U.S. Department of Labor

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

BRB No. 23-0168 BLA

JAMES MCGLOTHLIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 04/05/2024
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 Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

James McGlothlin, Honaker, Virginia.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Denying Benefits (2021-BLA-05288) rendered on

[1] On Claimant's behalf, Bradley Johnson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the

a claim filed on March 13, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 21.5 years of underground coal mine employment but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). Because Claimant did not establish an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.[3]

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

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administrative law judge's (ALJ's) decision, but he is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if they have 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] The ALJ correctly found the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act is not applicable because there is no evidence of complicated pneumoconiosis in the record. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 6.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, a 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[5] 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 found Claimant failed to establish total disability by any method. 20 C.F.R. §718.204(b)(2); Decision and Order at 8-18.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated April 26, 2019, June 11, 2020, and February 24, 2021. Decision and Order at 8-11. The April 26, 2019 study produced non-qualifying values without the administration of a bronchodilator, and the June 11, 2020 study produced non-qualifying values before and after the administration of a bronchodilator. Director's Exhibits 12, 19. The February 24, 2021 study produced qualifying values before and after the administration of a bronchodilator. Employer's Exhibit 1. The ALJ found the results of the April 26, 2019 study reliable because the technician who administered the study noted on a printout that Claimant had good effort and Dr. Green confirmed Claimant's effort in his ventilatory study report. Director's Exhibit 12 at 14-15, 22; Decision and Order at 10. However, she found the June 11, 2020 study results unreliable because in his ventilatory study report Dr. McSharry found them "poorly performed, [and] not reproducible."[6] Director's Exhibit 19 at 7; Decision and Order at 11. She also found the February 24, 2021 study results unreliable because the

[5] A "qualifying" pulmonary function study or arterial blood gas study yields results that are equal to or less than the applicable table values listed 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).

[6] The technician who administered the June 11, 2020 pulmonary function study noted Claimant had "[p]oor effort" and "was unable to produce [a]cceptable and [r]eproducible [s]pirometry data." Director's Exhibit 19 at 8.

technician who administered the study noted Claimant had poor effort and an inability to produce acceptable and reproducible data, and Dr. Sargent noted in his ventilatory study report Claimant "was either unwilling or unable to generate maximal effort." Employer's Exhibit 1 at 7, 8; Decision and Order at 11. Thus, the ALJ found the two most recent pulmonary function studies in essence neither support nor refute a finding of total disability.

It is within the ALJ's discretion, as the trier of fact, to determine the weight and credibility to accord the medical evidence. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). 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. §§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 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); 20 C.F.R. Part 718, Appendix B. 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 her role as the factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

The quality standards, however, do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008) (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). An ALJ must still determine, however, if treatment record pulmonary function studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

We see no error in the ALJ's finding that the results of the June 11, 2020 and February 24, 2021 pulmonary function studies are unreliable based on the uncontroverted comments of the technicians and reporting physicians. *See Compton v. Island Creek Coal*

[7] An ALJ must consider a reviewing physician's opinion regarding a miner'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 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).

Co., 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1997); Decision and Order at 10-11.

Further, the ALJ's error in failing to consider the February 1, 2017 and March 3, 2020 pulmonary function studies contained in Claimant's treatment records is harmless because they produced non-qualifying values. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Exhibits 14, 16.

We therefore affirm, as supported by substantial evidence, the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 11.

Arterial Blood Gas Studies

The ALJ next considered two arterial blood gas studies dated April 26, 2019, and February 24, 2021. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 12. She accurately noted the April 26, 2019 study produced qualifying results, while the February 24, 2021 study produced non-qualifying results. Director's Exhibit 12 at 25; Employer's Exhibit 1 at 13. She found the results of the two conflicting studies to be in equipoise. Decision and Order at 12. Thus, she found the arterial blood gas study evidence in essence neither supports nor refutes a finding of total disability, and Claimant did not meet his burden of proof. However, the ALJ did not consider the October 5, 2020 arterial blood gas study included in Claimant's treatment records that produced non-qualifying results. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Employer's Exhibit 17. Thus, we vacate her finding the blood gas testing results to be in equipoise at 20 C.F.R. §718.204(b)(2)(ii) and remand the case for further consideration of all the relevant evidence.[8] *McCune*, 6 BLR at 1-998.

[8] The ALJ also considered Dr. DePonte's April 26, 2019, June 11, 2020, and February 24, 2021 chest x-ray interpretations showing cor pulmonale and Dr. Green's opinion that Claimant has cor pulmonale. Decision and Order at 12-13; Director's Exhibits 12 at 5, 30; 21 at 3; Claimant's Exhibits 1, 2. She accurately stated that "neither Dr. DePonte nor Dr. Green . . . mentioned right-sided congestive heart failure." Decision and Order at 12; Director's Exhibits 12 at 5, 30; 21 at 3; Claimant's Exhibits 1, 2. She thus rationally found Claimant did not establish cor pulmonale with right-sided congestive heart failure and, therefore, total disability at 20 C.F.R. §718.204(b)(2)(iii). *See Harman Mining Co v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Newell v. Director, OWCP*, 13 BLR 1-37, 1-39 (1989); Decision and Order at 13.

Medical Opinions

The ALJ further considered the medical opinions of Drs. Green, McSharry, and Sargent. Decision and Order at 13-18.

In his initial report, Dr. Green opined Claimant is totally disabled based on hypoxemia reflected by the results of the April 26, 2019 arterial blood gas study. Director's Exhibit 12 at 4. He reiterated his opinion in a supplemental report, and further opined the x-ray, electrocardiogram, and blood gas study evidence supports a diagnosis of cor pulmonale that would be totally disabling. Director's Exhibit 21 at 2-3.

Dr. McSharry initially opined Claimant is totally disabled based on hypoxemia reflected by the results of the April 26, 2019 arterial blood gas study. Director's Exhibit 19 at 3-4. After reviewing additional records, however, Dr. McSharry opined it is not likely that Claimant has a respiratory or pulmonary impairment based on the non-qualifying results of the October 5, 2020 and February 24, 2021 arterial blood gas studies. Employer's Exhibits 5 at 2-3; 6 at 13-14, 21-22, 26. Dr. Sargent similarly opined Claimant does not have a totally disabling respiratory or pulmonary impairment based on the non-qualifying results of the October 5, 2020 and February 24, 2021 arterial blood gas studies. Employer's Exhibits 1 at 2; 1A at 1; 1B at 15-17, 23-25.

The ALJ found Drs. Green's, McSharry's, and Sargent's opinions reasoned and documented and based on an accurate understanding of Claimant's usual coal mine employment. Decision and Order at 14-17. But she further noted Dr. Green "did not review any tests conducted after" his October 25, 2020 supplemental report. *Id*. at 14-15. She concluded Drs. McSharry's and Sargent's opinions are entitled to greater weight than Drs. Green's contrary opinion because "their assessments of [Claimant] are based on more recent medical evidence." *Id*. at 18.

The ALJ erred in crediting Drs. McSharry's and Sargent's opinions that Claimant is not totally disabled over Dr. Green's diagnosis of total disability based solely on the recency of the medical evidence and objective testing that those doctors considered. Again, the ALJ found that the results of the two most recent pulmonary function studies were unreliable and, therefore, in essence neither support nor refute a finding of total disability. Moreover, the ALJ's reconsideration of all the arterial blood gas studies at 20 C.F.R. §718.204(b)(2)(ii) may affect her reconsideration of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). To the extent the ALJ credited the opinions of Drs. McSharry and Sargent solely on the basis of recency, she erred, as the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held it is irrational to credit evidence solely based on recency. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) ("A bare appeal to recency" in evaluating medical opinions "is an

abdication of rational decision-making."); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA, 22-0024 BLA-A, slip op. at 7-13 (Nov. 17, 2023); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 15 (June 27, 2023).

Thus, the ALJ did not adequately explain the basis for finding Drs. McSharry's and Sargent's opinions outweigh Dr. Green's opinion. Therefore, we vacate the ALJ's finding that the medical opinion evidence is insufficient to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 18. We must also vacate her finding that Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2). Because we vacate the ALJ's finding that Claimant failed to establish total disability, we also vacate her finding that Claimant is unable to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Decision and Order at 18; 20 C.F.R. §718.305.

Remand Instructions

On remand, the ALJ must first reconsider the arterial blood gas study evidence and weigh all relevant evidence. 20 C.F.R. §718.204(b)(2)(ii). She must consider whether the October 5, 2020 arterial blood gas study administered for purposes of treatment is sufficiently reliable. *See J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010); 65 Fed. Reg. at 79,928. Then she must weigh all the arterial blood gas studies together to determine if they support total disability, undertaking a qualitative and quantitative analysis of the evidence and providing an adequate rationale for how she resolves conflicts in the evidence. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016); *Adkins*, 958 F.2d at 52-53; *see also Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence"); 20 C.F.R. §718.204(b)(2)(ii).

The ALJ must also reconsider the medical opinion evidence, taking into consideration her findings regarding the objective studies and comparing the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); 20 C.F.R. §718.204(b)(2)(iv). In rendering her credibility findings, she must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Looney*, 678 F.3d at 316-17; *Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). If the ALJ determines total disability is demonstrated by the arterial blood gas studies or medical opinions, or both, she must then weigh all of the relevant evidence together to determine if Claimant has a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2);

Fields v. Island Creek Coal Co., 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability on remand, he will have invoked the Section 411(c)(4) presumption. The ALJ must then determine whether Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015). If the ALJ finds Claimant is not totally disabled, he will have failed to establish an essential element of entitlement and the ALJ may reinstate the denial of benefits. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). In rendering her findings, the ALJ must explain her determinations in compliance with the requirements of the Administrative Procedure Act.[9] 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[9] The Administrative Procedure Act provides that every adjudicatory decision must include "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).