U.S. Department of Labor

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

BRB No. 23-0230 BLA

CARLOS STURGILL Claimant-Respondent v. CUMBERLAND RIVER COAL COMPANY and Self-Insured Through ARCH COAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/05/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Willow Eden Fort, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Willow Eden Fort's Decision and Order Awarding Benefits (2020-BLA-05242) rendered on a subsequent claim filed on June 18, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with at least fifteen years of underground coal mine employment and found he has 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] 30 U.S.C. §921(c)(4) (2018), and established a change in the applicable condition of entitlement.[3] 20 C.F.R. §725.309. She further found Employer did not rebut the presumption and awarded benefits beginning in June 2018.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. It also asserts she erred in finding it did not rebut the presumption, and in awarding benefits beginning in June 2018,

[1] Claimant filed a prior claim for benefits on October 5, 2015, and the district director denied it on July 12, 2016, because Claimant failed to establish total disability. Prior Claim Director's Exhibits 2, 33.

[2] Section 411(c)(4) provides a rebuttable presumption that Claimant 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.

[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 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); *see 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.*

when Claimant filed his claim.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.

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 Assocs., 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 that, standing alone, prevents him from performing his usual coal mine work.[6] *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on qualifying pulmonary function studies, arterial blood gas studies,[7] 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). Qualifying evidence in any of the four categories

[4] We affirm, as unchallenged on appeal, 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 5.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3; 31; 33 at 7-12.

[6] The ALJ found Claimant's usual coal mine work as a ram car operator involved lifting and carrying 50 to 100 pounds and heavy manual labor, and we affirm that finding as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 7.

[7] 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).

establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Employer contends the ALJ erred in finding Claimant established total disability based on the medical opinion evidence and the evidence as a whole.[8] 20 C.F.R. §718.204(b)(2); Decision and Order at 10-14. We disagree.

Medical Opinions

The ALJ considered the medical opinions of Drs. Alam, Dahhan, and Rosenberg. Decision and Order at 10-14; Director's Exhibits 14, 19, 23; Employer's Exhibit 2. Dr. Alam performed the Department of Labor's complete pulmonary evaluation of Claimant on October 12, 2018, and opined Claimant is totally disabled from a pulmonary standpoint based on the blood gas study that he conducted showing hypoxia at rest.[9] Director's Exhibit 14 at 5-6. In a supplemental report, after reviewing the non-qualifying blood gas study that Dr. Dahhan conducted on March 27, 2019, Dr. Alam explained that the variability in the results of the blood gas studies is due to Claimant's multiple medical problems, including his significant coronary disease, and the amount of fluid in his lungs from his use of certain medications. Director's Exhibit 23 at 1-2. Dr. Alam nevertheless maintained that Claimant has a pulmonary disability, and the disability is due in part to Claimant's nearly twenty-seven years of coal mine dust exposure.

Dr. Dahhan opined Claimant has no pulmonary impairment based on the non-qualifying results of the pulmonary function studies and arterial blood gas studies that he conducted. Director's Exhibit 19. Dr. Rosenberg opined that Claimant is not totally

[8] The ALJ found the pulmonary function studies and arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 7-10. We decline Employer's request that the Board clarify the Sixth Circuit's interpretation of the later evidence rule given that Employer does not allege specific error with regard to the ALJ's weighing of the blood gas study evidence and how that weighing "skews the onset finding." *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *see also Smith v. Kelly's Creek Res.,* BLR , BRB No. 21-0329 BLA, slip op. at 15 n.26 (June 27, 2023); *Kincaid v. Island Creek Coal Co.,* BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 5-11 (Nov. 17, 2023); Employer's Brief at 6-8; Decision and Order at 10.

[9] In addition, Dr. Alam reported that the pulmonary function study he conducted also reflected a mild to moderate mixed airflow defect. Director's Exhibit 14 at 5.

disabled from a pulmonary perspective, observing that Claimant's "oxygenation has improved over time with the blood gases of Dr. Dahhan being normal." Employer's Exhibit 2 at 3.

The ALJ credited Dr. Alam's opinion and gave less weight to the opinions of Drs. Dahhan and Rosenberg, and thus found Claimant established that he has a totally disabling respiratory or pulmonary impairment. Decision and Order at 10-14.

Initially, we disagree with Employer's argument that Dr. Alam's medical opinion does not support a finding of total disability because he partially attributed Claimant's disability to nonpulmonary causes. Employer's Brief at 4-6. The applicable regulation provides that if a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, "that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). The ALJ correctly analyzed the relevant inquiry under this section, which is whether Claimant has a totally disabling pulmonary or respiratory impairment, irrespective of its cause. 20 C.F.R. §718.204(b); Decision and Order at 10-14.

The ALJ permissibly relied on Dr. Alam's opinion of total disability because it was supported by the qualifying blood gas study he conducted on October 12, 2018, and her findings with respect to that study.[10] *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 10-12; Director's Exhibits 14, 23. Although Dr. Dahhan conducted a blood gas study on March 27, 2019, and it resulted in non-qualifying results, the ALJ rationally accepted Dr. Alam's explanation for that variability – that it is due to Claimant's significant coronary disease and the amount of fluid in his lungs due to his use of certain medications.[11] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 11; Director's Exhibits 14 at 4; 19 at 3; 23 at 1-2. We thus affirm the ALJ's crediting of Dr. Alam's opinion as reasoned and documented.

Regarding Drs. Dahhan and Rosenberg, we reject Employer's general contention that the ALJ did not adequately explain her credibility findings. Employer's Brief at 9-11.

[10] Further, as Dr. Alam specifically diagnosed a totally disabling pulmonary impairment, we reject Employer's assertion that "it is unclear [from Dr. Alam's opinion] whether there is a pulmonary condition that prevents coal mine employment." Employer's Brief at 6.

[11] We note that no physician specifically contested Dr. Alam's explanation; the other physicians merely conclusorily stated that Claimant's condition improved to normal. Director's Exhibit 19; Employer's Exhibit 2 at 3.

The ALJ permissibly gave less weight to Dr. Dahhan's opinion because, unlike Dr. Alam, Dr. Dahhan did not address the effects of medication on Claimant's variable blood gas study results.[12] *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 12; Director's Exhibit 19.

The ALJ gave Dr. Rosenberg's opinion less weight because he did not adequately explain why Claimant's blood gas impairment would not prevent him from performing his usual coal mine work. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 13; Employer's Exhibit 2 at 3. Employer concedes Dr. Rosenberg "did not explain how [Claimant] was able to return to his heavy equipment operator position" but argues that fact is "not relevant" to the credibility of his opinion because he diagnosed Claimant with "normal lung function" based on Dr. Dahhan's objective testing. Employer's Brief at 9. We disagree.

As an initial matter, we are not convinced that Dr. Rosenberg diagnosed Claimant as having no impairment whatsoever. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172–73 (4th Cir. 1997) ("[A]n ALJ may rely on a physician's report that does not discuss the exertional requirements of the miner's work if the physician concludes that the miner suffers from no impairment at all."). Although he described Claimant's lung function as having "improved over time" between Drs. Alam's and Dahhan's examinations, and "normal" at the "point in time" of Dr. Dahhan's testing, he did not say Claimant's impairment was non-existent. Employer's Exhibit 2 at 3-5; Employer's Brief at 9.

Moreover, as discussed, we have held the ALJ permissibly credited Dr. Alam's opinion that Claimant remains totally disabled despite the improvement seen on Dr. Dahhan's blood gas testing, and discredited Dr. Dahhan's contrary opinion. Employer identifies nothing in Dr. Rosenberg's opinion that undermines that holding or otherwise provides a reason to credit Dr. Rosenberg's diagnosis of normal lung function beyond his reliance on that same testing. *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th

[12] As the ALJ provided a valid reason for giving less weight to Dr. Dahhan's opinion, we need not address Employer's challenge that she improperly required Dr. Dahhan to have an accurate understanding of the exertional requirements of Claimant's usual coal mine work as he specifically concluded Claimant has no pulmonary impairment. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73 (4th Cir. 1997) (ALJ may rely on a physician's report that does not discuss the exertional requirements of the miner's work if the physician concludes that the miner suffers from no impairment at all).

Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Employer's challenges to the weighing of the medical opinions amount to a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and on the record as a whole. 20 C.F.R. §718.204(b)(2); *see Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 12-13. Consequently, we also affirm the ALJ's finding that Claimant has established a change in the applicable condition of entitlement. 20 C.F.R. §725.309.

We further affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. Decision and Order at 14. Moreover, while Employer generally challenges the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption in its Petition for Review, it does not allege any specific error in its brief. *See* Employer's Petition for Review at 2. Thus, we decline to address its general challenge and affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. *Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109; Decision and Order at 14-21.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes the Miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

The ALJ found the record did not establish precisely when Claimant became totally disabled due to pneumoconiosis, but that no credible evidence establishes that Claimant was not totally disabled due to pneumoconiosis at any time after he filed his claim. Decision and Order at 21. She thus awarded benefits commencing as of June 2018, the month he filed his claim. *Id.* Employer challenges that finding and asserts Claimant was not totally disabled on March 27, 2019, because the objective studies conducted on that date are non-qualifying, and as both Drs. Dahhan and Rosenberg opined he was not totally disabled. Employer's Brief at 11-12. We disagree.

The medical opinions of Drs. Dahhan and Rosenberg, and the objective testing of March 27, 2019, do not undermine the ALJ's commencement date finding because the ALJ did not credit them in finding that Claimant established total disability. Decision and Order at 7-14. As the ALJ accurately found the medical evidence does not reflect the date Claimant became totally disabled due to pneumoconiosis, we affirm the ALJ's conclusion that benefits commence in June 2018, the month in which Claimant filed his claim. 20 C.F.R. §725.503(b); *Owens*, 14 BLR at 1-50; Decision and Order at 21.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge