U.S. Department of Labor

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

BRB No. 21-0611 BLA

CURTIS M. OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 5/10/2023
	)	
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 Jonathan C. Calianos, District Chief Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits (2019-BLA-05826), rendered on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on June 25, 2018.[1]

The ALJ accepted the parties' stipulation that Claimant had 29.86 years of underground coal mine employment. He also found Claimant established total disability and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309. Further, he determined that Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus in invoking the Section 411(c)(4) presumption.[3] Neither Claimant nor the Director, Office of the Workers' Compensation Programs, has filed a response brief.

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[1] Claimant filed two prior claims. Decision and Order at 2; Director's Exhibits 1, 2. Most recently, the district director denied his March 31, 2016 claim for failing to establish total disability. Director's Exhibit 2. Claimant took no further action.

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 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 the district director denied Claimant's prior claim for failure to establish total disability, Claimant must submit new evidence establishing total disability to warrant review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 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(b).

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 29.86 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.

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, 362 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish that he has a totally disabling respiratory or 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.[5] *See* 20 C.F.R. §718.204(b)(1). 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 established total disability based on the medical opinion evidence and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-16.

Employer argues the ALJ erred in finding total disability established. Employer's Brief at 4. It contends the ALJ erred in crediting Dr. Green's opinion that Claimant is disabled over the opinions of Drs. Sargent and McSharry that he is not. *Id.* at 4-5. We disagree.

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine work in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Hearing Transcript at 19-20; Director's Exhibit 5.

[5] The ALJ found Claimant's usual coal mining work was as a supply motor man, which required heavy exertional work. Decision and Order at 9-10. These findings are affirmed as unchallenged. *See Skrack*, 6 BLR at 1-711.

[6] The ALJ found Claimant did not establish total disability based on the pulmonary function or arterial blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 6-8.

The ALJ considered the medical opinions of Drs. Sargent, McSharry, and Green. Decision and Order at 10-16; Director's Exhibits 22, 27, 28; Employer's Exhibits 1, 5. He found each qualified to opine on the issue and understood the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 10. Drs. Sargent and McSharry opined Claimant was not disabled as his pulmonary function studies were normal and his arterial blood gas studies, while demonstrating a decrease in oxygenation with exercise, did not decline to disabling levels. Director's Exhibit 27; Employer's Exhibits 1, 5. Dr. Green found Claimant's decrease in oxygenation and shortness of breath with very little exercise precluded him from performing his usual coal mine employment. Director's Exhibits 22, 28.

The ALJ found Dr. Green's explanation that Claimant's hypoxemia rendered him incapable of performing his usual coal mine employment to be well-reasoned and documented. Decision and Order at 15. Conversely, he found Drs. Sargent's and McSharry's opinions undermined for failing to adequately explain how Claimant could perform his usual coal mine employment, requiring heavy exertion, given they acknowledged he has a mild blood gas abnormality with limited exercise.[7] *Id.* at 15-16. Providing greater weight to Dr. Green's opinion, he found Claimant established total disability based on the medical opinion evidence. *Id.* at 16.

Initially, we reject Employer's argument that the ALJ found the discrediting of Drs. Sargent's and McSharry's opinions constituted "prima facie" evidence of total disability. Employer's Brief at 4. The ALJ correctly stated Claimant bears the burden of establishing total disability. Decision and Order at 5, 16; 20 C.F.R. §718.201(b); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). He then examined the rationales of each physician to determine if they were well-reasoned and documented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 10-16. Indeed, as Employer next argument implicitly acknowledges, the ALJ considered Dr. Green's opinion to determine whether it was sufficient to affirmatively establish total disability. Employer's Brief at 5; Decision and Order at 10-12, 15.

[7] Employer has not challenged the ALJ's findings that Drs. Sargent's and McSharry's opinions are inadequately explained and speculative; thus, these findings are affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 15-16.

Employer next contends the ALJ erred in crediting Dr. Green's opinion because he did not consider the most recent arterial blood gas study, which was non-qualifying,[8] and rather "extrapolates and speculates" that the doctor's opinion would remain the same based on this evidence.[9] Employer's Brief at 5.

But an ALJ is not required to discredit a physician who did not review all of the miner's medical records and testing. Such an opinion can be credited when it is otherwise found well-reasoned, documented, and based on the physician's own examination of the miner, objective test results, and exposure histories. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). In crediting Dr. Green's opinion, the ALJ noted Dr. Green's interpretation of his own blood gas study dated August 13, 2018, observations of Claimant's shortness of breath with minimal exertion, and consideration of Dr. Sargent's December 18, 2018 arterial blood gas study which demonstrated a blood gas abnormality with little exercise. Decision and Order at 15. He further found Dr. Green had an adequate understanding of Claimant's coal mine employment history and the exertional requirements of his usual coal mining work.[10] *Id.* at 10. As the ALJ's findings are supported by substantial evidence, we affirm his crediting of Dr. Green's opinion. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Hicks*, 138 F.3d at 528; Decision and Order at 16-17.

Moreover, while the ALJ found none of the blood gas studies qualified under the regulations, he correctly explained that a miner may be disabled notwithstanding non-

[8] A "qualifying" blood gas study yields results equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[9] The ALJ considered three arterial blood gas studies, dated August 13, 2018, December 18, 2018, and September 8, 2020. Decision and Order at 8; Director's Exhibits 22, 27; Employer's Exhibit 1. None of the studies were qualifying under the regulations at rest or after exercise. Decision and Order at 8.

[10] Insofar as Employer argues that the September 8, 2020 blood gas study is the most probative because it is the most recent and shows improvement in function, this argument is misplaced. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held it irrational to credit evidence based solely on the basis of recency where the evidence shows the miner's condition has improved. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993).

qualifying testing. 20 C.F.R. §718.204(b)(2)(iv); *see Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141-42 (4th Cir. 1995); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). He found Dr. Green's opinion that Claimant was totally disabled due to his blood gas abnormality with exercise notwithstanding the non-qualifying results persuasive, particularly his explanation that hypoxemia was seen with "minimal" exercise and thus Claimant would be unable to perform the exertional requirements of his last job as a supply motor operator. Decision and Order at 15-16. While Dr. Green did not consider Dr. McSharry's subsequent study, Dr. McSharry noted, similar to Dr. Green's explanation regarding Dr. Sargent's study, an abnormality in his blood gas study and low exercise tolerance, indicating the study demonstrated a "modest degree of arterial desaturation with exercise."[11] Employer's Exhibit 1 at 4. Given that Dr. McSharry also described oxygen desaturation with exercise, poor exercise tolerance, and accompanying shortness of breath with his study, Employer has failed to explain how this evidence undermines Dr. Green's opinion. Thus, we affirm the ALJ's finding that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16.

As Employer raises no further arguments regarding the ALJ's weighing of the evidence, we also affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability and, consequently, that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order at 17.

Finally, as Employer has not challenged the ALJ's determination that it failed to rebut the Section 411(c)(4) presumption, we affirm this finding. *See* 20 C.F.R. §718.305(d)(1); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17-23.

[11] During Dr. Sargent's December 18, 2018 blood gas study, Claimant exercised for two minutes and twenty-eight seconds at one mile per hour, increasing his heart rate to seventy-five beats per minute. Director's Exhibits 27; Decision and Order at 12-13. During Dr. McSharry's September 8, 2020 study, Claimant exercised for three minutes and fifty-four seconds at 1.5 miles per hour, also reaching a heart rate of seventy-five beats per minute. Employer's Exhibit 1 at 21; Decision and Order at 13-14.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge