U.S. Department of Labor

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

BRB No. 20-0561 BLA

THOMAS P. BANDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 09/28/2021
	)	
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 and Order Denying Motion for Reconsideration of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2019-BLA-05688) rendered on a subsequent claim filed pursuant to the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2018) (Act). Claimant filed his subsequent claim on March 16, 2017.[1]

The ALJ found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she 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. She further found Employer did not rebut the presumption and awarded benefits. The ALJ denied Employer's motion for reconsideration.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal.

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[1] On November 15, 2007, the district director denied Claimant's prior claim, filed on April 23, 2007, because Claimant failed to establish he is totally disabled. Director's Exhibits 1, 44.

[2] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that he 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); 20 C.F.R. §718.305.

[3] 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 she 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, he had to submit new evidence establishing total disability in order to proceed with 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, the ALJ's finding that Claimant established at least fifteen 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.

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 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). Employer challenges the ALJ's findings that Claimant established total disability based on the pulmonary function studies and medical opinions, and in consideration of the evidence as a whole.[6]

Pulmonary Function Studies

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[7] 20 C.F.R.

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[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant's coal mine employment occurred in Virginia and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1; 12 at 1; Claimant's Exhibits 3 at 1; 4 at 1; Employer's Closing Argument at 2 n.2; Hearing Transcript at 28-29.

[6] The ALJ found the blood gas studies did not establish total disability and there was no evidence of cor pulmonale with right-sided congestive heart failure, and thus Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 7 n.8, 11.

[7] An ALJ must consider a reviewing physician's opinion regarding a claimant'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

§§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* Appendix B to 20 C.F.R. Part 718; *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). 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 ALJ must then, in his or her role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). In accomplishing this task, the ALJ must evaluate the reasoning and credibility of the medical opinions as to the reliability of the testing. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

The ALJ considered five pulmonary function studies. Decision and Order at 8. The August 16, 2017, July 10, 2019, July 19, 2019, and August 1, 2019 studies produced qualifying[8] pre-bronchodilator and post-bronchodilator results; in contrast, the August 23, 2018 study conducted by Dr. Fino produced non-qualifying pre-bronchodilator and post-bronchodilator results.[9] Director's Exhibits 12, 17; Claimant's Exhibits 3, 4; Employer's Exhibit 1. The ALJ found the studies valid and preponderantly establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-11.

Employer argues the ALJ erred in rejecting Dr. Fino's opinion that the qualifying studies were invalid. Employer's Brief at 5-8. It also argues the ALJ erred in finding the preponderant evidence sufficient to establish total disability. *Id.* at 8. We disagree.

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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).

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[9] The ALJ initially resolved the height discrepancy recorded on the five pulmonary function studies by averaging the heights recorded and finding Claimant's height is 67 inches. She then used the closest greater table height for purposes of determining the qualifying or non-qualifying nature of the studies. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 7.

Dr. Fino opined the August 16, 2017 study is invalid because he "did not see good expiratory flow-volume loops or volume-time tracings." Director's Exhibit 17 at 9. The ALJ permissibly found Dr. Fino's opinion not adequately explained because he "did not give any specific reason why the flow-volume loops and volume-time curves were not 'good.'" Decision and Order at 9 (emphasis in original); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). She also accurately noted the administering technician recorded "good effort, cooperation, and understanding." Decision and Order at 8; Director's Exhibit 12 at 13. Moreover, Dr. Green, the administering physician, described "satisfactory flow patterns" in which the "expiratory limb of the flow volume loops are satisfactory and reproducible" and the "timed expiratory volume curves are also satisfactory demonstrating again satisfactory reproducibility."[10] Director's Exhibit 19 at 4.

Considering Drs. Michos and Green found the study valid and Dr. Fino did not provide a reason why the flow-volume loops and volume-time curves were not "good," the ALJ permissibly concluded Dr. Fino's opinion is insufficient to invalidate the August 16, 2017 study.[11] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (ALJ must examine the reasoning employed in a medical opinion); *Hicks*, 138 F.3d at 533; *Clark*, 12 BLR at 1-155; *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361-62 (1984); Decision and Order at 9; Order Denying Motion for Reconsideration at 2; Director's Exhibits 10; 12 at 13; 17 at 9; 19 at 4. The ALJ has authority to determine the adequacy of a physician's opinion. *See Hicks*, 138 F.3d at 533. In this case, Employer has not shown that the ALJ did not act within her authority in determining that Dr. Fino's criticisms lacked sufficient specificity for her to accept his opinion that the pulmonary function test was invalid, when other physicians found it valid and it is presumed by regulation to be valid. 20 C.F.R. §718.103(c); *see* Appendix B to 20 C.F.R. Part 718; *Clark*, 12 BLR at 1-155; *Vivian*, 7 BLR at 1-361. Because it is supported by substantial evidence and Employer has not shown error, we affirm the ALJ's permissible finding that the August 16, 2017

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[10] Dr. Michos validated the study, though he noted "suboptimal MVV performances." Director's Exhibit 10. The August 16, 2017 pulmonary function study yields qualifying values on the FEV1 and FEV1/FVC ratio, as well as on the FEV1 and MVV values. Director's Exhibit 12.

[11] Generally, a party must challenge the validity of a pulmonary function study before the ALJ. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). Although Employer did not challenge the validity of the August 16, 2017 study below, we will address its challenge because the ALJ addressed the study's validity. Employer's Closing Argument at 13-14.

pulmonary function study is valid, as it is supported by substantial evidence. Decision and Order at 9.

Regarding the remaining studies, the ALJ considered that Dr. Fino opined the July 10, 2019, July 19, 2019, and August 1, 2019 studies were all invalid "because of a premature termination to exhalation and a lack of reproducibility in the expiratory tracings." Employer's Exhibit 3 at 5. Dr. Fino stated, "There was also a lack of an abrupt onset to exhalation on each study. The values that were recorded represented at least the minimal lung function that this individual could perform and certainly not his maximum lung function." *Id*.

The ALJ similarly permissibly found Dr. Fino's statements were not adequately explained because "he offered no basis or explanation for those conclusions" and did not "explain how the tracings from each test support his opinion." Decision and Order at 10. We therefore see no error in her finding that "Dr. Fino's conclusory statements, without any commentary regarding how he reached his opinions, do not satisfy" Employer's burden of proof. *Id.*; *see Compton*, 211 F.3d at 211; *Hicks*, 138 F.3d at 533; *Clark*, 12 BLR at 1-155; *Vivian,* 7 BLR at 1-361-362; Order Denying Motion for Reconsideration at 2-3; Employer's Exhibit 3 at 5. We therefore affirm her finding that the qualifying pulmonary function studies are "sufficiently reliable" to establish Claimant is totally disabled. Decision and Order at 11.[12] Decision and Order at 9-11.

Employer next argues that in weighing the pulmonary function studies, the ALJ should have credited the later non-qualifying August 23, 2018 study over the earlier qualifying August 16, 2017 study because it shows an improvement in Claimant's condition. Employer's Brief at 8. We reject Employer's contention of error. Because four of the five studies are qualifying, including the three most recent performed almost one year after the non-qualifying August 23, 2018 study, the ALJ permissibly found the

[12] The ALJ also found the studies' validity supported by the technician notes that Claimant completed the studies with "good effort, cooperation and understanding." Decision and Order at 10-11; Claimant's Exhibits 3, 4. Although the report of the July 19, 2019 study states Claimant "was unable to produce acceptable and reproducible spirometry data, best effort reported," the ALJ permissibly found this statement unexplained and alone insufficient to invalidate the study. Decision and Order at 10. She also noted the administering physician, Dr. Sargent, "expressed no concerns in relying on this test to assess Claimant's condition." *Id.*; at 10; Order Denying Motion for Reconsideration at 2; Employer's Exhibit 1 at 7. We note that even if the ALJ erred in finding the July 19, 2019 study valid, that error would be harmless given her permissible determinations that the other qualifying studies were valid and, as a whole, preponderate in favor of total disability.

preponderant weight of the pulmonary function studies supports a finding of total disability. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); Decision and Order at 11; Director's Exhibits 12, 17; Claimant's Exhibits 3, 4; Employer's Exhibit 1. We therefore affirm, as supported by substantial evidence, the ALJ's determination that Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11.

Medical Opinions

The ALJ next weighed the medical opinions of Drs. Green and Raj that Claimant is totally disabled and Dr. Fino's contrary opinion.[13] Director's Exhibits 12, 17, 19; Claimant's Exhibits 3, 4; Employer's Exhibit 3. She credited Drs. Green's and Raj's opinions as better supported by the qualifying pulmonary function studies. Decision and Order at 16-17. She found Dr. Fino's opinion unpersuasive because he relied on a 2007 non-qualifying pulmonary function study pre-dating the denial of the prior claim; furthermore, he concluded there were no valid pulmonary function studies after 2007, which was inconsistent with her determination that Claimant established total disability based on the newly submitted pulmonary function study evidence. *Id.* at 17.

Employer requests the Board "reconsider the medical opinion evidence, particularly Dr. Fino's medical opinion," if the Board "finds" probative Dr. Fino's opinion invalidating the pulmonary function studies. Employer's Brief at 8. Employer asserts Dr. Fino's opinion constitutes substantial evidence that Claimant is not totally disabled based on normal blood gas studies, normal diffusing capacity, and the 2007 pulmonary function study, which reflected only a mild obstruction. *Id.* at 9. Employer requests 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). Moreover, in light of our affirmance of the ALJ's weighing of the pulmonary function study evidence, we see no error in the ALJ's rationale for discrediting Dr. Fino's opinion on total disability. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 17. We therefore affirm her finding that the medical opinions establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and her finding that the evidence overall establishes total disability. *See Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2); Decision and Order at 17.

[13] Although Dr. Sargent conducted the pulmonary function study on July 19, 2019 and rendered a medical opinion, the ALJ did not consider it as it was not designated by any party. Decision and Order at 12 n.10; Employer's Exhibit 1.

Consequently, we affirm the ALJ's determination that Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. We further affirm, as unchallenged, the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(2).

Accordingly, the ALJ's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge