U.S. Department of Labor

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

BRB No. 24-0184 BLA

DANIEL R. FITCH Claimant-Respondent v. UMI, LLC and CNA Insurance Carrier Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 04/11/2025 DECISION and ORDER

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

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

Jeremy N. Faulk (Boehl Stopher & Graves, LLP), Louisville, 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, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits on Modification (2020-BLA-06145) rendered on a request for modification of a denial of a subsequent claim[1] filed on January 29, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a March 25, 2019 Decision and Order Denying Benefits, ALJ Steven D. Bell found Claimant failed to establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). As Claimant did not establish a change in an applicable condition of entitlement, ALJ Bell denied his subsequent claim. 20 C.F.R. §725.309(c). Claimant timely filed a request for modification on October 8, 2019, which the district director granted on July 23, 2020, ultimately awarding benefits. 20 C.F.R. §725.310. Employer requested a hearing before an ALJ, and the case was assigned to ALJ Golden (the ALJ). Director's Exhibit 18.

In his January 24, 2024 Decision and Order, which is the subject of this appeal, the ALJ found Claimant established total disability and therefore a mistake in determination of fact in ALJ Bell's decision. Moreover, because the ALJ determined Claimant established at least fifteen years of qualifying coal mine employment, he concluded 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 thus established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). He further found Employer

[1] Claimant filed a prior claim on July 29, 2013, which the district director denied on June 12, 2014, for failure to establish total disability. Director's Exhibit 1B at 156, 235.

[2] 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.

[3] When 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 "one of the applicable conditions of entitlement . . . has changed since the date upon which the order

did not rebut the presumption. Finally, he found granting Claimant's request for modification would render justice under the Act and, therefore, he granted Claimant's request for modification. 20 C.F.R. §725.310.

On appeal, Employer argues the ALJ erred in analyzing the arterial blood gas study evidence, and thus erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[4] It also urges the Benefits Review Board to refine its holding in *Tucker v. Director*, 10 BLR 1-35 (1987) concerning the blood gas study PCO2 values listed in Appendix C of 20 C.F.R. Part 718. Claimant and the Acting Director, Office of Workers' Compensation Programs (the Director), respond, urging the Board to reject Employer's arguments and affirm the award of benefits.

The 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).

Modification

In considering whether to grant modification of the prior denial of Claimant's subsequent claim, the ALJ was required to determine whether the denial contained a mistake in a determination of fact or whether the evidence submitted on modification, along with the evidence previously submitted in this subsequent claim, establishes a change in an applicable condition of entitlement. 20 C.F.R. §§725.309(c), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). In reviewing the record on modification, the ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of

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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 failed to establish total disability in his prior claim, he had to submit new evidence establishing this element to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 1B at 148.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 4-5.

[5] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine work in Indiana. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 9.

entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Thus, the ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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

To invoke the Section 411(c)(4) presumption, 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,[6] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2). Employer challenges the ALJ's finding that Claimant established total disability based on the arterial blood gas studies, medical opinions, and evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order on Modification at 7-8, 11-12.

The ALJ weighed three blood gas studies. He found the April 5, 2016 study, administered by Dr. Dultz, qualifying because Claimant's PCO2 result was above the Appendix B table value of 50. Decision and Order on Modification at 7-8 n.22; Director's

[6] 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).

[7] The ALJ found there was no evidence of complicated pneumoconiosis or cor pulmonale with right-sided congestive heart failure and that none of the pulmonary functions studies are qualifying. Decision and Order on Modification at 6-7. Therefore, this evidence does not support a finding of total disability at 20 C.F.R. §§718.204(b)(2)(i), (iii); 718.304.

Exhibit 1B at 100. Dr. Tuteur administered the May 1, 2017 study, which produced a PCO2 result of 42 and a PO2 result of 73, which the ALJ found to be non-qualifying. Employer's Exhibit 4 at 6. Considering the March 30, 2022 study, administered by Dr. Broudy, the ALJ noted it produced a PCO2 result of 49.3 and a PO2 result of 71. Decision and Order on Modification at 7; Employer's Exhibit 6 at 9. In finding the March 30, 2022 study to be qualifying, the ALJ stated:

> "A [miner's] PCO2 and PO2 values must be 'equal to or less than' the values on the table used to evaluate the [miner's] values. Therefore, [an ABG] which produced a PCO2 value of 49.1 and a PO2 value of 67.7, is qualifying. . . [T]he study cannot be analyzed using the line on the table for PCO2 values from 40 to 49, because [the] measured PCO2 value of 49.1 is not 'equal to or less than' 49. Thus, the study must be analyzed using the next line, for PCO2 values 'Above 50'- which, . . . effectively means '50 and above.'"

Decision and Order on Modification at 7-8 n.24 (bolding omitted), *quoting Jackson v. Drummond Co, Inc.*, BRB No. 16-0250 BLA, slip op. at 8 (Feb. 27, 2017) (unpub). Thus, the ALJ concluded Claimant established that a preponderance of the blood gas studies were qualifying and supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). Considering the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ next determined each of the three physicians – Drs. Dultz, Sood, and Tuteur – found Claimant is totally disabled. Decision and Order on Modification at 8-12. Weighing the evidence as a whole, the ALJ concluded Claimant has a total pulmonary or respiratory disability and that he invoked the Section 411(c)(4) presumption. *Id.* at 12.

Employer argues the ALJ erred in finding the March 30, 2022 arterial blood gas study qualifying under Appendix C of Part 718 based on the Board's guidance in *Jackson*. Employer's Brief at 4-9. It asserts this error necessitates remand because the ALJ's blood gas study analysis "is reflected in every portion of the finding of total disability." *Id*. at 2-4. Further, it contends the Board should refine its holding in *Tucker v. Director*, 10 BLR 1-35, 1-41 (1987), concerning the Appendix C table values for blood gas study results. *Id*. at 9-10. Claimant and the Director respond, urging the Board to affirm the ALJ's total disability finding, as the medical opinion evidence is sufficient to establish total disability regardless of whether the 2022 blood gas study is qualifying. Claimant's Brief at 4-8; Director's Brief at 3-4.[8]

[8] The Director further urges the Board to reject Employer's arguments concerning the ALJ's weighing of the 2022 blood gas study. Director's Brief at 4-5. However, as we affirm the ALJ's finding of a total pulmonary or respiratory disability based on the medical

We agree with Claimant and the Director's argument. The regulation at 20 C.F.R. §718.204(b)(2) provides that "[i]n the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i)(ii), (iii), or (iv) of this section *shall* establish a miner's total disability." 20 C.F.R. §718.204(b)(2). As the ALJ noted, all of the physicians who provided an opinion on total pulmonary or respiratory disability,[9] including Employer's own physician, opined that Claimant is totally disabled from performing his usual coal mine work.[10] Decision and Order on Modification at 11; Director's Exhibit 1B at 89; Claimant's Exhibit 3; Employer's Exhibit 4.

Dr. Dultz performed the Department of Labor-sponsored complete pulmonary evaluation of Claimant on April 5, 2016, and concluded Claimant is "disabled for gainful employment of any kind (including mining) since he requires supplemental [oxygen] to ambulate." Director's Exhibit 1B at 92. Further, Dr. Dultz determined that an exercise blood gas study was not necessary because the resting study yielded qualifying values and Claimant's health would be at risk if he exercised him.[11] *Id*.

Dr. Tuteur examined Claimant on May 1, 2017 and conducted an oxygen desaturation study (or six-minute walk test), noting Claimant walked 850 feet at a slow pace and complained of moderate shortness of breath. Employer's Exhibit 4 at 1, 5. He opined that Claimant's "[o]xygen saturation is normal at rest, but there is desaturation seen while walking 850 feet in six minutes." *Id*. at 2. He concluded that, "[c]learly, [Claimant] is totally and permanently disabled from returning to work in the coal mine industry or engag[ing] in employment requiring similar effort." *Id*.

Dr. Sood reviewed Claimant's medical records and authored a medical report dated December 10, 2019. Claimant's Exhibit 3. He opined that Claimant's "current activity

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opinions, independent of the blood gas study evidence, we need not reach this argument. *See infra*.

[9] The ALJ determined Dr. Broudy did not offer an opinion regarding pulmonary or respiratory total disability. Decision and Order on Modification at 11; Employer's Exhibit 6.

[10] Employer does not challenge, and we therefore affirm, the ALJ's determination that Claimant's usual coal mine work as a "mechanic/greaser" required "heavy labor." Decision and Order on Modification at 5-6; *see Skrack*, 6 BLR at 1-711.

[11] Dr. Dultz also prepared a February 5, 2018 supplemental report based on a review of Dr. Tuteur's May 1, 2017 report, but it was focused on the existence of pneumoconiosis and total disability causation. Claimant's Exhibit 2.

intolerance is consistent with an inability to perform his last coal mine employment." *Id*. at 4. Further, he indicated that the results of the walk test Dr. Tuteur administered "correspond[] to severe exercise limitation." *Id*. at 7. He stated, "[i]ndividuals with this level of peak oxygen consumption would have class IV or the most severe impairment category of the whole person." *Id*. at 12. He concluded that Claimant has a disabling respiratory impairment and "can no longer do his last coal mining job . . . ." *Id*.

Although Employer is correct that the ALJ observed that the medical opinions diagnosing total disability were consistent with the qualifying blood gas study evidence, remand is not required on this basis. Employer's Brief at 3; *see* Decision and Order on Modification at 11-12. Because all of the physicians prepared their reports prior to March 2022, none of their conclusions were based on the March 30, 2022 blood gas study that Employer asserts is non-qualifying. Further, as the ALJ specifically noted, Drs. Tuteur and Sood opined Claimant has a totally disabling respiratory or pulmonary impairment based on a May 2017 walk test Dr. Tuteur conducted, independent of the blood gas testing. *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Decision and Order on Modification at 12; Claimant's Exhibit 3; Employer's Exhibit 4. Therefore, even if the blood gas study evidence were found to be preponderantly non-qualifying, Drs. Tuteur's and Sood's opinions sufficiently support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).[12] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Moreover, Employer does not challenge the ALJ's determination that the opinion of Dr. Tuteur, its own expert, is credible or argue that the ALJ impermissibly found the opinions of Drs. Dultz, Tuteur, and Sood were reasoned or documented. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).[13]

[12] The ALJ found each physician knew the exertional requirements of Claimant's usual coal mine work and sufficiently explained how the level of impairment observed on the walk test would prevent Claimant from performing his usual coal mine work. Decision and Order on Modification at 11.

[13] Consequently, we decline to address Employer's arguments regarding the Board's holdings in *Jackson* or *Tucker* or its assertion that the ALJ erred in relying on them to find the March 30, 2022 study qualifying. *See* Employer's Brief at 2-11.

Having rejected Employer's contention that the ALJ's medical opinion determination was somehow tainted by his blood gas study determination at 20 C.F.R. §718.204(b)(2)(ii), and there is no contrary probative evidence,[14] we affirm the ALJ's conclusion that Claimant established total disability at 20 C.F.R. §718.204(b)(2). Consequently, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). We further affirm, as unchallenged, the ALJ's determination that Employer did not rebut the presumption; consequently, we affirm the ALJ's conclusion that Claimant is entitled to modification based on mistake in a determination of fact with regard to the prior denial of his claim. *See Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 12-15. Finally, we affirm, as unchallenged, the ALJ's finding that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 15-16. We therefore affirm the award of benefits.

[14] We note Dr. Broudy observed that the results of the 2022 pulmonary function and arterial blood gas studies were similar to those of the 2016 and 2017 testing, although the 2022 pulmonary function test results were above federal minimums. Employer's Exhibit 6 at 2-3.

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge