U.S. Department of Labor

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

BRB No. 21-0337 BLA

RICKY GLEN ADAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/15/2022
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	
	)	
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 on Modification of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor).

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

BUZZARD and JONES, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits on Modification (2019-BLA-05760) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves Claimant's request for modification of his claim filed on August 26, 2013.[1]

On September 5, 2017, ALJ William T. Barto denied benefits because Claimant failed to establish total disability. Claimant timely requested modification on August 27, 2018, and the case was assigned to ALJ Silvain (the ALJ), who held a telephonic hearing on August 11, 2020.

The ALJ credited Claimant with at least twenty-seven years of underground coal mine employment. Considering the previously submitted evidence in conjunction with the newly submitted evidence, the ALJ found Claimant established total disability and 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).[2] The ALJ further found Employer did not rebut the presumption, and thus concluded Claimant established modification based on a mistake in a determination of fact. Additionally, the ALJ found granting modification renders justice under the Act and awarded benefits. 20 C.F.R. §725.310.

On appeal, Employer generally alleges the law allowing Claimant to seek modification is unconstitutional. It also challenges the ALJ's findings that Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of

[1] In a miner's claim, the ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the ALJ], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant is totally disabled due to pneumoconiosis if he establishes 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.

Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's constitutional arguments regarding modification. *See* 20 C.F.R. §725.310.[3]

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.[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).

Constitutionality of Modification Law

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), and is implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits in a miner's claim based on a change in conditions or a mistake in a determination of fact. 30 U.S.C. §922, as incorporated by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310.

Employer asserts that the modification provisions are unconstitutional because they deprive it of due process and equal protection. Employer's Brief at 10. In support, Employer informs the Board that it has appealed this issue to the United States Court of Appeals for the Fourth Circuit in two separate cases, *Island Creek Coal Co. v. Payne*, No. 20-2131[5] and *Consolidation Coal Co. v. Director, OWCP*, No. 21-1015, arguing "the law on modification . . . needs to be changed, and specifically restricted with respect to requirements" for claimants requesting modification. *Id.*

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

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in either Virginia or West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibits 29 at 12; 96 at 7, 20-21.

[5] The United States Court of Appeals for the Fourth Circuit recently rejected due process and equal protection challenges to the modification provisions as the employer in that case did not raise their challenges before the ALJ and the Board. *Terry Eagle Ltd. P'ship v. Payne*, No. 20-2131 (4th Cir. Oct. 12, 2022).

However, the United States Supreme Court and federal circuit courts have routinely applied 33 U.S.C. §922 and have allowed parties to seek modification thereunder, without any suggestion the law is unconstitutional. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (An ALJ has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."); *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999) ([A]ny "mistake of fact may be corrected [by the ALJ], including the ultimate issue of benefits eligibility."); *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 321-22 (4th Cir. 2012), *cert. denied*, 570 U.S. 917 (2013) (modification is not automatically granted when a mistake in fact is found; rather, the fact finder must consider whether granting the modification request renders "justice under the [Act]."); *see also Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547 (7th Cir. 2002); *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *USX Corp. v. Director, OWCP* [*Bridges*], 978 F.2d 656, 658 (11th Cir. 1992).

Because Employer concedes the prevailing law governing modification "does not support its arguments," and it only raises the issue for purposes of preserving error on appeal, we decline to further consider its arguments. Employer's Brief at 10; Director's Brief at 3. Moreover, that Employer has raised a similar challenge in two different cases pending before the Fourth Circuit is not grounds for relief, as the possibility of a future circuit decision is not a basis for the Board to decline to apply the modification statute and regulations in this case. *Cf. United States v. Windsor*, 570 U.S. 744, 756 (2013) (executive branch continues to enforce applicable statutory provisions pending definitive resolution of provision's validity by the courts); *Hill v. Director, OWCP*, 9 BLR 1-126, 1-127 n. 1 (1986) (appellate body must apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary); *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010) (declining to hold claim in abeyance pending resolution of legal challenges to the Act), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012).

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

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. 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

[6] A "qualifying" pulmonary function study or 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.

pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[7] 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 challenges the ALJ's finding that Claimant established total disability based on the medical opinion evidence and in consideration of the evidence as a whole. We are not persuaded by Employer's arguments.

Initially, the ALJ determined Claimant's usual coal mine employment as a roof bolter required heavy manual labor.[8] He credited Dr. Ajjarapu's opinion that Claimant is totally disabled over the contrary opinions of Drs. Silman, Green, and Vuskovich. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-14; Director's Exhibits 11, 81, 82;

Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The ALJ found no evidence of complicated pneumoconiosis or cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §§718.304, 718.204(b)(2)(iii); Decision and Order at 5. The ALJ considered four pulmonary function studies and noted the two earliest studies were qualifying while the latter two studies were not. He found the pulmonary function study evidence inconclusive and therefore insufficient, when considered alone, to establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6-10; Director's Exhibits 11-13, 81, 82, 88; Employer's Exhibit 4. The ALJ found all the blood gas studies were non-qualifying. Decision and Order at 10; Director's Exhibits 11, 12, 81, 82, 84.

[8] The ALJ noted Claimant testified his job as a roof bolter was "brute labor" and that he was "pretty much" "killed out by the time the end of [a] shift comes around." Decision and Order at 5, *quoting* Director's Exhibit 29 at 9, 11. He further noted Claimant's explanation that he had to load the bolt machine with boxes of glue, which weighed twenty-five to thirty pounds, "approximately 500 [times] a shift." *Id.* at 5, *quoting* Director's Exhibit 29 at 9. Moreover, the ALJ noted Claimant wrote on his Description of Coal Mine Work and Other Employment form that he primarily worked as a roof bolter and was required to lift and carry between 50 and 100 pounds. *Id*. at 5; Director's Exhibit 4 at 1, 2.

Employer's Exhibit 4. The ALJ further found the treatment records support a finding of total disability. Decision and Order at 14-15.

Dr. Ajjarapu

Dr. Ajjarapu conducted the Department of Labor's complete pulmonary evaluation and obtained a qualifying pulmonary function study pre-bronchodilator and a non-qualifying blood gas study that showed hypoxemia. Director's Exhibit 11 at 22, 29, 35, 39, 40, 41. She noted Claimant's symptoms included cough and dyspnea on ambulation and reported he "can walk 100 feet [on] level surface and can climb 5 to 10 steps." *Id*. at 38. Dr. Ajjarapu concluded Claimant has a "severe and complete pulmonary disability." *Id*. at 3.

Employer first argues that because Dr. Ajjarapu's examination is the oldest of record, the ALJ should have given deference to the more recent opinions of its medical experts. Employer asserts that it is well-accepted that more recent evidence is entitled to greatest weight, and the ALJ ignored that rule by relying on the law from the United States Court of Appeals for the Sixth Circuit, when this case arises within the jurisdiction of the Fourth Circuit. We disagree.

Both the Sixth Circuit and the Fourth Circuit have held that given the progressive nature of pneumoconiosis, it is irrational to credit later evidence solely on the basis of recency if the evidence shows a 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, 719 (4th Cir. 1993) ("A bare appeal to recency" in evaluating medical opinions "is an abdication of rational decisionmaking."); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). Thus, we reject Employer's contention the ALJ erred in failing to credit the more recent medical opinions over Dr. Ajjarapu's opinion.

Moreover, we disagree that the ALJ erred in finding Dr. Ajjarapu's opinion adequately reasoned because she did not review objective testing obtained after her examination. An ALJ is not required to discredit a physician's opinion for failing to consider the most recent medical evidence. The ALJ permissibly found Dr. Ajjarapu's opinion reasoned and documented based on her physical examination of Claimant, her review of the objective testing she obtained which the ALJ found "valid and probative of the Claimant's disability," and her understanding of Claimant's respiratory symptoms, his physical limitations, and his coal mine employment history. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Decision and Order at 11; Director's Exhibit 11 at 2, 34, 38, 41.

Employer also alleges Dr. Ajjarapu's opinion is not credible because it is based on an invalid pulmonary function study she described as "suboptimal due to fair effort." Employer's Brief at 7. However, when weighing the pulmonary function studies, the ALJ specifically rejected Employer's contention that Dr. Ajjarapu's pulmonary function testing was invalid and Employer raises no specific challenge to the ALJ's conclusion. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-8, 11; Director's Exhibit 11 at 22. Consequently, Employer mischaracterizes the evidence in contending that Dr. Ajjarapu relied on an invalid study and its argument regarding her pulmonary function study fails.

We further disagree that Dr. Ajjarapu's opinion lacks credibility because it was based, in part, on a non-qualifying blood gas study. A physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); Decision and Order at 11; Director's Exhibit 11 at 29, 41.

Additionally, we reject Employer's contention that Dr. Ajjarapu's opinion is entitled to little weight because she did not identify the specific exertional requirements of Claimant's usual coal mine job. Because Dr. Ajjarapu noted Claimant worked as a roof bolter, the ALJ permissibly concluded she understood the nature of Claimant's job duties, and her opinion "is consistent with the physical limitations she documented, including that the Claimant can only walk 100 feet on [level] ground." *See Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-303 (2003); Decision and Order at 11; Director's Exhibit 11 at 33, 38.

Employer also mischaracterizes Dr. Ajjarapu's opinion as merely advising against further coal mine dust exposure. Employer's Brief at 7. Dr. Ajjarapu opined Claimant has a severe and complete pulmonary disability. Director's Exhibit 11 at 3. In light of his respiratory impairment, she also concluded Claimant "should be advised to avoid [continuous] and persistent exposure to coal mine dust" even if he could perform his prior job. *Id*. at 40. Thus her opinion is two-fold: she opined Claimant has a disabling impairment and also recommended that due to his impairment he no longer be exposed to coal mine dust. *Id*. at 2-3, 40-41.

Because Dr. Ajjarapu specifically opined Claimant has a respiratory impairment that precludes the performance of his usual coal mine work, and the ALJ found her opinion reasoned and documented, we affirm the ALJ's crediting of her opinion to support a finding that Claimant is totally disabled. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533

(4th Cir. 1988); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986); Decision and Order at 11, 14; Director's Exhibits 11 at 2-3, 40-41.

Drs. Green, Silman, and Vuskovich

Employer further asserts the ALJ did not adequately explain his rejection of Drs. Green's, Silman's, and Vuskovich's opinions that Claimant is not totally disabled. Employer's Brief at 6-7. We disagree.

The ALJ accurately noted that while Dr. Silman indicated Claimant does "not meet federal [black lung] disability [criteria for total disability]," he nonetheless diagnosed a moderate respiratory impairment but "did not state whether the Claimant could return to his last coal mine job." Decision and Order at 12; Director's Exhibit 82 at 5. Because the ALJ permissibly found that Dr. Silman "does not thoroughly address" whether Claimant is totally disabled, we affirm his decision to accord Dr. Silman's opinion "little probative weight." Decision and Order at 12; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Dr. Green examined Claimant and documented his history of pleurisy, wheezing, and shortness of breath, cough, sputum, and chest pain, as well as his daily symptoms of shortness of breath, cough, sputum, 2-3 pillow orthopnea, and awakening at night with difficulty breathing. Director's Exhibit 81 at 3-4. He noted that Claimant experiences shortness of breath "walking along his level driveway a distance of about 300 feet" and "[h]e avoids climbing and lifting." *Id*. at 4. Dr. Green opined that Claimant has a moderate obstructive respiratory impairment shown on pulmonary function testing and that the Claimant's exercise arterial blood gas study reflected "a mild degree of hypoxemia with exercise." *Id. at 5*. However, Dr. Green opined that the Claimant is not totally disabled due to the fact that "[h]e does not meet the Federal guideline criteria for total pulmonary disability." *Id*.

The ALJ permissibly found Dr Green's opinion unpersuasive because, contrary to Dr. Green's assessment, non-qualifying objective test results do not preclude a finding of total disability, so long as a reasoned and documented medical opinion concludes the miner's testing reflects a respiratory impairment that prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 13; Director's Exhibit 81 at 5. In concluding Claimant is not disabled because his objective test results are non-qualifying, the ALJ permissibly found that Dr. Green did not adequately address why Claimant's moderate obstruction and exercise hypoxemia don't preclude Claimant

from performing heavy manual labor as a roof bolter.[9] *See Cornett*, 227 F.3d at 578 (even a mild impairment may be totally disabling depending on the exertional requirements of Claimant's usual coal mine work); Decision and Order at 11-13; Director's Exhibit 81 at 5.

As the ALJ found, Dr. Vuskovich diagnosed a mild respiratory impairment with a restrictive pattern, but opined Claimant could work as a roof bolter. Employer's Exhibit 4 at 16-17. We see no error in the ALJ's determination that Dr. Vuskovich's opinion is not credible on total disability because he did not explain how Claimant could perform the heavy labor required of his usual coal mine work, in light of the impairment Dr. Vuskovich diagnosed and "the various medical records [Dr. Vuskovich considered] documenting the Claimant's physical limitations such as shortness of breath with walking on ground level and dyspnea on exertion with one flight of stairs." *See Cornett*, 227 F.3d at 578; Decision and Order at 13-14; Employer's Exhibit 4.

Lastly, Employer contends the ALJ erred in stating Drs. Silman's and Green's reports were obtained at Employer's request when they actually evaluated Claimant at his request. Employer's Brief at 8-9. We see no merit in Employer's unexplained contention that "a correct understanding of the origination of the reports may very well have changed the ALJ's consideration of the reports as a whole." *Id*. at 9. There is no indication in the ALJ's decision that he assigned weight based on which party he thought requested the medical opinions. Rather, as discussed above, the ALJ permissibly discredited Drs. Green and Silman based on their lack of explanation as to why they believed Claimant could perform his usual coal mine work, not because of who he thought had hired the physicians to prepare their reports. *See Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992) (identity of the party who hired a physician as an expert witness does not by itself demonstrate partiality or partisanship on the part of the physician).

As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the explanations the experts give for their diagnoses and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013). Employer's arguments regarding the ALJ's weighing of the medical opinions are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[9] Dr. Vuskovich opined that Claimant has a mild impairment, and concluded Claimant has "the pulmonary capacity to return to his underground [coal mine] work including lifting up to 100 pounds and roof bolting." Employer's Exhibit 4 at 17.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 14, 15. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. As Employer does not challenge the ALJ's finding that it did not rebut the presumption, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16-23. We further affirm as unchallenged the ALJ's determination that granting Claimant's modification request renders justice under the Act.[10]

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

I concur in the result.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

[10] Before granting a request for modification, an ALJ must determine whether doing so will render justice under the Act." *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327-28 (4th Cir. 2012). In making that determination, the ALJ must consider several factors, including the need for accuracy, the quality of the new evidence, the moving party's diligence and motive, and whether a favorable ruling would still be futile. *Sharpe v. Dir., OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007).