U.S. Department of Labor

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

BRB No. 24-0341 BLA

BENNY SOUTHERN Claimant-Respondent v. ALDEN RESOURCES, LLC and COMMERCE & INDUSTRY INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 04/14/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and Cameron Blair (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Ryan D. Thompson, Esq. (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2021-BLA-05271) rendered on a claim filed on December 13, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation and credited Claimant with sixteen years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[2] Claimant filed a brief in support of the award. The Acting Director, Office of Workers' Compensation Programs, declined to file a 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.[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] 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.

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

[3] 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 Exhibit 3; Hearing Transcript at 19-20.

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,[4] 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).

The ALJ found Claimant established total disability based on the arterial blood gas studies, medical opinions, and evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 7-11.

Blood Gas Studies

The ALJ considered five blood gas studies taken on June 13, 2019, February 17, 2020, November 2, 2021, February 22, 2022, and March 11, 2022. Decision and Order at

[4] 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).

[5] The ALJ found Claimant did not establish total disability based on the pulmonary function studies or pneumoconiosis and cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 5, 6. The ALJ also determined there was no evidence of complicated pneumoconiosis and therefore Claimant 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); 20 C.F.R. §718.304; Decision and Order at 5.

6-7. The June 13, 2019 study produced qualifying values at rest.[6] Director's Exhibit 15 at 12-14. The November 2, 2021 and February 22, 2022 studies produced qualifying values at rest and no exercise study was performed. Claimant's Exhibits 1 at 5; 2 at 2-3. The February 17, 2020 and March 11, 2022 studies produced nonqualifying values at rest and no exercise studies were performed. Director's Exhibit 20 at 5; Employer's Exhibit 8 at 4. The ALJ found all the studies were valid. Decision and Order at 7. He noted that there were qualifying blood gas studies across a two-and-one-half year period, from the first designated study to seventeen days prior to the most recent blood gas study. *Id.* Therefore, the ALJ found a preponderance of the blood gas study evidence supports a finding of total disability. Decision and Order at 7.

Employer argues the ALJ erred in not relying on the most recent study, asserting "it is acceptable to apply a 'later is better' analysis," and committed reversible error by "deviating from Court precedent." Employer's Brief at 11-13. We disagree.

Contrary to Employer's argument,[7] the Board has held it is irrational to credit evidence solely on the basis of recency when a miner's condition improves. *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-50-52 (2023). This is particularly the case when the studies being considered are very close in time (here the most recent tests were conducted merely seventeen days apart). Moreover, the ALJ properly conducted a qualitative and quantitative analysis of the evidence in concluding a preponderance of the blood gas study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJs may perform a quantitative analysis of the evidence provided that they also perform a qualitative analysis); Decision and Order at 7.

[6] The ALJ noted that Dr. Nader administered and recorded two qualifying resting blood gas values during his examination. Decision and Order at 7 n.24; Director's Exhibit 15 at 12-13. An exercise study was not performed. Director's Exhibit 15 at 12.

[7] In making this assertion, Employer relied on *Worley v. Blue Diamond Coal Co.*, 82 F.3d 419, 1996 WL 180175 (Table) (6th Cir. 1996) (unpub.). However, despite Employer's argument to the contrary, *Worley* does not stand for the proposition that "later is better." Employer's Brief at 11-12. Rather, the Sixth Circuit held that "recency alone is insufficient to reconcile conflicting evidence where the most recent evidence shows that the miner has 'improved,' a more reasoned explanation is required." *Worley*, 1996 WL 180175, at *3.

Additionally, Employer briefly argues that the ALJ failed to consider Dr. Dahhan's opinion that the studies were unreliable because the facility where they were conducted is at a higher elevation than his own facility, which can affect testing. Employer's Brief at 12. The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). While Dr. Dahhan did observe that the facility was at a higher elevation and the results were "a little bit out of kilter," he specifically stated that he "[didn't] want to criticize another laboratory without having objective findings." Employer's Exhibit 9 at 16-20. The ALJ permissibly did not credit these statements, nor Dr. Dahhan's opinion as a whole, because he failed to adequately explain why he discredited these studies outside of offering speculation lacking objective support. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 10; Employer's Exhibit 9.

In the absence of evidence to the contrary, compliance with the quality standards set forth in the regulations is presumed. 20 C.F.R. §718.103(c); *see* Appendix B to 20 C.F.R. Part 718; *Vivian*, 7 BLR at 1-361; Employer's Brief at 12. We therefore affirm the ALJ's finding the studies performed at the Norton Community Hospital are valid and qualifying. Consequently, we further affirm, as supported by substantial evidence, the ALJ's finding that the blood gas study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 7.

Medical Opinions and Evidence as a Whole

The ALJ considered the medical opinions of Drs. Westerfield,[8] Nader, Dahhan, Habre,[9] and Green. Decision and Order at 7-11. Employer argues that the ALJ improperly

[8] Dr. Westerfield opined that "[Claimant] has no pulmonary impairment and no respiratory disability, and retains the breathing capacity to return to his previous position in the coal mines." Employer's Exhibit 1 at 2. The ALJ noted that Dr. Westerfield did not provide an opinion on the exertional requirements of Claimant's last coal mine work; therefore, it was unclear whether Dr. Westerfield had an adequate understanding of Claimant's last coal mining job. Decision and Order at 8. As Employer has not challenged these findings, we affirm the ALJ's determination that Dr. Westerfield's opinion is not well reasoned and is entitled to little probative weight. *See Skrack*, 6 BLR at 1-711; Decision and Order at 8.

[9] Dr. Habre examined Claimant on November 2, 2021. Claimant's Exhibit 1. He noted the pulmonary function and arterial blood gas studies but did not assess the results. Claimant's Exhibit 1 at 4. Dr. Habre concluded that Claimant has "a completely disabling lung disease." Claimant's Exhibit 1 at 5. The ALJ noted that Dr. Habre did not explain

credited Drs. Nader's and Green's opinions that Claimant is totally disabled over Dr. Dahhan's opinion that he is not. Employer's Brief at 13-16. We disagree.

Dr. Nader performed Claimant's Department of Labor-sponsored complete pulmonary exam on June 13, 2019. Director's Exhibit 15. He found that Claimant's last work required heavy exertion. *Id.* at 1. Based on Claimant's qualifying resting blood gas studies, physical symptoms of shortness of breath on exertion, and difficulty walking more than fifty feet uphill, Dr. Nader opined that Claimant is totally disabled from a pulmonary standpoint and could not return to his previous coal mine work. *Id.* at 3. In a supplemental opinion dated September 2, 2020, based on a review of Dr. Dahhan's medical report and testing, Dr. Nader reiterated his belief that Claimant is totally disabled from a respiratory standpoint. Director's Exhibit 22 at 3. The ALJ found his opinion well-reasoned and gave it full probative value because it was based on the objective studies, Claimant's physical symptoms, and an adequate understanding of the exertional requirements of Claimant's usual coal mine work. Decision and Order at 8.

Dr. Dahhan first examined Claimant on February 17, 2020 and reviewed Dr. Nader's June 13, 2019 report and the objective studies conducted as part of his examination. Director's Exhibit 20. Dr. Dahhan observed that as the results of the June 13, 2019 blood gas study were "right on the cutoff numbers" they were not below disability standards. *Id.* at 3. Based on this review he concluded there was no evidence of a pulmonary disability. *Id.* The ALJ noted that blood gas studies are qualifying if they are "equal to or less than" the values provided in Appendix C of part 718; therefore, Dr. Dahhan utilized an incorrect understanding of the regulations in arriving at his opinion. Decision and Order at 9.

Dr. Dahhan administered "repeat arterial blood gases" on March 11, 2022 and reviewed additional records, including Dr. Westerfield's October 22, 2018 report and Dr. Habre's November 2, 2021 report. Employer's Exhibit 8. In his supplemental report, Dr. Dahhan observed that the newly submitted blood gas studies show no evidence of hypoxemia and a "mild increase in the A-a gradient for oxygen as compared to the study of Dr. Westerfield." *Id.* at 2. He also stated that Dr. Habre's blood gas study showed "hyperventilation with disabling hypoxemia . . . suggestive of a much wider A-a gradient for oxygen than the one generated from [his] exam." *Id.* The ALJ found that this

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his conclusion or the factors he considered in arriving at this conclusion. Decision and Order at 10. Further, Dr. Habre did not specifically opine whether Claimant's disabling impairment would prevent him from performing his last coal mine job. *Id.* Thus, the ALJ found Dr. Habre's opinion is entitled to little probative value. Decision and Order at 10.

supplemental report did not offer a cohesive opinion as to whether Dr. Dahhan still found Claimant not totally disabled. Decision and Order at 9.

Additionally, Dr. Dahhan was deposed on March 11, 2022. Employer's Exhibit 9. He was asked to consider the entirety of the blood gas study evidence and observed that all of the qualifying studies were conducted at Norton Community Hospital. *Id.* at 16-17. Dr. Dahhan noted that this hospital was at a higher elevation than his office where the two nonqualifying studies were conducted. *Id.* As previously noted, Dr. Dahhan indicated that the results generated at the Norton facility were "a little bit out of kilter," but he did not want to "criticize another laboratory without having objective findings." *Id.* at 20. Dr. Dahhan concluded that the "data did not support" a finding of total disability. *Id.* at 21. When asked why three studies produced qualifying results, Dr. Dahhan conceded "I really don't know." *Id.* at 24. The ALJ found Dr. Dahhan did not adequately explain why he doubted the three qualifying test results. Decision and Order at 10. The ALJ noted that Dr. Dahhan, beyond speculation, did not explain why the difference in elevation between the facilities affected his analysis and appeared to almost exclusively rely on the most recent blood gas study without acknowledging that the next most recent qualifying study was administered seventeen days prior. *Id.* Therefore, the ALJ gave his opinion little probative value.

Dr. Green conducted a review of the records on behalf of Claimant and prepared a report dated March 9, 2022. Claimant's Exhibit 3. He noted that the pulmonary function studies were "within the range of normal," while the blood gas studies showed an impairment of gas exchange. *Id.* at 3-7. He indicated there was "enough reproducible evidence between multiple blood gases over a number of years" to support that Claimant "is hypoxemic on a consistent basis." *Id.* at 6. Dr. Green acknowledged "some fluctuation in occasional blood gases" but indicated "those blood gases were still abnormal." *Id.* The ALJ found that Dr. Green had an adequate understanding of Claimant's exertional requirements and considered the qualifying and nonqualifying blood gas studies. Decision and Order at 11. Thus, the ALJ determined his opinion is well-reasoned, well-documented, and worthy of full probative value. *Id.*

Employer first alleges it was "incorrect" for the ALJ to credit Dr. Nader's opinion when he "did not review every single blood gas study of record" or address why he believed Claimant was totally disabled after considering the February 17, 2020 non-qualifying study. Employer's Brief at 14. However, an ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned and documented. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Moreover, as the ALJ observed, Dr. Nader prepared a supplemental report addressing Dr. Dahhan's February 17, 2020 testing and stated "[Claimant] remains totally disabled from a pulmonary capacity standpoint and my opinion will not be changed."

Director's Exhibit 22 at 3; *see* Decision and Order at 8. Because the ALJ permissibly found that Dr. Nader based his opinion on the objective testing, Claimant's physical symptoms, and an adequate understanding of the exertional requirements of Claimant's usual coal mine work, we affirm his finding that Dr. Nader's opinion is well-reasoned and entitled to full probative weight. *See Banks*, 690 F.3d at 489; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 8.

Employer next asserts that "Dr. Green clearly places an emphasis on the more recent studies than the earlier studies he reviewed." Employer's Brief at 14. Employer continues, "[u]sing Dr. Green's application and reliance on more recent testing, it is likely had Dr. Green reviewed the March 11, 2022, he would conclude that Claimant is not totally disabled." *Id*. Employer's argument is speculative and fails to show error by the ALJ. The ALJ accurately noted:

> Considering Claimant's impaired blood gas exchange, Dr. Green opined that Claimant suffers from a totally disabling respiratory or pulmonary impairment that prevents him from performing his last coal mine job. He explained that the record includes a "number of blood gases that show [Claimant] at least some of the time meets the criteria for total pulmonary disability and at other times the blood gases are abnormal indicating a moderate degree of hypoxemia."

Decision and Order at 11 (citations omitted, quoting Claimant's Exhibit 3 at 6-7.)

Because the ALJ permissibly found Dr. Green had an accurate understanding of the exertional requirements of Claimant's usual coal mine work and considered the objective testing, including non-qualifying studies, in concluding Claimant is totally disabled, we affirm the ALJ's finding that Dr. Green's opinion is reasoned and sufficient to support a finding that Claimant is totally disabled. *See Napier*, 301 F.3d at 713-14; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 11.

Finally, Employer contends that because Dr. Dahhan reviewed "all" the evidence of record, including the most recent non-qualifying blood gas study, the ALJ erred in discrediting his opinion. Employer's Brief at 7. However, the ALJ is not required to give additional weight to Dr. Dahhan's opinion on the basis that he reviewed the most evidence. *See Church*, 20 BLR at 1-13. Further, the ALJ rationally found that Dr. Dahhan did not offer a reasonable explanation of why he doubted the results of the three qualifying studies. *See Banks*, 690 F.3d at 489; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 10. We therefore affirm the ALJ's determination to accord less weight to Dr. Dahhan's opinion as not sufficiently reasoned regarding whether Claimant is totally disabled.

Employer's arguments that the ALJ erred in weighing the medical opinion evidence are a request to reweigh the evidence, which we are not empowered to 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 in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Martin*, 400 F.3d at 305; Decision and Order at 11. Thus, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 11.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to rebut the presumption by establishing that Claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer rebutted the presumption of the presence of clinical, but not legal pneumoconiosis and failed to establish that pneumoconiosis caused no part of Claimant's pulmonary or respiratory disability. Decision and Order at 11-17. As Employer does not challenge these findings, we affirm the ALJ's determination that it failed to rebut the presumption. 20 C.F.R. §718.305(d)(1); Decision and Order at 16-17; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge