U.S. Department of Labor

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

BRB No. 24-0240 BLA

BUFORD DAVID HINKLE Claimant-Petitioner v. POWELL MOUNTAIN COAL COMPANY INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 04/22/2025 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Buford David Hinkle, Dryden, Virginia.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

Ann Marie Scarpino (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:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Denying Benefits (2020-BLA-05488) rendered on a claim filed on December 17, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. He credited Claimant with 24.26 years of coal mine employment based on Employer's stipulation but found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant did not establish entitlement to benefits under 20 C.F.R. Part 718. Thus, he denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Acting Director, Office of Workers' Compensation Programs (the Director), argues the ALJ erred in relying on the most recent pulmonary function study to find that Claimant did not establish a totally disabling respiratory or pulmonary impairment and that error affected his weighing of the medical opinion evidence.

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.[3] 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).

[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Napier is not representing Claimant in this appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant withdrew his 2018 prior claim. Decision and Order at 2; Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe*

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. The ALJ accurately observed the record contains no evidence of complicated pneumoconiosis and therefore the ALJ properly found Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). *See* Decision and Order at 5; Director's Exhibits 14, 17-19, 21, 42;[4] Claimant's Exhibits 1-4; Employer's Exhibits 1, 2, 5-12.

Total Disability

In order to prove entitlement, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist Claimant in establishing the elements of entitlement, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 14; Director's Exhibit 4.

[4] Director's Exhibit 42, Dr. Ramakrishnan's interpretation of the October 15, 2019 x-ray, is not contained in the record before the Board; however, the ALJ admitted it into the record, Claimant designated it as his rebuttal to Employer's affirmative October 15, 2019 x-ray, and Employer describes it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. *See* Decision and Order at 2; ALJ Exhibits 2 at 3; 3 at 2; Employer's Post-hearing Brief at 5.

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work.[5] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies and 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 did not establish a totally disabling respiratory or pulmonary disability under 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 14-16, 19.

Pulmonary Function Studies

The record contains five pulmonary function studies. We affirm the ALJ's determination that the October 15, 2019 pulmonary function study is invalid as all of the physicians addressing its validity agree it is invalid. Decision and Order at 12; Director's Exhibits 19 at 7, 9; 21; Employer's Exhibits 1 at 3; 6 at 8; 7 at 15-18; 8; 10-12.

Addressing the four remaining pulmonary function studies, the ALJ permissibly used the table values at Appendix B of 20 C.F.R. Part 718 for a 71 year old to assess whether Claimant is totally disabled.[7] *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008); Decision and Order at 9. We see no error in the ALJ's finding that while Dr. Fino testified about adjusting the table values for Claimant's age, Dr. Fino did not

[5] The ALJ found Claimant's usual coal mine work as a repairman/mechanic required medium to heavy work because he was required to, among other duties, lift and carry 25 to 100 pounds. *See* Decision and Order at 4-5 & n.24, *citing* the Dictionary of Occupational Title's definitions of both "[m]edium" and "[h]eavy" work; Hearing Transcript at 15; Director's Exhibits 5, 14; *see also* Director's Exhibit 19 at 3.

[6] A "qualifying" pulmonary function study or blood gas study yields values 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" blood gas study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] Employer does not raise any specific argument on appeal that the ALJ erred in determining the validity of the pulmonary function studies. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

specify the appropriate table values or cite authority for any necessary age adjustment and no other physician asserted the table values are improper. *See Meade*, 24 BLR at 1-47; Decision and Order at 7-9 & n.39; Director's Exhibit 18 at 2; Employer's Exhibit 7 at 17-18. The ALJ also permissibly determined Claimant's height was 70.1 inches, based upon his averaging of the different recorded heights on the studies. *See Meade*, 24 BLR at 1-44; Decision and Order at 9 & nn. 44-45.

Applying the table values at Appendix B for a male aged 71 years old with a height of 70.1 inches, the ALJ accurately found as follows. The November 20, 2018 pulmonary function study yielded qualifying values without a bronchodilator being administered. Decision and Order at 9; Claimant's Exhibit 2. The March 19, 2019 pulmonary function study yielded qualifying values both pre- and post-bronchodilator. Decision and Order at 10; Director's Exhibit 14. The October 15, 2019 and November 21, 2019 pulmonary function studies yielded non-qualifying values without a bronchodilator being administered. Decision and Order at 12, 14; Director's Exhibit 19; Claimant's Exhibit 3. Finally, the May 17, 2021 pulmonary function study yielded non-qualifying values both pre- and post-bronchodilator. Decision and Order at 13; Employer's Exhibit 8.

The ALJ gave the greatest weight to the most recent May 17, 2021 pulmonary function study, on the sole basis that it is "more reflective of Claimant's condition at the time of the hearing, particularly because it was performed a year and a half after the next most recent" November 21, 2019 pulmonary function study. Decision and Order at 14. He therefore determined the pulmonary function study evidence did not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

We agree with the Director's argument that the ALJ did not give a sufficient rationale for the weight accorded to the conflicting pulmonary function study evidence. Director's Brief at 1-2.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, and the Board both have held it irrational to credit evidence solely because of recency if it shows the miner's condition has improved. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Kincaid v. Island Creek Coal Co*., 26 BLR 1-43, 1-50-52 (2023) (recency can only

be used as a basis to credit newer tests over older tests when the more recent tests show a deterioration consistent with the progressive nature of pneumoconiosis).

Because the ALJ credited the May 17, 2021 pulmonary function study solely because it is the most recent, we vacate his finding at 20 C.F.R. §718.204(b)(2)(i). *Adkins*, 958 F.2d at 51-52; *Kincaid*, 26 BLR at 1-52-53 n.14.

Arterial Blood Gas Studies

When weighing arterial blood gas studies developed by any party, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.105(c); 20 C.F.R. Part 718, Appendix C; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 n.8 (2007) (en banc); *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). 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 initially noted that no physician questioned the validity of the blood gas study evidence and we therefore affirm the ALJ's determination that the studies are valid. 20 C.F.R. §§718.101(b), 718.105(c); 20 C.F.R. Part 718, Appendix C; Decision and Order at 15. Because all of the blood gas studies dated March 19, 2019, October 15, 2019, and May 17, 2021 yielded non-qualifying results, we also affirm the ALJ's finding that the blood gas study evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 14-15; Director's Exhibits 14, 19; Employer's Exhibit 8.

Cor Pulmonale

The ALJ accurately found no evidence of cor pulmonale with right-sided congestive heart failure; thus, we affirm his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 15-16.

Medical Opinions

The ALJ considered three medical opinions. Dr. Harris opined Claimant is totally disabled, while Drs. Fino and Tuteur opined he is not. Director's Exhibits 14, 19, 21; Employer's Exhibits 1 at 5; 6 at 15; 7 at 21; 8 at 4; 10 at 4; 11 at 5; 12 at 3-4. Dr. Harris performed the Department of Labor-sponsored complete pulmonary evaluation of Claimant on March 19, 2019, conducting pulmonary function and blood gas studies, taking Claimant's smoking and coal mine employment histories, and recording the results of his

physical examination. Director's Exhibit 14. Based on Claimant's "significant dyspnea on exertion," and the results from the pulmonary function studies, which showed a "markedly reduced lung function including an FEV1 of 43% predicted and FVC of 45% predicted," Dr. Harris opined Claimant is "totally disabled due to his pulmonary impairment" and "would not be expected to be able to complete the exertional requirements of his last coal mine employment." *Id*. at 8. In his supplemental report, Dr. Harris reiterated his opinion that Claimant is totally disabled due to his pulmonary impairment based on his significant dyspnea on exertion and on the results of his March 19, 2019 pulmonary function testing. Director's Exhibit 21 at 2.

The ALJ found the opinions of Drs. Fino and Tuteur do not assist Claimant in establishing that he has a totally disabling respiratory or pulmonary impairment. Decision and Order at 18-19. He further gave little weight to Dr. Harris's opinion because it was based "extensively" on the qualifying March 19, 2019 pulmonary function study, contrary to the ALJ's finding that the weight of the pulmonary function study evidence does not establish total disability. *Id*. at 18. He determined the persuasiveness of Dr. Harris's opinion is "further diminished" because Dr. Harris did not review the most recent May 17, 2021 pulmonary function study, which he had accorded determinative weight, nor Claimant's treatment records, which he found "show[ed] a lack of respiratory deficits on examination."[8] *Id.* He therefore found that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19.

The ALJ was not required to discredit Dr. Harris's opinion because he did not review all of the medical evidence when he based his opinion on an examination of Claimant, objective test results, and exposure histories. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Moreover, because the ALJ's improper weighing of the pulmonary function study evidence affected the weight he accorded the conflicting medical opinions, we vacate his finding at 20 C.F.R. §718.204(b)(2)(iv). We also vacate the ALJ's

[8] Claimant's treatment records consist of office notes from Stone Mountain Health Services on November 20, 2018, January 22, 2019, and November 21, 2019. Claimant's Exhibit 4. They document Claimant's symptoms of dyspnea, diagnoses of shortness of breath and chronic obstructive pulmonary disease, and treatment with inhalers. *Id*. The ALJ found Claimant did not establish total disability based on the treatment records because they do not contain an explicit opinion on disability or describe a limitation from Claimant's respiratory or pulmonary impairments that would allow for an inference of total disability. Decision and Order at 16-17; Claimant's Exhibit 4. The only examination in the treatment records reported Claimant's breathing is "effortless and normal," he has "bilateral clear breath sounds with no rales, rhonchi or wheezes," and his "[b]reath sounds were normal." Claimant's Exhibit 4 at 7.

finding that Claimant did not establish total disability based on the evidence as a whole and the denial of benefits. 20 C.F.R. §718.204(b)(2); Decision and Order at 19.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established he has a totally disabling respiratory or pulmonary impairment based on the pulmonary function study and/or the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(i), (iv). He must consider the physicians' opinions in conjunction with the exertional requirements of Claimant's usual coal mine employment and draw appropriate inferences. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577-78 (6th Cir. 2000); *Walker v. Director, OWCP*, 927 F.2d 181, 183-85 (4th Cir. 1991). If Claimant establishes total disability based on the pulmonary function studies, the medical opinions, or both, the ALJ then must determine whether Claimant is totally disabled taking into consideration the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability by a preponderance of the evidence, the ALJ must make a finding regarding his length of qualifying coal mine employment to determine whether he can invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[9] Although the ALJ accepted Employer's stipulation to 24.26 years of coal mine employment, he did not determine whether those years of employment were performed underground or in substantially similar surface coal mine employment.[10] *See* Decision and Order at 3.

If Claimant successfully invokes the Section 411(c)(4) presumption, the ALJ must determine whether Employer is able to rebut it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R.

[9] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[10] Claimant testified at the hearing that he had "probably about 18-19 years underground." Hearing Transcript at 15. At his deposition, Claimant testified that he had "probably about 17 [years] underground." Director's Exhibit 38 at 36. Thus, the record appears to support a finding of at least fifteen years of underground coal mine employment, but we leave it to the ALJ to make this determination on remand. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) ("When the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case to the ALJ . . . rather than attempting to fill the gaps in the ALJ's opinion.").

§718.305. If Claimant does not establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. In rendering all of his determinations on remand, the ALJ must explain his findings as the Administrative Procedure Act requires.[11] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[11] The Administrative Procedure Act provides 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).