U.S. Department of Labor

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

BRB No. 24-0456 BLA

JOHN K. SMITH)
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Claimant-Respondent)
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v.)
)
BLACKJEWEL, LLC)
)
and)
)
ROCKWOOD CASUALTY INSURANCE COMPANY)
)
Employer/Carrier-Petitioners)
)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 12/09/2025

DECISION and ORDER

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

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

Denise Hall Scarberry (Baird & Baird, PSC), Pikeville, Kentucky, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2021-BLA-05525) rendered on a claim filed on February 18, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty years of underground coal mine employment based on the parties' stipulation and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found 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). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and invoked the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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, 361-62 (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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 6.

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

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,[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).

The ALJ found Claimant established total disability based on the pulmonary function studies, the medical opinion evidence, and the evidence as a whole.[5] Decision and Order at 6-13. Employer argues the ALJ erred in weighing the pulmonary function study and medical opinion evidence. Employer's Brief at 5-13 (unpaginated).

Pulmonary Function Studies

The ALJ considered two pulmonary function studies dated June 16, 2020, and October 28, 2020. Decision and Order at 7-9. The June 16, 2020 pulmonary function study produced qualifying pre-bronchodilator results but non-qualifying post-bronchodilator results. Director's Exhibit 27 at 10. The October 28, 2020 study produced non-qualifying results both pre- and post-bronchodilator. Director's Exhibit 30 at 12. The ALJ found the October 28, 2020 study is valid and did not address the validity of the June 16, 2020 study. Decision and Order at 8. He gave the greatest weight to the qualifying pre-bronchodilator

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 15; Hearing Tr. at 13.

[4] 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).

[5] The ALJ found the arterial blood gas study evidence failed to establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 6 n.26, 9.

result of the June 16, 2020 study and found the pulmonary function study evidence supports a finding of total disability. *Id.* at 9.

Employer argues the ALJ erred in failing to explain why the June 16, 2020 qualifying pre-bronchodilator study is entitled to more weight than the October 28, 2020 non-qualifying pre-bronchodilator study.[6] Employer's Brief at 7-9 (unpaginated). We need not address this issue because, as we discuss below, we affirm the ALJ's finding that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv) regardless of whether the pulmonary function studies are qualifying; therefore, the ALJ's error in finding the pulmonary function study evidence supports total disability at 20 C.F.R. §718.204(b)(2)(i) is harmless. *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).

Medical Opinions

Before weighing the medical opinions, the ALJ found Claimant's usual coal employment was working as an electrician, which required very heavy labor. Decision and Order at 6-7. As this finding is unchallenged on appeal, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ considered the medical opinions of Drs. Nader, Fino, and Tuteur. Decision and Order at 9-13. Dr. Nader opined Claimant is totally disabled based on his pulmonary function testing, shortness of breath on exertion, and the exertional requirements of his usual coal mine employment. Director's Exhibits 27 at 4; 31 at 4. Drs. Fino and Tuteur opined Claimant has a pulmonary impairment but is able to perform his usual coal mine employment. Director's Exhibit 30; Employer's Exhibits 5-7. The ALJ found the opinions of Drs. Fino and Tuteur inadequately explained and credited Dr. Nader's opinion as reasoned and documented. Decision and Order at 9-13. Consequently, he found the medical opinion evidence supports a finding of total disability. *Id.* at 13.

[6] To the extent Employer argues the ALJ should have credited the October 28, 2020 pulmonary function study over the June 16, 2020 pulmonary function study because it is more recent, we disagree. Employer's Brief at 8 (unpaginated). An ALJ may not credit more recent non-qualifying tests over earlier qualifying tests solely based on their recency. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-52-53 n.14 (2023); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).

Employer argues the ALJ erred in crediting Dr. Nader's opinion because it is based solely on Claimant's subjective symptoms. Employer's Brief at 10-11 (unpaginated). We disagree.

Dr. Nader observed Claimant worked as an "electrician, miner operator, shuttle car operator, [and] scoop operator [and] rock dusted [and] shoveled belts"; that the mines were four to six feet tall, requiring Claimant to sometimes work stooped over; that he lifted fifty to one hundred pounds throughout the day; and that his job required heavy labor. Director's Exhibit 27 at 2. Dr. Nader diagnosed Claimant with a moderate obstructive impairment and opined he lacks the pulmonary capacity to perform the "previous exercise requirement" of his usual coal mine job based on his pulmonary function study results demonstrating low FEV1, FEV1 to FVC ratio, and MVV values. Director's Exhibits 27 at 3-4; 31 at 4; 68 at 3. Further, Dr. Nader opined Claimant has shortness of breath, mainly with exertion, that contributes to his pulmonary disability. Director's Exhibits 27 at 4; 31 at 4.

Thus, contrary to Employer's contention, the ALJ permissibly found Dr. Nader's opinion is reasoned because he examined Claimant, considered his symptoms, and credibly explained how the objective evidence demonstrates he could not meet the exertional requirements of his usual coal mine employment because of his moderate obstructive impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); Decision and Order at 8-9 (unpaginated).

Employer also asserts the ALJ erred in discrediting the contrary opinions of Drs. Fino and Tuteur. Employer's Brief at 11-13. We are not persuaded.

Dr. Fino acknowledged Claimant's usual coal mine employment was working as an electrician and required fifteen percent very heavy labor, seventy percent heavy labor, ten percent moderate labor, and five percent light labor. Director's Exhibit 30 at 3. He noted Claimant is limited "in what he can do" because of his "breathing problem" characterized as shortness of breath which has been ongoing for twenty years and is getting worse, and which causes him to become dyspneic when walking on level ground or ascending one flight of stairs, lifting and carrying, or performing manual labor. *Id.* Specifically, Dr. Fino diagnosed a mild restrictive impairment and opined Claimant's FVC and FEV1 results on pulmonary function testing are mildly reduced, but opined Claimant's pulmonary function studies do not meet disability standards and his mild impairment "would not prevent him from returning to his last mining job or a job requiring similar effort." Director's Exhibit 30 at 8-9; Employer's Exhibit 5 at 3.

The ALJ summarized Dr. Fino's opinion and permissibly found he did not persuasively explain how Claimant would be able to perform very heavy labor given the abnormalities seen on his pulmonary function study, his mild restrictive impairment, and the physical limitations Dr. Fino acknowledged. *See Cornett*, 227 F.3d at 578; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 254-55; Decision and Order at 10-11. Thus, contrary to Employer's contention, the ALJ did not require Dr. Fino to "explain why the miner can perform his coal mine job," but rather determined Dr. Fino did not adequately explain his opinion. Employer's Brief at 11-12 (unpaginated).

Dr. Tuteur noted Claimant's "exercise is limited to walking [one hundred] feet," and that he was required "[a]t times" to lift one hundred pounds working as a coal miner. Employer's Exhibits 6 at 1-2; 7 at 8. He diagnosed a moderate obstructive ventilatory abnormality that is impairing but opined Claimant is not totally disabled because his pulmonary function studies do not meet disability standards. Employer's Exhibits 6 at 2-3; 7 at 10-11. Further, Dr. Tuteur opined that to find Claimant is totally disabled, he would need "to see impairment that is worse than [sixty] percent of predicted or a moderate obstructive ventilatory abnormality" and, because the October 28, 2020 pulmonary function study is better than sixty percent of the predicted values, Claimant is not disabled. Employer's Exhibit 7 at 12-14.

The ALJ observed that Dr. Tuteur diagnosed a moderate obstructive ventilatory abnormality but did not discuss whether "someone who was required to lift [one hundred] pounds" could do so with that level of impairment. Decision and Order at 12. He found it unclear whether Dr. Tuteur considered Claimant's exertional requirements when opining he could perform his usual coal mine employment and thus permissibly found his opinion unpersuasive. *See Cornett*, 227 F.3d at 578; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 254-55; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); Decision and Order at 12-13.

Therefore, as it is supported by substantial evidence, we affirm the ALJ's finding the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 9-13. Further, as there is no contrary probative evidence to the medical opinions diagnosing total disability based on Claimant's moderate pulmonary function impairment, we affirm the ALJ's finding that the evidence overall establishes total disability and that Claimant invoked the Section 411(c)(4) presumption. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); 20 C.F.R. §718.204(b)(2); Decision and Order at 13. As Employer has not challenged the ALJ's determination that it failed to rebut the presumption, we further affirm the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; *see Skrack*, 6 BLR at 1-711; Decision and Order at 20.

Accordingly, we affirm the Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge