U.S. Department of Labor

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

BRB No. 21-0577 BLA

JAMES D. DAUGHERTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LONG PIT MINING COMPANY	)	
	)	
and	)	
	)	
UNITED STATES FIDELITY & GUARANTY	)	DATE ISSUED: 03/22/2023
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

James D. Daugherty, Caryville, Tennessee.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Larry W. Price's Decision and Order Denying Benefits (2020-BLA-05616) 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 August 8, 2018.[2]

The ALJ credited Claimant with at least twenty-four years of qualifying coal mine employment, but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, he found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718. He therefore denied benefits.

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but she does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed four previous claims. Director's Exhibits 1-3, 70. The ALJ noted Claimant's second claim was withdrawn. Decision and Order at 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. He also stated Claimant's "first and third claims were closed and became final." Decision and Order at 2.

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 he finds "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).

[3] 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.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Neither Employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[4]

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are 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 (1965).

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

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). 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). 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 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 failed to establish total disability by any method.[6] 20 C.F.R. §718.204(b)(2); Decision and Order at 13-15.

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[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least twenty-four years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 7; Hearing Tr. at 8.

[6] The ALJ correctly determined Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). He found the only arterial blood gas study of record does not support a finding of total disability. Decision and Order at 14; Director's Exhibit 22 at 10-12. Further, he stated that "[a]lthough there is some evidence of cor pulmonale, there is no evidence of *right-sided congestive heart failure*." Decision and Order at 13-15

Pulmonary Function Studies

The ALJ considered seven pulmonary function studies dated July 18, 2017, July 2, 2018, August 27, 2018, January 8, 2020,[7] April 29, 2020, July 28, 2020, and January 26, 2021. Decision and Order at 7-8. He stated the July 28, 2020 study is "qualifying,"[8] but "invalid," and "[a]ll other tests [are] non-qualifying." Decision and Order at 13. He thus found the pulmonary function studies do not support a finding of total disability. *Id*.

The ALJ's analysis of the pulmonary function study evidence is flawed for multiple reasons. First, he inaccurately characterized the July 18, 2017 and July 2, 2018 studies as non-qualifying based on the predicted FEV_1 and FVC values at rest.[9] Decision and Order at 7-8, 13; Director's Exhibit 25 at 1, 5. He noted the July 18, 2017 study produced an FEV_1 value of 3.12, an FVC value of 4.24, and an FEV_1/FVC ratio of 74 percent, and the July 2, 2018 study produced an FEV_1 value of 2.93, an FVC value of 4.01, and an FEV_1/FVC ratio of 73 percent. Decision and Order at 7-8. Contrary to the ALJ's findings, the July 18, 2017 study actually produced an FEV_1 value of 1.24 and an FVC value of 2.08 at rest, and the July 2, 2018 study actually produced an FEV_1 value of 1.19 and an FVC value of 1.57 at rest.[10] Director's Exhibit 25 at 1, 5. Because the July 18, 2017 and July

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(emphasis added); Director's Exhibit 49 at 9-36; Claimant's Exhibits 4 at 2, 7 at 11-34. As substantial evidence supports these findings, we affirm them.

[7] The ALJ inaccurately listed the date for the January 8, 2020 pulmonary function study as June 11, 2021. Decision and Order at 8; Claimant's Exhibit 7 at 17.

[8] 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).

[9] For a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce both a qualifying FEV_1 value and one of the following: either an FVC value or MVV value equal to or less than the values appearing in the tables set forth in Appendix B, or an FEV_1/FVC ratio equal to or less than fifty-five percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). The qualifying values in Appendix B are based on gender, height, and age. 20 C.F.R. Part 718, Appendix B.

[10] The July 18, 2017 and July 2, 2018 studies were administered when Claimant was 70 and 71years old, respectively. Director's Exhibit 25 at 1, 5. Because the ALJ found all the pulmonary function studies reported varying heights for Claimant falling between 68.0 inches and 69.0 inches, he permissibly calculated an average height of 68.125 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 7. He then used the closest greater table height set forth at Appendix B of 20 C.F.R. Part 718

2, 2018 studies produced FEV_1 and FVC values at rest that are less than the values appearing in the tables set forth in Appendix B for Claimant's age and height, the ALJ mischaracterized these studies as non-qualifying. *See* 20 C.F.R. Part 718, Appendix B; *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (explaining if the ALJ misconstrues relevant evidence, the case must be remanded for reevaluation of the issue to which the evidence is relevant).

Next, the ALJ erred in failing to address all the comments regarding the reliability of the July 18, 2017 and July 2, 2018 qualifying pulmonary function studies and in failing to explain why he concluded the July 28, 2020 qualifying pulmonary function study is invalid. Decision and Order at 7-8, 13; Director's Exhibit 25 at 1, 5; Claimant's Exhibits 2, 7 at 8.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[11] 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). 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) (party challenging the validity of a study has the burden to establish the results are unreliable); 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 quality standards, however, do not apply to pulmonary function studies, like the July 28, 2020 study, conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of West*

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of 68.5 inches for determining the qualifying or non-qualifying nature of the studies. *Id.* As the ALJ correctly noted, an FEV_1 value of 1.77 and an FVC value of 2.29 are qualifying values for a male who is seventy years old and 68.5 inches tall, and an FEV_1 value of 1.76 and an FVC value of 2.28 are qualifying values for a male who is seventy-one years old and 68.5 inches tall. 20 C.F.R. Part 718, Appendix B; Decision and Order at 7.

[11] An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

Virginia/Apogee Coal Co., 24 BLR 1-78, 1-92 (2008) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment). An ALJ must still determine, however, if treatment record pulmonary function studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

The ALJ noted Dr. Forehand stated the July 18, 2017 and July 2, 2018 studies have "[u]nacceptable spirograph" and "[e]xcessive variability." Decision and Order at 7-8; Director's Exhibit 25 at 1, 5. Although the ALJ noted the technician for the July 18, 2017 study stated Claimant "has difficulty understanding instructions but gives his best effort and cooperation," Decision and Order at 8; Director's Exhibit 25 at 5, he did not address the comment of the technician for the July 2, 2018 study that Claimant gave "[g]ood effort and cooperation." Director's Exhibit 25 at 2. Further, while the ALJ noted Dr. Hughes stated the July 28, 2020 study was "compromised by poor patient efforts rendering the probably [sic] test invalid," Decision and Order at 8; Director's Exhibit 25 at 5, he did not explain his credibility determinations regarding the doctor's validity opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). Moreover, the ALJ did not address the inapplicability of the quality standards regarding the July 28, 2020 study, but assessed the study's reliability, since Claimant performed that study as part of his medical treatment. Decision and Order at 13; *see Stowers*, 24 BLR at 1-92. Thus, the ALJ's weighing of the July 18, 2017, July 2, 2018, and July 28, 2020 studies does not satisfy the Administrative Procedure Act (APA).[12] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Rowe*, 710 F.2d at 255; *Wojtowicz*, 12 BLR at 1-165.

Further, the ALJ erred in failing to consider all of the pulmonary function studies in the record. Claimant's Exhibit 7 at 22, 27, 33. While the ALJ is not required to accept evidence that he determines is not credible, he must consider and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Here, Claimant submitted pulmonary function studies as part of his treatment records. Claimant's Exhibit 7. The ALJ considered the January 8, 2020, April 29, 2020, July 28, 2020, and January 26, 2021 treatment studies. Decision and Order at 7-8, 13; Claimant's Exhibit 7 at 3, 13, 8, 17, 33. But he neither discussed nor explained why he did not address

[12] The Administrative Procedure Act 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).

the February 22, 2016, August 3, 2016, and January 31, 2017 treatment studies. Claimant's Exhibit 7 at 22, 27, 33. The February 22, 2016 and August 3, 2016 studies produced qualifying results at rest, and the January 31, 2017 study produced non-qualifying results at rest. *Id*. Although Claimant did not identify these studies as his affirmative evidence, the ALJ admitted the studies into the record as part of Claimant's treatment records. Claimant's Exhibit 7 at 1-34; Hearing Tr. at 7-8. Thus the ALJ erred in failing to consider these treatment studies. *See McCune*, 6 BLR at 1-998.

In view of the forgoing errors, we vacate the ALJ's finding that Claimant did not establish total disability based on the pulmonary function study evidence, and remand the case for further consideration of that evidence. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ next considered the opinions of nurse practitioner Eberharter (Claimant's primary care provider), Dr. DiMeo, and Dr. Ajjarapu. Decision and Order at 14-15. Nurse practitioner Eberharter diagnosed pulmonary hypertension, cor pulmonale, reactive airway disease and chronic obstructive pulmonary disease, and opined Claimant would be unable to return to his usual coal mine work due to his respiratory condition.[13] Claimant's Exhibit 4 at 2. Similarly, Dr. DiMeo opined "it would be unlikely [Claimant] would be able to do any type of work [he is] accustomed to due to dyspnea on exertion." Claimant's Exhibit 3. The ALJ found their opinions not well-reasoned or well-documented because they did not reference any data or explain their disability conclusions.[14] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; Decision and Order at 14. We affirm this determination as within the discretion of the ALJ. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185.

Finally, Dr. Ajjarapu opined Claimant is not totally disabled. Director's Exhibit 22 at 7. She concluded Claimant "doesn't meet [the Department of Labor's] criteria for total and complete pulmonary impairment," and "has the pulmonary capacity to do his previous coal mine [job]." *Id*. The ALJ noted Dr. Ajjarapu relied on "Claimant's non-qualifying pulmonary function test and arterial blood gas study results, as well as a normal electrocardiogram" and "explain[ed] why that [objective] data led . . . to her ultimate

[13] Nurse practitioner Eberharter opined Claimant would be "unable to do any type of work." Claimant's Exhibits 4, 7.

[14] The ALJ noted Dr. DiMeo did not "definitively say whether Claimant could return to his [usual] coal mine employment." Decision and Order at 14.

[disability] conclusion." Decision and Order at 14. He thus found Dr. Ajjarapu's opinion well-reasoned and well-documented. *Id*. Consequently, he concluded Claimant did not establish total disability based on the medical opinions.

Because the ALJ's erroneous weighing of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i) may have affected his weighing of Dr. Ajjarapu's opinion, we vacate his finding that Claimant did not establish total disability based on the medical opinions, 20 C.F.R. §718.204(b)(2)(iv), or in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 14-15. We also therefore vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and the denial of benefits. Consequently, we remand the case for further consideration.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on a preponderance of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i). He must properly characterize the pulmonary function study evidence and undertake a quantitative and qualitative analysis of the conflicting results in rendering his findings of fact. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993).

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must first determine the exertional requirements of Claimant's usual coal mine work and consider the medical opinions assessing his impairment in light of those requirements.[15] *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to the miner's work capabilities); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability). In rendering his credibility findings, he must consider the comparative credentials of the physicians, the

[15] A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

explanations for their conclusions, and the documentation underlying their medical judgments. *See Barrett*, 478 F.3d at 356; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

The ALJ must then weigh the categories of evidence together to determine if Claimant has established total disability based on a preponderance of the evidence. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, and thus invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ must also determine whether Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309. If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See 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, 1-2 (1986) (en banc). In rendering his findings on remand, the ALJ must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge