U.S. Department of Labor

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

BRB No. 21-0448 BLA

ROBERT T. BUGGEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY	)	
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	DATE ISSUED: 11/17/2022
	)	
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 on Modification Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order on Modification Awarding Benefits (2019-BLO-00011) rendered on a subsequent claim filed on August 22, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In an October 27, 2017 Decision and Order Denying Benefits, ALJ Drew A. Swank denied benefits because Claimant failed to establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Claimant timely requested modification of the denial of benefits and submitted additional evidence.

In the Decision and Order that is the subject of this appeal, ALJ Appetta (the ALJ) credited Claimant with thirty-two years of underground coal mine employment and found the new evidence established a totally disabling respiratory or pulmonary impairment. Thus, she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established both a change in conditions,[3] 20 C.F.R. §725.310, and a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's second claim for benefits. The district director denied his first claim, filed on June 1, 1993, for failure to establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that the Miner's total disability is due to pneumoconiosis if the Miner has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] The ALJ also found that granting modification would render justice under the Act.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim, 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)(1); *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).

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and thus invoked the Section 411(c)(4) presumption and established a change in conditions.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a 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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Modification of a denial of benefits may be granted if a change in conditions has occurred or because of a mistake in a determination of fact in the prior decision. 20 C.F.R. §725.310. When considering a modification request, the ALJ must reconsider the evidence for any mistake of fact, including the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995).

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 upon 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). 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). The ALJ found Claimant established total disability

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Because Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *See id.*; Director's Exhibit 1.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-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 5.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 10, 12.

based on the pulmonary function studies, medical opinion evidence, and weighing of the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 13, 22.

The ALJ considered three pulmonary function studies on modification dated April 18, 2018, November 27, 2018, and December 10, 2020. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11-12; Director's Exhibit 101 at 11; Claimant's Exhibit 1 at 6; Employer's Exhibit 2 at 12. The April 18, 2018 and November 27, 2018 studies produced qualifying[8] results before the administration of bronchodilators but were non-qualifying after the administration of bronchodilators. Director's Exhibit 101 at 5; Employer's Exhibit 2 at 12. The December 10, 2020 study produced non-qualifying results both before and after the administration of a bronchodilator. Claimant's Exhibit 1 at 6. The ALJ further noted ALJ Swank previously considered two non-qualifying pulmonary function studies dated November 24, 2014, and May 4, 2017. Decision and Order at 12; Director's Exhibits 22 at 11; 78 at 11.

The ALJ gave greater weight to the pulmonary function studies submitted on modification as well as to their pre-bronchodilator results.[9] Decision and Order at 12-13. Thus, noting that two of the three pre-bronchodilator studies submitted on modification are qualifying, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 13, 21-22.

Employer contends the ALJ erred by failing to address the non-qualifying December 10, 2020 pulmonary function study. Employer's Brief at 12. We disagree.

Contrary to Employer's contention, the ALJ observed the December 10, 2020 pulmonary function study was non-qualifying both before and after the administration of a bronchodilator, but that Dr. Aulick noted the study still showed some respiratory impairment. Decision and Order at 12; Claimant's Exhibit 1 at 4. She found this study outweighed by the two qualifying pre-bronchodilator studies, noting that the majority of the pre-bronchodilator results meet the criteria for total disability. Decision and Order at

[7] The ALJ found the arterial blood gas studies do not establish total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 13-14.

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at Appendix B for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[9] We affirm, as unchallenged, the ALJ's crediting of the pre-bronchodilator values. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); *Skrack*, 6 BLR at 1-711.

12, 21. Employer generally argues that the December 10, 2020 pulmonary function study is "the most reliable."[10] Employer's Brief at 12-13. Employer's argument is 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). Because the ALJ conducted both quantitative and qualitative analyses of the conflicting pulmonary function studies and Employer does not identify any specific error in the ALJ's weighing of the pulmonary function study evidence, we affirm her conclusion that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

The ALJ also considered the medical opinions of Drs. Aulick and Basheda.[11] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 15-22. Dr. Aulick opined Claimant has a "significant respiratory impairment" and "do[es] not believe" Claimant can perform his last coal mining job.[12] Claimant's Exhibit 1 at 4. Dr. Basheda initially opined Claimant has a "Class II impairment of the whole person" but does not have a pulmonary impairment that would prevent him from performing his last coal mining work. Employer's Exhibit 1 at 6-7. In his December 19, 2019 supplemental report, however, Dr. Basheda opined Claimant's condition had worsened such that he had a "Class III impairment" and a "disabling form of pulmonary disease" that would prevent him from performing coal mining work. Employer's Exhibit 2 at 7-8. But in his subsequent January 11, 2021 supplemental report, Dr. Basheda again revised his opinion to assert Claimant has "a Class

[10] To the extent Employer suggests the December 10, 2020 pulmonary function study is the "most reliable" because it is the most recent, we note the fact that a non-qualifying study is more recent than an earlier qualifying study, standing alone, is not a sufficient reason to credit the later study. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

[11] In addition, the ALJ considered the opinion of Dr. Saludes that Claimant has moderate airflow obstruction consistent with chronic obstructive pulmonary disease due to smoking and coal mine dust exposure, but accurately observed that the physician did not provide a specific opinion as to whether Claimant can perform his last coal mining job. Decision and Order at 15; *see* Director's Exhibit 101 at 3.

[12] We affirm, as unchallenged, the ALJ's determination that there is no mistake of fact in ALJ Swank's conclusion that Claimant's last coal mining job as a utility man or hoister/lamps man required heavy exertional work. *See Skrack*, 6 BLR at 1-711; Decision and Order at 4-5.

I/II impairment" that is "unrelated to pulmonary disease" and concluded Claimant has no obstructive or restrictive pulmonary impairment. Employer's Exhibit 3 at 7-8. Crediting the opinion of Dr. Aulick over the opinion of Dr. Basheda, the ALJ found the medical opinion evidence establishes total disability. Decision and Order at 20-22.

Employer asserts the ALJ erred in crediting Dr. Aulick's opinion because it is equivocal and, in light of the "non-qualifying pulmonary function studies and non-qualifying arterial blood gas studies," unsupported by the medical evidence. Employer's Brief at 6-7. We disagree. The ALJ permissibly concluded Dr. Aulick's statement that he "does not 'believe'" Claimant can perform his last coal mining job did not render his opinion equivocal or vague, because the doctor further explained that Claimant's respiratory status rendered him "completely impaired from doing his last coal mining job." Decision and Order at 20 (quoting Claimant's Exhibit 1 at 4); *see Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *see also Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (physician's use of cautious language does not necessarily reflect equivocation, and it is the function of the ALJ to evaluate the strength of the doctor's opinion). In addition, contrary to Employer's argument, non-qualifying pulmonary function and blood gas studies do not preclude a finding of total disability based on medical opinion evidence, as non-qualifying test results alone do not establish the absence of an impairment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Balsavage*, 295 F.3d at 396; *Estep v. Director, OWCP*, 7 BLR 1-904, 1-905 (1985); *see also 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").

We likewise reject Employer's contention that the ALJ erred in finding Dr. Aulick's opinion reasoned because the doctor did not explain his diagnosis or conclusions. Employer's Brief at 7. As the ALJ observed, Dr. Aulick supported his opinion by noting Claimant's pulmonary function study showed reduced FVC and mildly reduced diffusing capacity for carbon monoxide (DLCO), as well as no significant response to bronchodilators, and concluding the study demonstrated a "respiratory impairment" that would render Claimant "completely impaired" from performing his last coal mine work. Decision and Order at 20; Claimant's Exhibit 1 at 4, 8 The ALJ has broad authority to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage*, 295 F.3d at 396; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). We therefore affirm the ALJ's determination that Dr. Aulick's opinion is credible and reject Employer's contention to the contrary.

Employer also argues the ALJ erred in discrediting Dr. Basheda's opinion. Employer's Brief at 10-11, 13. We disagree. Contrary to Employer's contention, the ALJ permissibly discredited Dr. Basheda's opinion as equivocal because Dr. Basheda indicated Claimant's respiratory impairment is "undertreated" and that additional testing is necessary

to accurately assess his level of impairment. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Decision and Order at 22; Employer's Exhibits 1 at 7; 2 at 7; Employer's Brief at 10-11. Moreover, the ALJ did not discredit Dr. Basheda's opinion on the basis that he changed his opinion in response to new medical evidence but rather permissibly found his opinion poorly documented because, in opining that Claimant is not disabled, Dr. Basheda did not address the qualifying pre-bronchodilator pulmonary function study results. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order at 21-22; Employer's Brief at 10-11.

Employer generally contends the ALJ should have found Dr. Basheda's opinion "reasoned and well-documented." Employer's Brief at 10. We consider Employer's argument to be a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. We thus affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(iv).

Employer raises no further challenge to the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b). Thus, because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability, invoked the Section 411(c)(4) presumption, and established a change in conditions and a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §§725.309(c), 725.310(a); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 21-22. Additionally, because Employer does not challenge the ALJ's finding it failed to rebut the Section 411(c)(4) presumption, we affirm that determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27, 31-32. We therefore affirm the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge