U.S. Department of Labor

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

BRB No. 22-0314 BLA

TOMMY SHUFFLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADENA FUELS INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 6/23/2023
	)	
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 Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2020-BLA-05230) rendered on a claim filed on March 19, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-two years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he concluded Claimant 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) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding that Claimant is totally disabled.[2] Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

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.[3] 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).

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

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

[2] We affirm, as unchallenged on appeal, the ALJ's finding of twenty-two years of underground coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[3] 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); Decision and Order at 3; Hearing Transcript at 14.

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).

Employer contends the ALJ erred in finding that Claimant established total disability based on the pulmonary function study evidence and in consideration of the evidence as a whole.[4] Decision and Order at 4-6, 14; Employer's Brief at 12-15.

Pulmonary Function Studies

The ALJ considered six pulmonary function studies dated August 17, 2017, July 2, 2018, August 19, 2018, January 16, 2019, January 22, 2019, and September 1, 2020. Decision and Order at 4-6; Director's Exhibits 17, 24, 25; Claimant's Exhibit 2. Dr. Alam recorded Claimant's height as 71 inches on the three studies that he conducted, while Drs. Green, Dahhan, and Tuteur recorded Claimant's height as 70 inches on their respective studies. Director's Exhibits 17, 24, 25; Claimant's Exhibit 2. The ALJ resolved the height discrepancy by averaging the heights to 70.5 inches. Decision and Order at 5. Using a table height of 70.5 inches and Claimant's age at the time of each study, the ALJ determined the September 1, 2020 study produced qualifying values pre- and post-bronchodilator, while the remaining studies produced non-qualifying values.[5] *Id.* at 4-5. The ALJ found the September 1, 2020 qualifying study most probative of Claimant's current pulmonary condition due to its recency and the pulmonary function studies therefore established total disability at 20 C.F.R. §718204(b)(2)(i). *Id.* at 5-6. Contrary to Employer's assertion, we see no error in this finding. Employer's Brief at 12-14.

Initially, we reject Employer's assertion the ALJ erred in averaging Claimant's recorded heights to find he is 70.5 inches tall. Employer's Brief at 13-14. The Board has held where there are substantial differences in the recorded heights among the pulmonary

[4] The ALJ found the blood gas study evidence overall does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 6. He also found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 4.

[5] 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).

function studies of record, an ALJ must make a factual finding to determine a claimant's actual height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); *see also Toler v. E. Associated Coal Co.*, 43 F.3d 109, 114 (4th Cir. 1995) (ALJ erred by failing to "ascertain [the miner's] 'correct' height in order properly to evaluate the pulmonary function studies"). The task of weighing the evidence and rendering findings of fact is committed to the ALJ. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The ALJ thus permissibly averaged Claimant's recorded heights to find he is 70.5 inches tall. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas*, 6 BLR at 1-223. As Employer does not challenge the ALJ's finding that Claimant's September 1, 2020 pulmonary function study produced qualifying values at this height, we affirm the ALJ's finding that the study is qualifying.[6]

We further reject Employer's contention that the ALJ erred in finding Claimant's September 1, 2020 study most probative. Employer's Brief at 14. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held it is rational to credit more recent evidence that shows a miner's condition worsens given the progressive nature of pneumoconiosis. *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, 719 (4th Cir. 1993). The ALJ permissibly reasoned that, because the September 1, 2020 qualifying study is the most recent study by approximately one year and seven months, it better represents Claimant's current condition. *See Woodward*, 991 F.2d at 319-20; Decision and Order 5-6. Thus, we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 5-6.

[6] Moreover, even if the ALJ had found Claimant is 70 inches tall, Employer fails to explain why remand is required as the September 1, 2020 study would remain qualifying given Claimant's 70 years of age at the time of the study. *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). Using table values set forth in Appendix B for Claimant's age and the nearest greater height of 70.1 inches, a pulmonary function study that yields an FEV1 equal to or less than 1.93 and an MVV equal to or less than 76 is qualifying. 20 C.F.R. Part 718, App. B; *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008). Claimant's September 1, 2020 study yielded pre- and post-bronchodilator FEV1 and MVV results below these values (FEV1 = 1.6 and 1.72; MVV = 51 and 66). 20 C.F.R. Part 718, App. B; *Meade*, 24 BLR at 1-44; Claimant's Exhibit 2 at 3.

Medical Opinions

The ALJ considered four medical opinions. Decision and Order at 8-14. Drs. Green and Alam diagnosed a totally disabling obstructive impairment that precludes Claimant's usual coal mine work. Director's Exhibits 17, 23 at 2; Claimant's Exhibits 3 at 23-25, 4 at 15-16 & 19-21, 5 at 9. Drs. Dahhan and Tuteur opined Claimant is not totally disabled from a pulmonary standpoint. Director's Exhibits 25 at 3-4, 56; Employer's Exhibits 3 at 5, 4 at 3, 5 at 9. The ALJ found the opinions of Drs. Green and Alam merit probative weight as they are consistent with the weight of the pulmonary function studies and Dr. Green accurately understood the exertional requirements of Claimant's usual coal mine job. Decision and Order at 10-12. By contrast, he found the opinions of Drs. Dahhan and Tuteur inconsistent with the weight of pulmonary function studies and entitled to "no weight" as the physicians did not discuss the exertional requirements of Claimant's usual coal mine work. *Id.* at 12-14. He thus found Claimant established total disability by a preponderance of medical opinions at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 14.

In challenging the ALJ's credibility determinations, Employer asserts only that the ALJ's alleged error in weighing the pulmonary function studies affected his weighing of the medical opinions. Employer's Brief at 14-15. Having already rejected this argument, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). We therefore further affirm his overall conclusion that Claimant established a totally disabling pulmonary impairment based on the evidence as a whole, and thereby invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b), 718.305; Decision and Order at 14.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not rebut the presumption under either method. Because Employer does not challenge this finding, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge