

U.S. Department of Labor

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



BRB No. 22-0374 BLA

JIMMY D. BURKE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 9/22/2023
GLAMORGAN COAL CORPORATION)	
)	
Employer-Respondent)	
)	
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 Jodeen M. Hobbs,
Administrative Law Judge, United States Department of Labor.

Jimmy B. Burke, Nicklesville, Virginia.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner,
Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals),
Washington, D.C., for the Director, Office of Workers' Compensation
Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,¹ Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Denying Benefits (2021-BLA-05496) rendered on a subsequent² claim filed on January 3, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has nineteen years of underground or substantially similar surface (qualifying) coal mine employment but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 718.305(b)(i). She therefore determined Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2018),³ and could not establish

¹ Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Benefits Review Board review Administrative Law Judge (ALJ) Jodeen M. Hobbs's decision on Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

² Claimant filed two prior claims for benefits. Director's Exhibits 1-4. On July 20, 2018, the district director finally denied his more recent prior claim, filed on June 26, 2017, for failure to establish total disability. Director's Exhibit 31. 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). Because Claimant did not establish total disability, he had to submit evidence establishing that element to obtain review of the merits of his current claim. *Id.*

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner 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); *see* 20 C.F.R. §718.305.

entitlement under 20 C.F.R. Part 718 or a change in the applicable condition of entitlement at 20 C.F.R. 725.309.⁴ Accordingly, the ALJ denied benefits.⁵

On appeal, Claimant generally challenges the denial of benefits. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, asking the Board to vacate the denial of benefits and remand the case to the district director because Claimant did not receive a complete pulmonary evaluation as required by the regulations.⁶

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁷ 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).

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 and arterial

⁴ The ALJ also found Claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 5 and n.6, 12.

⁵ The ALJ subsequently corrected her decision to reflect that Employer's Exhibits 1 through 3 were admitted into evidence but not Employer's Exhibits 4 and 5; given that correction, she stated her denial of benefits remains unchanged. ALJ's Errata Order.

⁶ We affirm the ALJ's finding that Claimant established nineteen years of qualifying coal mine employment as it is unchallenged on appeal and not adverse to Claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4; Hearing Transcript at 14, 17, 28, 30.

⁷ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his last coal mine employment in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2 n.3; Director's Exhibits 7, 9; Hearing Transcript at 17, 20, 31.

blood gas studies,⁸ 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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).

The ALJ considered three pulmonary function studies:⁹ Dr. Dean's January 30, 2020 study; Dr. Green's February 22, 2020 study; and Dr. Basheda's February 12, 2021 study. Decision and Order at 6-7. The ALJ found Dr. Green's February 22, 2020 study invalid and explained:

The February 22, 2020 testing ordered by Dr. Michael Green provides results that meet the DOL disability standards. However, in his report prepared as part of the DOL-sponsored examination, Dr. Green noted that the “[s]pirometry shows increased variance and is invalid on the basis of the increased variance in the measurements.” (DX 20 at 4). Dr. George Goodman, who reviewed the February 22, 2020 testing results, agreed that the results were invalid for assessing Claimant's respiratory impairment. (DX 25 at 2). As the evidence is undisputed that the February 22, 2020 results are invalid, I do not consider these results in my assessment.

Decision and Order at 7. Finding the remaining two pulmonary function studies were in equipoise, the earlier one being qualifying while the later one is non-qualifying, the ALJ concluded Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

⁸ A “qualifying” pulmonary function study or arterial 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. Part 718. A “non-qualifying” study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

⁹ Because the three pulmonary function studies reported varying heights for Claimant as 73, 71, and 70 inches, the ALJ permissibly relied on an average height of 71.33 inches and used the closest greater table height of 71.7 inches set forth in Appendix B in determining whether the pulmonary function studies are qualifying. *See K.J.M. [Meade] v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 7 and n.7.

Weighing the medical opinion evidence,¹⁰ the ALJ discredited Dr. Eastridge's one-paragraph opinion that Claimant "is disabled by black lung" because he did not explain the factors he relied on to reach his diagnosis. Decision and Order at 10-11; Claimant's Exhibit 2. In contrast, the ALJ credited the opinions of Drs. Green and Basheda that Claimant is not totally disabled as reasoned and documented.¹¹ Decision and Order at 8-11; Director's Exhibit 14 at 4; Employer's Exhibit 1 at 25.

Evaluating the evidence as a whole, the ALJ found that Claimant did not establish total disability as the pulmonary function and blood gas studies did not establish total disability, there was no evidence of cor pulmonale with right-sided congestive heart failure, and the weight of the medical opinion evidence did not support total disability. Decision and Order at 11. Finding that Claimant could not establish total disability, the ALJ denied benefits. *Id.* at 11-12.

The Director requests the Board vacate the ALJ's denial of benefits because the Department of Labor (DOL) "failed to provide [C]laimant with a complete and credible pulmonary examination." Director's Brief at 4.

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a) ("[e]ach miner who files a claim for benefits under the Act must be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation"), 725.406; *see Hodges*, 18

¹⁰ The ALJ found the sole blood gas study, which Dr. Basheda obtained, was non-qualifying and that there was no evidence to establish that Claimant has cor pulmonale with right-sided congestive heart failure; therefore, she found Claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 8; Employer's Exhibit 1 at 31.

¹¹ Dr. Green explained:

This gentleman is not totally disabled from a pulmonary capacity standpoint. He does not meet the Federal guideline criteria for total pulmonary disability. Pulmonary function tests do show a chronic airflow obstruction pattern, however the results are influenced by significant variance in the measurements which makes the test invalid for a legitimate conclusion.

Director's Exhibit 14 at 4.

BLR at 1-93. To fulfill its obligations under the Act, the DOL must “provid[e] ‘a medical opinion that addresses all of the essential elements of entitlement.’” *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640 (6th Cir. 2009), quoting *Smith v. Martin Cnty. Coal Corp.*, 233 F. App’x 507, 512 (6th Cir. 2007).

The Director explains that while Dr. Green examined Claimant, on behalf of the DOL, he based his opinion that Claimant is not totally disabled on a pulmonary function study he stated was “invalid for a legitimate conclusion.” Director’s Brief at 4, citing Director’s Exhibit 14. The Director asserts the DOL should have arranged for Claimant to have undergone another pulmonary function study given the doctor’s conclusion about his own study’s invalidity. Director’s Brief at 4, citing 20 C.F.R. §725.406(c) (requiring DOL to offer a miner a repeat study when the initial study does not comply with the quality standards).

We vacate the ALJ’s denial of benefits and grant the Director’s request to remand this case given the Director’s concession that the DOL failed to provide Claimant with a complete pulmonary evaluation as the Act requires. 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406, 725.456(e); *Greene*, 575 F.3d at 641-42; *R.G.B. [Blackburn] v. S. Ohio Coal Co.*, 24 BLR 1-129, 1-137-40 (2009) (en banc).

Accordingly, we remand the case to the district director for further development of the evidence.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge