U.S. Department of Labor

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

BRB Nos. 24-0414 BLA
and 25-0012 BLA

BONNIE OWENS
(o/b/o and Widow of JOHN A. OWENS)

Claimant-Respondent

v.

LODESTAR ENERGY, INCORPORATED

and

KENTUCKY EMPLOYERS' MUTUAL INSURANCE

Employer/Carrier-
Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

PUBLISHED

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DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits on Remand of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits on Remand (2017-BLA-05152; 2018-BLA-05445), pursuant to claims filed under the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on December 22, 2014, and a survivor's claim filed on October 30, 2017.[1] Both claims are before the Board for a second time.[2]

In his initial Decision and Order Denying Benefits, the ALJ credited the Miner with twenty-six years of surface coal mine employment. The ALJ found Claimant failed to establish the Miner was totally disabled in either claim and therefore did not invoke the rebuttable presumption of total disability due to pneumoconiosis in the miner's claim or of death due to pneumoconiosis in the survivor's claim pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] As Claimant failed to establish total disability, an essential element of entitlement in the miner's claim, he denied benefits in that claim. He

[1] Claimant is the widow of the Miner, who died on September 15, 2017. Director's Exhibit S-7. Employer's appeal in the miner's claim was assigned BRB No. 24-0414 BLA, and its appeal in the survivor's claim was assigned BRB No. 25-0012 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only. We incorporate the ALJ's identification of some exhibits with the letters "A," "B," "M," or "S" before them. Decision and Order on Remand at 2.

[2] We incorporate the procedural history of this case set forth in *Owens v. Lodestar Energy, Inc.*, BRB Nos. 22-0329 BLA and 22-0330 BLA, slip op. at 2-3 (Aug. 24, 2023) (unpub.).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis or that his 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. Because the ALJ found the Miner was not totally disabled, he did not reach the issue of whether the Miner's surface employment was qualifying for the purpose of invoking the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 4, 13.

further found Claimant failed to establish that the Miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(b) and denied benefits in the survivor's claim.

On review of Claimant's appeal, the Board vacated the ALJ's finding that Claimant did not establish total disability because the ALJ erroneously relied solely on the recency of two non-qualifying pulmonary function studies without explaining his rationale and because that error affected his weighing of the medical opinions. *Owens v. Lodestar Energy, Inc.*, BRB Nos. 22-0329 BLA and 22-0330 BLA, slip op. at 4-9 (Aug. 24, 2023) (unpub.). The Board also vacated the ALJ's rejection of Dr. Ajjarapu's opinion as the ALJ failed to address whether the physician's opinion is sufficient to establish total disability regardless of whether the pulmonary function study evidence is qualifying. *Id.* at 9. Thus, the Board vacated the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption in either claim, vacated the denials in both claims, and remanded them for further consideration. *Id*.

On remand, the ALJ found Claimant established the Miner had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) and that his coal mine employment occurred in conditions substantially similar to those in an underground mine. Thus, he found Claimant invoked the Section 411(c)(4) presumption in the miner's claim. 30 U.S.C. §921(c)(4). He further found Employer did not rebut the presumption and awarded benefits in the miner's claim. With respect to the survivor's claim, the ALJ found Claimant is derivatively entitled to benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018).[4]

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and therefore invoked the Section 411(c)(4) presumption.[5] Claimant has not filed a response brief. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a response brief urging the Board to reject Employer's argument.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in

[4] Section 422(*l*) of the Act provides the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[5] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner had twenty-six years of qualifying coal mine employment. Decision and Order on Remand at 15; *see Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

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 & Grylls Assocs., Inc*., 380 U.S. 359, 362 (1965).

Miner's Claim – Invocation of the Section 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, Claimant must establish the Miner had 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 or comparable gainful work.[7] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial 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 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 found Claimant established total disability based on the pulmonary function studies and medical opinion evidence.[9] Decision and Order on Remand at 14.

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[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Dir., OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 4; Jan. 14, 2021 Hearing Transcript at 33-34.

[7] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner's usual coal mine work as an end-loader operator required medium exertion. Decision and Order on Remand at 10; *see Skrack*, 6 BLR at 1-711.

[8] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The Board previously affirmed the ALJ's finding that the arterial blood gas study evidence does not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *Owens*, BRB Nos. 22-0329 BLA and 22-0330 BLA, slip op. at 4 n.8.

Pulmonary Function Studies

On remand, the ALJ reconsidered the results of five pulmonary function studies.[10] Decision and Order on Remand at 4-9. The March 9, 2015 and October 15, 2015 studies produced qualifying pre-bronchodilator results and non-qualifying post-bronchodilator values.[11] Director's Exhibits A-13 at 13; A-22. The November 21, 2016 study, included in the Miner's treatment records, resulted in qualifying values pre-bronchodilator and no bronchodilator was administered. Claimant's Exhibit M-4. The December 9, 2016 study yielded qualifying pre-bronchodilator values, while the post-bronchodilator values were non-qualifying.[12] Employer's Exhibit 4 at 9. The August 30, 2017 study, also in the Miner's treatment records, produced non-qualifying pre-bronchodilator values and no bronchodilator was administered.[13] Claimant's Exhibit M-3.

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[10] Because the physicians who administered the five pulmonary function studies reported the Miner's height as 68.50, 69, and 69.25 inches, the ALJ averaged the recorded heights as 68.95 inches and determined whether the pulmonary function studies were qualifying using the closest greater table height of 69.30 inches set forth in Appendix B of 20 C.F.R. Part 718. *See Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 756 (6th Cir. 2019); *Carpenter v. GMS Mine & Repair Maint. Inc.*, 26 BLR 1-33, 1-38-39 (2023); *K.J.M.* (*Meade*) *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order on Remand at 5.

[11] The ALJ found the October 15, 2015 pulmonary function study's post-bronchodilator results are not reliable as the MVV result does not comply with the quality standards, while the pre-bronchodilator value is sufficiently reliable. Decision and Order on Remand at 6; Director's Exhibit A-22.

[12] Dr. Dahhan, who conducted the December 9, 2016 pulmonary function study, indicated its results were invalid. Employer's Exhibit 7 at 8-9. The ALJ determined that the study's MVV value does not comply with the quality standards and is not sufficiently reliable for making a disability determination. *Id.* at 9, 13; Decision and Order on Remand at 6. If the MVV is not considered, the study is not qualifying. Employer's Exhibit 4; Decision and Order on Remand at 5.

[13] The ALJ found the November 21, 2016 and August 30, 2017 pulmonary function studies from the Miner's treatment records were sufficiently reliable for determining disability. Decision and Order on Remand at 6; Claimant's Exhibits M-3; M-4; *see* 20 C.F.R. §§718.101, 718.103; *see also 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); 65 Fed. Reg.

The ALJ noted the post-bronchodilator results are less probative as to total disability than the pre-bronchodilator results. Decision and Order on Remand at 7; *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (post-bronchodilator results "do[] not provide an adequate assessment of the miner's disability"). Irrespective of the chronological order of the studies, the ALJ determined the qualifying pre-bronchodilator studies from the March 9, 2015, October 15, 2015, and November 21, 2016 pulmonary function studies outweigh the more recent, non-qualifying pre-bronchodilator studies from the December 9, 2016 and August 30, 2017 studies.[14] Decision and Order on Remand at 8. Thus, he concluded the preponderance of pulmonary function studies supports a finding of total disability. *Id.*

Employer argues the ALJ erred by not giving greater weight to the more recent, non-qualifying pulmonary function studies. Employer's Brief at 1, 6-8 (unpaginated). It argues the principle of not according more weight to later tests based solely on their recency, when those tests show improved values, pursuant to *Woodward v. Director, Office of Workers' Compensation Programs*, 991 F.2d 314 (6th Cir. 1993), is based on cases that implicate deference to agency interpretation of the law under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), which was overruled by *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). *Id.* The Director counters that the later evidence rule is not derived from the Act or the Director's interpretation of the Act and *Loper Bright* does not call into question prior cases that relied on *Chevron*. Director's Brief at 2-3.

We agree with the Director's position. Nothing in the Supreme Court's decision in *Loper Bright* supports Employer's argument that the ALJ's reference to *Woodward* when weighing the pulmonary function studies was misplaced. *Loper Bright*, 603 U.S. at 412; *Woodward,* 991 F.2d at 319-20. In *Loper Bright*, the Supreme Court held its ruling "[did] not call into question prior cases that relied on the *Chevron* framework." 603 U.S. at 412; *see Tennessee v. Becerra*, 117 F.4th 348, 363-64 (6th Cir. 2024) (*Loper Bright* "forecloses new challenges based on specific agency actions that were already resolved via *Chevron*

79,920, 79,928 (Dec. 20, 2000) (ALJ must still determine if studies from treatment records are sufficiently reliable).

[14] The ALJ stated that if he were not "constrained" by Board precedent, he would give greater weight to the more recent, non-qualifying studies as "a better indicator" of the Miner's "condition at the time of his death." Decision and Order on Remand at 8-9 n.14. Alternatively, "were [he] not prohibited from considering the chronology of the [pulmonary function studies]," he would find the results of the two more recent non-qualifying studies to be in equipoise with the results of the three older qualifying studies. *Id.*

deference analysis"). Consequently, the mere implication of the *Chevron* framework in cases cited in *Woodward* does not constitute a "special justification" for overruling the United States Court of Appeals for the Sixth Circuit's holding in *Woodward* that it is irrational to credit evidence solely on the basis of recency when it shows a miner's condition has improved. *Loper Bright*, 603 U.S. at 412 ("Mere reliance on *Chevron* cannot constitute a special justification for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, just an argument that the precedent was wrongly decided.") (citation modified); *Woodward*, 991 F.2d at 319-20 (given the progressive nature of pneumoconiosis, a fact-finder must evaluate evidence without reference to its chronological order when the evidence shows a miner's condition has improved) (citing *Adkins v. Dir., OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (it is irrational to credit evidence *solely* because of recency when the miner's condition has improved) (emphasis added)); *see Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-50-51 (2023) (same).

We also reject Employer's contention that *Woodward* is distinguishable from this case. Employer's Brief at 7 (unpaginated). Although *Woodward* was based on a diagnostic issue and x-rays, rather than total disability and pulmonary function studies, the United States courts of appeals and the Board have applied its analysis to total disability determinations. *Woodward*, 991 F.2d at 319-20 (repeatedly refers to "tests and exam[s]," rather than just x-rays;); *Thorn v. Itmann Coal Co*., 3 F.3d 713, 718-19 (4th Cir. 1993) (applying the holding in *Adkins* to medical opinions and finding "[a] bare appeal to 'recency' is an abdication of rational decisionmaking"); *Adkins*, 958 F.2d at 51-52 (holding not limited to x-rays); *Gray v. Dir., OWCP*, 943 F.2d 513, 520-21 (4th Cir. 1991) (addressing whether the ALJ improperly applied a "later evidence rule" when analyzing arterial blood gas studies); *Kincaid*, 26 BLR at 1-50-52 n.14 (ALJ erred by "not provid[ing] a reason other than recency to credit the non-qualifying testing and in so doing failed to resolve the actual conflict in the medical opinions regarding which test more accurately reflected the miner's pulmonary capacity"). We therefore reject Employer's argument as it would be erroneous for the ALJ to credit the most recent non-qualifying pulmonary function studies solely based on the dates the Miner performed them. *Woodward*, 991 F.2d at 319-20; *Kincaid*, 26 BLR at 1-50-52; *see also Adkins*, 958 F.2d at 51-52.

We also reject Employer's argument that the ALJ impermissibly restricted his analysis of the pulmonary function study evidence. Employer's Brief at 8 (unpaginated). The Board instructed the ALJ to explain his rationale for weighing the pulmonary function studies as "it is irrational to credit evidence *solely* on the basis of recency where it shows the miner's condition has improved." *Owens*, BRB Nos. 22-0329 BLA and 22-0330 BLA, slip op. at 6 (emphasis added); *see Kincaid*, 26 BLR at 1-52-53 n.14 (*Kincaid*'s holding "does not mean that newer evidence showing an improvement cannot ever be credited over older conflicting evidence, that newer evidence showing a deterioration must always be credited as establishing disease or disability, or that pulmonary function test results cannot

fluctuate depending on a number of factors."); *Adkins*, 958 F.2d at 51-52. In compliance with the Board's remand instruction, the ALJ rationally concluded the qualifying pulmonary function results from the March 9, 2015, October 15, 2015, and November 21, 2016 studies outweigh the more recent, non-qualifying studies from December 9, 2016 and August 30, 2017. Decision and Order on Remand at 8; Director's Exhibits A-13 at 13; A-22; Claimant's Exhibits M-3; M-4; Employer's Exhibit 4 at 9; *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Woodward*, 991 F.2d at 319-20; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); *Kincaid*, 26 BLR at 1-50-52.

We therefore affirm the ALJ's conclusion that, based on the quality of the pulmonary function evidence, the preponderance of pulmonary function studies supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Remand at 8; *see Woodward*, 991 F.2d at 319-20; *Kincaid*, 26 BLR at 1-50-52.

Medical Opinions

The ALJ also reconsidered the medical opinions of Drs. Ajjarapu, Jarboe, and Dahhan.[15] Decision and Order on Remand at 10-13. Drs. Ajjarapu and Dahhan opined the Miner was totally disabled, while Dr. Jarboe indicated he could perform his usual coal mine employment.[16] Director's Exhibits A-13 at 8; A-23 at 7; A-27 at 8; Employer's Exhibit 4 at 3, 5. The ALJ accorded no weight to the opinions of Drs. Jarboe and Dahhan as he found they were not reasoned or well-documented,[17] but he accorded probative weight to Dr. Ajjarapu's reasoned opinion. Decision and Order on Remand at 11-13.

[15] The ALJ again found the Miner's treatment records do not address total disability or specify any degree of respiratory or pulmonary impairment. Decision and Order on Remand at 4; *see Owens*, BRB Nos. 22-0329 BLA and 22-0330 BLA, slip op. at 4 n.8; Director's Exhibits A-19; A-20.

[16] Dr. Ajjarapu opined that the Miner was totally disabled from performing the exertional requirements of an end-loader operator based on his qualifying pulmonary function study values and an arterial blood gas study that showed resting hypoxemia. Director's Exhibits A-13 at 3; A-27 at 2-3.

[17] The ALJ found Dr. Jarboe's opinion was not reasoned or well-documented because the physician failed to discuss the level of exertion of the Miner's usual coal mine work and his opinion was inconsistent with the preponderant weight of pulmonary function evidence. Decision and Order on Remand at 12. Similarly, the ALJ found Dr. Dahhan's opinion was not sufficiently reasoned or documented as the doctor had an incorrect understanding of the exertional requirements of the Miner's usual coal mine work. *Id.* at

Employer contends the ALJ erred in crediting Dr. Ajjarapu's opinion because the ALJ "predicated the probative value provided to Dr. Ajjarapu on the results of his constrained finding regarding the pulmonary [function] testing." Employer's Brief at 8 (unpaginated). As we have affirmed the ALJ's finding that the pulmonary function studies establish total disability, however, we reject this argument. The ALJ found Dr. Ajjarapu's opinion was entitled to "some probative weight" because, although Dr. Ajjarapu did not consider the more recent pulmonary function studies, she had a "thorough understanding of the exertional requirements of the Miner's usual coal mine work" and her opinion is consistent with the studies she did review and the overall weight of the studies. Decision and Order on Remand at 11. As Employer does not otherwise challenge the ALJ's credibility findings, we affirm them. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 11. We therefore affirm the ALJ's determination that the preponderance of the medical opinion evidence supports a finding of total respiratory or pulmonary disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 13.

Because Employer makes no further assertions of error, we also affirm the ALJ's conclusion that Claimant established total disability based on the preponderance of pulmonary function studies and medical opinion evidence and invoked the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §§718.204(b)(2), 718.305(b), (c). We further affirm, as unchallenged on appeal, the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. *Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 17-22. Consequently, we affirm the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim, and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co*., 25 BLR 1-121, 1-126 (2013).

13. Because Employer does not challenge the ALJ's discrediting of Dr. Dahhan's opinion or Dr. Jarboe's opinion, we affirm these findings. *See Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge