U.S. Department of Labor

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

BRB Nos. 21-0030 BLA
and 21-0031 BLA

JAMES DAVID HILL, JR. (o/b/o the Estates of BETTIE J. HILL, deceased Widow of the Miner, and JAMES DAVID HILL, SR., deceased Miner)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	
and	)	DATE ISSUED: 09/29/2021
CONSOL ENERGY, INCORPORATED	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Noran J. Camp, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

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

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order Denying Benefits (2018-BLA-06066, 2018-BLA-06337) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2] This case involves a request for modification of a subsequent miner's claim[3] filed on August 22, 2014,[4] and a survivor's claim filed on September 8, 2016.

The ALJ credited the Miner with twenty-four years of underground coal mine employment, based on the parties' stipulation, but found Claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). He therefore found Claimant did not establish a change in an applicable condition of entitlement, 20 C.F.R. §725.309,[5] invoke the presumption of total disability

[1] Claimant is son of the Miner and the Miner's widow. The Miner requested modification on April 14, 2016, but he died on August 19, 2016 while his request for modification was pending. Miner's Claim (MC) Director's Exhibits 19, 43. On September 8, 2016, the Miner's widow filed a claim for survivor's benefits but died on October 2, 2017, while her claim was pending. Survivor's Claim (SC) Director's Exhibits 2, 11. At Claimant's request, both claims were referred to the Office of Administrative Law Judges for hearings and consolidated. MC Director's Exhibit 67, 77. Claimant is pursuing both claims on behalf of the estates of his mother and father. MC Director's Exhibit 43; SC Director's Exhibit 11.

[2] We have consolidated for decision Claimant's appeals of the denial of benefits in the Miner's claim and survivor's claim.

[3] This is the Miner's fourth claim. The district director denied his most recent prior claim, filed on December 17, 2003, because he did not establish total disability or total disability due to pneumoconiosis. MC Director's Exhibit 4.

[4] This case involves a request for modification of a district director's denial of benefits. MC Director's Exhibit 56. In cases involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

[5] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds that "one

due to pneumoconiosis at Section 411(c)(4) of the Act,[6] 30 U.S.C. §921(c)(4) (2018), or establish entitlement to benefits under 20 C.F.R. Part 718.[7] He therefore denied benefits in the Miner's claim.

In the survivor's claim, the ALJ found Claimant could not invoke the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the Miner suffered from clinical and legal pneumoconiosis, 20 C.F.R. §718.202(a), but did not establish that the Miner's death was due to pneumoconiosis and thus denied benefits. 20 C.F.R. §718.205(b).

On appeal, Claimant contends the ALJ erred in finding the Miner was not totally disabled and Claimant therefore did not invoke the Section 411(c)(4) presumption.[8] Employer responds, urging affirmance of the denial of benefits. The Director, Office of

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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). Because the Miner did not establish total disability in his most recent prior claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim. *Id.*; MC Director's Exhibit 56.

[6] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability or death was due to pneumoconiosis if he had 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.

[7] The ALJ further found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 8. We affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] Claimant further argues the ALJ's error deprived him of automatic entitlement in the survivor's claim pursuant to Section 422(*l*) of the Act. Section 422(*l*) provides that the survivor of a miner who was eligible to receive benefits at the time of the miner's death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

Workers' Compensations Programs, has not filed a response brief. Claimant has filed a reply brief, reiterating his arguments.

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.[9] 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).

Miner's Claim

A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). Total disability can be established by pulmonary function or 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 the evidence supporting total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988). Claimant asserts the ALJ erred in finding the blood gas studies and medical opinions do not establish total disability.[10]

Blood Gas Studies

The ALJ considered the results of three arterial blood gas studies. Decision and Order at 10. Dr. Chavda's October 14, 2014 study produced non-qualifying[11] values at rest and with exercise, his January 5, 2016 study produced qualifying values at rest, and Dr.

[9] Because the Miner performed his last coal mine employment in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 12; Hearing Transcript at 22.

[10] We affirm, as unchallenged, the ALJ's finding that the pulmonary function studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(i); *Skrack*, 6 BLR at 1-711; Decision and Order at 9-10.

[11] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

Tuteur's June 13, 2016 study produced non-qualifying values at rest.[12] MC Director's Exhibits 17, 19, 27. The ALJ gave greater weight to the non-qualifying June 13, 2016 study because it was the most recent. Decision and Order at 10. Thus, the ALJ found Claimant did not establish total disability based on the blood gas studies. 20 C.F.R. §718.204(b)(2)(ii).

Claimant argues the ALJ did not rationally explain why he gave greater weight to the non-qualifying June 13, 2016 blood gas study. Claimant's Brief at 20-25. We agree. The ALJ's sole rationale for crediting the study was that it was more recent than the qualifying January 5, 2016 study. Decision and Order at 10. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held it is irrational to credit evidence solely on the basis of recency when a miner's condition improves. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the Court reasoned that a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's current condition." *Id.* But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply": one must be incorrect — "and it is just as likely that the later evidence is faulty as the earlier." *Id.* An administrative law judge must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id.*; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJs must perform a qualitative analysis of conflicting tests when they indicate a miner's condition has improved); *Adkins*, 958 F.2d at 52 ("'[l]ater is better' is not a reasoned explanation").

Because the ALJ did not provide adequate rationale for assigning greater weight to the June 13, 2016 non-qualifying blood gas study other than its recency, we vacate his finding that Claimant did not establish total disability based on the blood gas evidence.[13]

[12] Dr. Tuteur did not perform an exercise blood gas study. MC Director's Exhibit 27.

[13] Claimant further argues the ALJ erred in crediting Dr. Tuteur's June 13, 2016 blood gas study because it does not comply with the quality standards at 20 C.F.R. §718.105(b), as the study produced non-qualifying results at rest and Dr. Tuteur did not administer an exercise study. Claimant's Brief at 18-20. But Claimant did not dispute the validity of this study before the ALJ. Thus, we will not consider this challenge for the first

20 C.F.R. §718.204(b)(2)(ii); *see Woodward*, 991 F.2d at 319; *Conley*, 7 BLR at 1-312; Decision and Order at 10.

Medical Opinion Evidence

The ALJ credited the opinions of Dr. Tuteur that Claimant is not totally disabled over the contrary opinion of Drs. Chavda and Krefft. Decision and Order at 39. Because the ALJ's erroneous weighing of the blood gas studies influenced his credibility determinations regarding the medical opinions, we vacate them.[14] 20 C.F.R. §718.204(b)(2)(iv).

Further, as Claimant correctly argues, in discrediting the opinions of Drs. Chavda and Krefft, the ALJ improperly conflated the issue of total disability with the issues of disease and disability causation. *See* 20 C.F.R. §718.204(b)(2), (c); Claimant's Brief at 34-35. The ALJ discredited Dr. Chavda's opinion in part because he "did not attribute any of the Miner's shortness of breath to his heart problems." Decision and Order at 34. He likewise discredited the opinion of Dr. Krefft because she based her opinion in part on the Miner's need for supplemental oxygen, whereas "there is no indication in the treatment records that the supplemental oxygen was related to his pulmonary diagnoses as opposed to his cardiac diagnoses." Decision and Order at 38; Employer's Exhibit 1 at 66. These findings are erroneous, however, as the regulations treat the existence of a totally disabling respiratory or pulmonary impairment and the etiology of that impairment as distinct issues. 20 C.F.R. §§718.204(b)(2), (c).

For these reasons, we vacate the ALJ's finding that Claimant did not establish total disability based on the medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv), or in consideration of the evidence as a whole.[15] Thus, we vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits.

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time on appeal. *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986).

[14] The ALJ gave the opinions of Drs. Chavda and Krefft less weight in part because they relied on the qualifying January 5, 2016 blood gas study, which the ALJ found outweighed by the non-qualifying June 13, 2016 study. Decision and Order at 34, 37. He found the opinion of Dr. Tuteur credible in part because he relied on the non-qualifying June 13, 2016 study. *Id.* at 37.

[15] Claimant further alleges the ALJ erred in discrediting Dr. Krefft's opinion that the Miner "more likely than not" had cor pulmonale with right-sided congestive heart failure. Employer's Exhibit 1 at 67. Contrary to Claimant's contention, the ALJ

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on the blood gas studies and medical opinions. 20 C.F.R. §718.204(b)(2)(ii), (iv). He must consider the qualifications of the respective physicians, the explanations their medical opinions provide, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). If the ALJ determines total disability has been demonstrated by the blood gas studies, medical opinions, or both, he must weigh the evidence supportive of a finding of total disability against any contrary probative evidence of record and determine whether the Miner was totally disabled. *See Defor*e, 12 BLR at 1-28-29.

If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the ALJ must consider if Employer has rebutted it.[16] 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant does not establish total disability, however, the ALJ may reinstate the denial of benefits in the Miner's claim. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In reaching his credibility determinations on remand, the ALJ must set forth his findings in detail and explain his rationale in accordance with the Administrative Procedure Act.[17] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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permissibly accorded "no weight to Dr. Krefft's speculative conclusion" that the Miner more likely than not had cor pulmonale with right-sided congestive heart failure because, despite documenting numerous examinations, procedures, and other testing, as well as "reports by cardiologists, hospitalization reports and other treatment records related to the Miner's cardiac status," the treatment records "do not include any mention of cor pulmonale or right sided congestive heart failure." *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 32.

[16] If Employer successfully rebuts the presumption of total disability due to pneumoconiosis in the Miner's claim, the ALJ must consider whether it has rebutted the presumption of death due to pneumoconiosis in the survivor's claim.

[17] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

The Survivor's Claim

Because we vacate the ALJ's determination that Claimant did not establish entitlement to benefits in the Miner's claim, we also vacate his finding that Claimant is not entitled to derivative benefits in the survivor's claim under Section 422(*l*). Further, because we vacate the ALJ's determination that Claimant did not establish total disability, we must also vacate his finding that Claimant did not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act. 20 C.F.R. §718.205(b)(4).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge