Pennsylvania, for Employer.

[1] The Miner died on December 28, 2020. Director's Exhibit 46. The Miner's widow, Eleanor Jenkins, is pursuing the claim on his behalf. *Id*.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05318) on a claim filed on September 27, 2019,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with twenty years of qualifying coal mine employment, based on the parties' stipulation, and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues 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, has not filed a response brief.

The Benefits Review 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.[4] 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).

[2] The Miner filed two prior claims. Director's Exhibits 1, 2. The record associated with his 2005 claim was destroyed in accordance with the Department of Labor's records retention policy. Director's Exhibit 1. The Miner withdrew his second claim. Director's Exhibit 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

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

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in

Invocation of the Section 411(c)(4) Presumption - Total Disability

In order to invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground or substantially similar surface coal mine employment and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. 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. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[5] 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).

Employer contends the ALJ erred in finding Claimant established total disability based on the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii), and improperly credited Dr. Whaley's finding of cor pulmonale as sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iii).[6] Employer's Brief at 6-7.

Blood Gas Studies

The ALJ considered two blood gas studies. Decision and Order at 12. Dr. Zlupko conducted a blood gas study on October 16, 2019, which yielded non-qualifying values at rest and with exercise. Director's Exhibit 14. Dr. Pickerill conducted a study on August

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Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibit 5.

[5] 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).

[6] The ALJ found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i) because, of the two pulmonary function studies, the later August 26, 2020 qualifying study was invalid and the only valid study, dated October 16, 2019, was non-qualifying. Decision and Order at 8; Director's Exhibit 14; Claimant's Exhibit 1. He further discredited, as insufficiently reasoned, the only medical opinion of record: Dr. Zlupko's opinion that the Miner could perform his previous coal mine work and thus is not totally disabled. Decision and Order at 13; Director's Exhibit 14.

26, 2020, which yielded non-qualifying values at rest but qualifying values with exercise. Claimant's Exhibit 2.

In resolving the conflict in the blood gas study evidence, the ALJ gave greater weight to the exercise studies. Decision and Order at 12. He also found the more recent August 26, 2020 study most probative and thus concluded Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*

Employer argues that because three of the four study results at both rest and with exercise were non-qualifying, the preponderance of the blood gas study evidence establishes that the Miner was not totally disabled. Employer's Brief at 7. We disagree.

The ALJ was not required to rely only on a quantitative assessment of the results without also performing a qualitative assessment of them. He permissibly found the qualifying exercise blood gas study result was most probative of the Miner's ability to perform his usual coal mine work as a shuttle car operator because exercise studies assess blood gas levels during physical exertion. *See Coen v. Director, OWCP*, 7 BLR 1-30, 31-32 (1984) (exercise blood gas study may be given more weight than a resting blood gas study at 20 C.F.R. §718.204(b)(2)(ii)); *Sturnick v. Consolidation Coal Co*., 2 BLR 1-972, 1-977 (1980). Decision and Order at 5, 11-13; Director's Exhibit 14; Claimant's Exhibit 2. Thus, we reject Employer's contention that the preponderance of the evidence, including a contemporaneous non-qualifying resting blood gas study result, undermines the ALJ's conclusion that Claimant established total disability. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994).

Employer also argues Claimant did not establish total disability because there was an "insignificant" time lapse of ten months between Dr. Zlupko's October 16, 2019 blood gas study and Dr. Pickerill's August 26, 2020 blood gas study. Employer's Brief at 7. We disagree. The ALJ has considerable discretion in drawing inferences from the evidence, including whether the time between tests is sufficiently great to enable the ALJ to determine there has been a deterioration in Claimant's condition. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997) (ALJ's function is to weigh the evidence, draw appropriate inferences and determine credibility.). Even if the Board would weigh the evidence differently if considered *de novo*, it must affirm the ALJ's finding if it is supported by substantial evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (The Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis."). Employer has not shown that the ALJ failed to act within that discretion in assigning greatest weight to the most recent blood gas study exercise result, which was taken ten months after the

preceding exercise study result. Decision and Order at 12; *see, e.g., Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJ permissibly found valid contemporaneous objective tests established disability where most recent were qualifying). Thus, as he acted within his discretion, the ALJ permissibly gave greatest credit to the more recent study as showing a deterioration in the Miner's condition. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (citing *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992)); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the Sixth Circuit 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. *Woodward*, 991 F.2d at 319-20; Decision and Order at 12; Director's Exhibit 14; Claimant's Exhibit 2. 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." *Woodward*, 991 F.2d at 319-20.

Employer further asserts the only qualifying blood gas study of record barely met the disability standard. Employer's Brief at 7. However, Employer's reference to the Miner's blood gas study values being just below the disability levels does not take into account the applicable regulation, which sets forth the table values that "establish a miner's total disability" based on the blood gas study evidence. Specifically, the regulation at 20 C.F.R. §718.204(b)(2)(ii) requires only that the PO2 value be equal to or less than a specific number associated with the corresponding PCO2 value. 20 C.F.R. §718.204(b)(2)(ii); Appendix C to 20 C.F.R. Part 718.

Finally, Employer argues the ALJ erred in relying on Dr. Pickerill's blood gas study because Dr. Pickerill did not examine the Miner and did not comment on the result of the qualifying exercise blood gas study. Employer's Brief at 7. Contrary to Employer's contention, there was no need for Dr. Pickerill or any other physician to comment on whether the Miner's qualifying exercise blood gas study precluded the performance of his usual coal mine work pursuant to 20 C.F.R. §718.204(b)(2)(ii), as disability can be established when the study is qualifying under the table values at Appendix C. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 11-12.

Employer's arguments regarding the ALJ's crediting of the August 26, 2020 qualifying exercise blood gas study result amount 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). We therefore affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), as it is supported by substantial evidence. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); Decision and Order at 12.

Cor Pulmonale

Employer correctly asserts the ALJ erred in finding Dr. Whaley's diagnosis of cor pulmonale alone is sufficient to support a finding of total disability, as the applicable regulation requires a diagnosis of cor pulmonale *with right-sided congestive heart failure* to establish total disability. 20 C.F.R. §718.204(b)(2)(iii) (emphasis added); Decision and Order at 12; Claimant's Exhibit 7; Employer's Brief at 6-7. Any error in this regard is harmless, however, because Claimant established total disability based on the blood gas study evidence and thus the ALJ's finding of total disability is supported by substantial evidence.[7] *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As Employer raises no further challenge to the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2), we affirm it and his conclusion that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 8-13. We further affirm, as unchallenged, the ALJ's finding that Employer failed to rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16.

[7] We affirm, as unchallenged, the ALJ's discrediting of Dr. Zlupko's opinion that Claimant is not totally disabled because the physician did not address the August 26, 2020 qualifying exercise blood gas study result. 20 C.F.R. 718.204(b)(2)(iv); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge