U.S. Department of Labor

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

BRB No. 20-0480 BLA

LESLIE C. STURGILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMONT COAL COMPANY, VA, LLC C/O ALPHA NATURAL RESOURCES	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 09/28/2021
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2018-BLA-06007) rendered on a subsequent claim filed on April 5, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 28.7 years of coal mine employment, with at least fifteen years underground, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and in invoking the Section 411(c)(4) presumption.[4] It also argues the ALJ erred

[1] Claimant filed two prior claims. He filed his first claim on October 22, 1979, but the district director denied it as abandoned on August 22, 1980. Director's Exhibit 1. Claimant filed his second claim on February 15, 2005, and the district director denied it on October 26, 2005, because Claimant failed to establish any element of entitlement. Director's Exhibit 2.

[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); *see* 20 C.F.R. §718.305.

[3] Where 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 any element of entitlement, he had to submit new evidence establishing at least one element of entitlement in order to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 28.7 years of coal mine employment with at least fifteen years underground. *See Skrack v.*

in finding the presumption unrebutted. Claimant has not filed 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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (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 and 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.[6] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (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 pulmonary function studies and his consideration of the evidence overall. Decision and Order at 15-19. Employer contends the ALJ failed to adequately address the validity of the pulmonary function studies and erred in weighing the medical opinion evidence. Employer's Brief at 3-11. We agree.

Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 15; Hearing Transcript at 9-10; Employer's Closing Argument at 3.

[5] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Director's Exhibit 5; Hearing Transcript at 10.

[6] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies, cor pulmonale with right-sided congestive heart failure, or complicated pneumoconiosis. 20 C.F.R. §§718.204(b)(2)(ii), (iii), 718.304; Decision and Order at 16, 17.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies. The studies conducted on August 30, 2016 and January 18, 2017, were non-qualifying[7] before and after the administration of a bronchodilator. Director's Exhibit 14 at 21-26; 16 at 11-22; Employer's Exhibit 1. The ALJ noted Dr. Sargent invalidated both studies but gave them some weight.[8] Decision and Order at 16.

The November 6, 2018 pulmonary function study was qualifying before and after a bronchodilator was administered, but the ALJ found it invalid based on the technician's statement that Claimant gave poor effort and Dr. Broudy's opinion the study is unreliable. Decision and Order at 17; Employer's Exhibit 4 at 5-9.

The December 21, 2018 study was qualifying and no bronchodilator was administered. Claimant's Exhibit 1 at 6-7. The study was signed by Dr. Schuldheisz, Claimant's treating physician. *Id*. Dr. Sargent testified the study was invalid; in his opinion it showed "very poor effort," because the "flow-volume loop is just flat and kind of saw-toothed, and he's just not giving a good effort[.]" Employer's Exhibit 6 at 19.

The ALJ, however, did not credit Dr. Sargent's explanation:

> The December 21, 2018 PFT, taken during treatment, was qualifying pre-bronchodilator and did not include a post-bronchodilator test. In his deposition, Dr. Sargent found that the December 21, 2018 PFT was invalid based on poor effort, saying that the flow volume loop was flat and saw-toothed. The technician conducting the PFT noted that Claimant gave good effort but was struggling to breathe and trying to pass out. 20 C.F.R. Part 718, Appendix B (2)(ii)(G) provides that "[a]s individuals with obstructive disease or rapid decline in lung function will be less likely to achieve" the

[7] 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).

[8] The ALJ found Dr. Sargent did not adequately explain his basis for invalidating the August 30, 2016 pulmonary function study. Decision and Order at 16. However, he credited Dr. Sargent's explanation that the January 18, 2017 pulmonary function study was invalid for "lack of reproducibility," but observed that since the study was still non-qualifying, the values would only have been higher had the pulmonary function study been reproducible. *Id*.

> degree of reproducibility required by the regulations, "tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits." In addition, the party challenging the admission of objective medical evidence must specify how it fails to conform to the quality standards, and how the defect or omission renders the study unreliable. Here, Dr. Sargent was not present for the tests, at which the technicians noted good effort, *and did not adequately explain what led him to conclude the efforts were insufficient*. An ALJ may give more weight to first-hand observations and notations of technicians who administered the test than a physician who merely reviewed the tracings. Therefore, I do not credit his invalidation.

Decision and Order at 17 (citations omitted) (emphasis added). Finding the December 21, 2018 study was valid, qualifying, and the most recent study, the ALJ concluded that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*.

As the ALJ noted, Employer argued below that Dr. Sargent invalidated the December 21, 2018 pulmonary function study based on his observations the flow volume loop was "flat" and "saw-toothed." Post-hearing Brief at 7. Prior to discussing the December 21, 2018 study, however, Dr. Sargent further explained the validity of a pulmonary function study can be determined by reviewing the flow volume loops "and the shapes should be the same with every effort or you are getting inconsistent effort" and that an acceptable effort results in a "smooth flow" loop that starts off "very high" and "tapers" off gradually. Employer's Exhibit 6 at 12-13; Post-hearing Brief at 5-6. As Employer argues on appeal, while the ALJ specifically weighed Dr. Sargent's comment that the flow loop was flat in crediting the administering technician's opinion on the validity of the test over Dr. Sargent's, it is not clear that he also considered Dr. Sargent's earlier testimony explaining why flat shaped loops indicate poor effort. Employer's Brief at 7-8. We therefore agree with Employer that the ALJ did not fully address Dr. Sargent's rationale explaining why the December 21, 2018 study is invalid for poor effort. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer also asserts the ALJ did not properly consider Dr. Broudy's opinion that the December 21, 2018 pulmonary function study was "totally invalid" because Claimant performed only one effort or maneuver. Employer's Brief at 7; Employer's Exhibit 5 at 10. Dr. Broudy explained the federal regulations require at least three efforts with the top two being within five percent of each other.[9] Employer's Exhibit 5 at 11.

[9] The regulation at 20 C.F.R. §718.103(b) provides that "[a]ll pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three

Contrary to Employer's contention, the fact that the December 21, 2018 pulmonary function study is nonconforming because it lacks three tracings for both the flow versus volume and the electronically-derived volume versus time tracings does not mean it is not probative of any impairment. Employer's Brief at 6. Because the ALJ correctly observed the December 21, 2018 study was conducted as part of Claimant's treatment,[10] the quality standards do not apply. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (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). The ALJ must only determine if the results are sufficiently reliable to support a finding of total disability. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

Here, however, the ALJ only summarized Dr. Broudy's opinion and did not explain the weight he accorded it as the APA requires. *See* 30 U.S.C. §923(b); *Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). The ALJ also failed to determine, with adequate supporting rationale, whether the study is non-conforming but otherwise reliable to establish total disability. *See Wojtowicz*, 12 BLR at 1-165.

Consequently, we vacate the ALJ's finding that Claimant established a total disability based on the pulmonary function study evidence.[11] 20 C.F.R. §718.204(b)(2)(i).

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tracings of the flow versus volume and the electronically derived volume versus time tracings." 20 C.F.R. §718.103(b); *see* Appendix B.

[10] Although the ALJ noted the technician's comments, Dr. Schuldheisz, Claimant's treating physician, administered the December 21, 2018 study, signed it, and wrote the following interpretation: "moderate obstruction" and "With reduced FVC, [I] cannot rule out some component of restriction without full [pulmonary function test]." Claimant's Exhibit 1 at 6. In considering the reliability of this test on remand, the ALJ must address Dr. Schuldheisz's comments

[11] Notably, Employer also contends the ALJ improperly relied on the recency of the evidence in finding Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Employer's Brief at 8. If the ALJ determines the December 21, 2018 pulmonary function study is sufficiently reliable on remand, however, he may give it controlling weight over earlier non-qualifying pulmonary function studies. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990) (ALJ may consider amount of time separating studies).

Medical Opinions/Weighing Evidence as a Whole

The ALJ found the medical opinion evidence inconclusive as to whether Claimant is totally disabled and, when weighing the evidence as a whole, found the qualifying December 21, 2018 pulmonary function study established total disability. 20 C.F.R. §718.204(b)(2).

Employer alleges the ALJ erred in rejecting Dr. Sargent's opinion.[12] Dr. Sargent opined the pulmonary function studies he conducted were normal, despite poor efforts; the remaining pulmonary function studies of August 30, 2016, November 6, 2018, and December 21, 2018 were all invalid; and that his studies and the normal blood gas studies established Claimant is not disabled. Employer's Exhibit 6 at 20-22. However, because the ALJ found the December 21, 2018 pulmonary function study to be valid, he concluded Dr. Sargent's opinion was not adequately reasoned. Decision and Order at 19. The ALJ also noted, "Dr. Sargent failed to address the fact that Dr. Broudy noted that Claimant was unable to take a deep [breath] and in his deposition noted that he was struggling to breathe [footnote omitted], or that the technician performing the December [21,] 2018 [pulmonary function study] reported that he was struggling to breathe and trying to pass out." *Id*. To the extent we have vacated the ALJ's weighing of the pulmonary function studies, we also vacate his rejection of Dr. Sargent's opinion.[13]

In conclusion, we vacate the ALJ's finding that Claimant established total disability based on the December 21, 2018 qualifying pulmonary function study and therefore invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §752.309(c). We thus vacate the award of benefits.

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[12] Employer maintains the ALJ "correctly discredited Dr. Alam's opinion." Employer's Brief at 10. It also argues the ALJ erred in relying on "Dr. Gallup's" opinion; however, there is no medical report or treatment records from this doctor, and the ALJ did not reference such an opinion in the Decision and Order. *Id*.

[13] We affirm the ALJ's finding that Dr. Broudy's opinion is inconclusive on the issue of total disability as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19; Employer's Exhibit 5 at 12-13 (Dr. Broudy testifying by deposition that he could not render an opinion on total disability based on his conclusion that all of the new spirometry was invalid); Employer's Brief at 10-11. The ALJ also found that Dr. Alam's opinion diagnosing total disability based on the blood gas study results was speculative and insufficient to satisfy Claimant's burden of proof. Decision and Order at 18; Director's Exhibit 14 at 5-6, 29-30, 32-33.

Remand Instructions

The ALJ must reconsider whether the pulmonary function study evidence establishes total disability. In this context, he must explain the weight he accords the opinions of Drs. Sargent and Broudy as to whether the December 21, 2018 pulmonary function study is sufficiently reliable to support a finding of total disability. If the study is sufficiently reliable, he must weigh the totality of the pulmonary function study evidence and determine if Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). The ALJ must also reconsider Dr. Sargent's opinion and reach a determination regarding the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). The ALJ must further weigh all of the evidence together and determine whether Claimant has established total disability and invoked the Section 411(c)(4) presumption. *See Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 1-198. If Claimant invokes the Section 411(c)(4) presumption, he must then determine whether Employer has rebutted it.[14] If Claimant is unable to establish total disability and invoke the presumption, benefits are precluded. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). In reaching his conclusions on remand, the ALJ must explain the bases for all of his credibility determinations and findings of fact as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[14] We decline to address as premature Employer's challenge to the ALJ's findings that it failed to rebut the Section 411(c)(4) presumption.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge