

U.S. Department of Labor

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



BRB No. 21-0530 BLA

GEORGE A. DAVIS)

Claimant-Respondent)

v.)

CONSOL OF KENTUCKY,)
INCORPORATED)

and)

CONSOL ENERGY, INC. c/o)
HEALTHSMART CCS)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 02/23/2023

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly¹ (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits (2019-BLA-05261) rendered on a subsequent claim filed on August 6, 2010,² pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018).

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). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act³ and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues it was deprived of due process due to the extended procedural history of this claim. Employer also argues the ALJ erred in finding Claimant

¹ Jeffrey R. Soukup filed Employer and Carrier's (Employer's) Petition for Review and Brief, but Employer filed a notice of substitution of counsel because Mr. Soukup is no longer with Jackson Kelly PLLC.

² The ALJ noted "Claimant reported on his 2010 claim application that he had previously filed a claim for federal black lung benefits and that it was denied." Decision and Order at 2 n.1 He found, however, that the record does not include Claimant's initial claim file and thus does not indicate "the date the initial claim was filed, the date the initial claim was denied, or the basis of the denial decision." *Id.* Thus he assumed Claimant failed to "establish any of the elements of entitlement previously." *Id.* at 12.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had 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.

totally disabled and thus erred in finding Claimant invoked the Section 411(c)(4) presumption.⁴ Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging rejection of Employer's due process arguments.

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'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Procedural History

Claimant filed this claim for benefits on August 6, 2010. Director's Exhibit 2. He then underwent a Department of Labor (DOL)-sponsored complete pulmonary evaluation performed by Dr. Alam on October 14, 2010, with follow-up pulmonary function testing on July 22, 2011. Director's Exhibit 9. The district director issued a Proposed Decision and Order Awarding Benefits on October 27, 2011. Director's Exhibit 19 at 4-5. Employer disagreed with the decision and requested a hearing, and the matter was referred to the Office of Administrative Law Judges (OALJ) on December 15, 2011. Director's Exhibit 25.

The claim was scheduled for a hearing before ALJ Peter B. Silvain, Jr., on April 22, 2015. On February 3, 2015, however, ALJ Silvain issued an Order finding the DOL-sponsored pulmonary evaluation from 2010 was incomplete, unreliable, and of little probative value. Director's Exhibit 28 at 25. He thus remanded the claim to the district director to provide Claimant with a new DOL-sponsored complete pulmonary evaluation.

The district director obtained a supplemental report from Dr. Alam clarifying the results of his 2010 complete pulmonary evaluation. Director's Exhibit 28 at 3-4. The district director then referred the case back to the OALJ on June 12, 2015. Director's Exhibit 29 at 4.

⁴ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established over 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 10-11.

⁵ 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 32 at 6, 10.

The case was assigned to ALJ William King, who conducted a hearing on August 2, 2016. Director's Exhibit 32 at 564. ALJ King found the supplemental report by Dr. Alam was not consistent with ALJ Silvain's February 3, 2015 Order for the district director to provide Claimant with a new DOL-sponsored pulmonary evaluation, and so issued an Order again remanding the claim for a new and complete pulmonary evaluation on September 13, 2016. *Id.* at 576. Claimant underwent a second DOL-sponsored complete pulmonary evaluation performed by Dr. Raj on September 17, 2018. *Id.* at 1-41. The district director referred the claim to OALJ for a third time on December 12, 2018. It was assigned to ALJ Merck who thereafter issued the Decision and Order that is the subject of this appeal.

Employer requests the Board vacate the ALJ's Decision and Order and transfer liability to the Black Lung Disability Trust Fund (Trust Fund) because of the protracted procedural history of this case and the intervening changes to the evidentiary record, which it alleges constitute due process violations. Employer's Brief at 22-25. The Director argues Employer has not been prejudiced by any delay or changes in the record and cannot establish a due process violation. Director's Brief at 3-5. We agree with the Director's argument.

Due process requires a party be afforded notice of the claim and the opportunity to respond. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has emphasized that "it is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1999).

Although this claim has been subject to protracted litigation for various reasons, Employer has had notice and an opportunity to respond at every step. The district director provided timely notification to Employer of its potential liability in the claim and of the initial finding of entitlement under the applicable regulations. Moreover, as the Director correctly notes, Employer had the opportunity to develop evidence, attend the hearing, and raise arguments in a post-hearing brief, and thus has fully participated in all proceedings related to the adjudication of the claim throughout its duration.⁶ Director's Brief at 3.

⁶ Employer cites to *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998), in support of its argument. In that case, the Fourth Circuit held that the Department of Labor's seventeen-year delay in *notifying* the employer of its potential liability in the processing of a claim deprived it of the opportunity to mount a meaningful

Employer generally speculates that, had a satisfactory DOL-sponsored complete pulmonary examination been provided at the outset of the claim, Claimant may not have established entitlement to benefits. Employer's Brief at 24. However, Employer has failed to adequately explain how it was deprived of notice and opportunity to respond. Although Employer alleges additional expenses and speculates about what the ALJ might have done with other medical reports, it does not explain how it was deprived of a fair opportunity to mount a meaningful defense in this case. *See Borda*, 171 F.3d at 183. We therefore reject its assertions that it was deprived of due process and that liability should be transferred to the Trust Fund. *Id.*

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work⁷ and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, 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 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 medical opinions, treatment records, and the record as a whole.⁸ 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 39-40.

The ALJ considered the opinions of Drs. Jarboe, Dahhan, Alam, and Raj. Dr. Alam opined that Claimant is totally disabled, while Drs. Jarboe and Dahhan opined Claimant is not. Director's Exhibit 32 at 312-13, 322, 518; Claimant's Exhibit 4; Employer's Exhibit

defense. *Id.* at 806-08. There was no such delay in notifying Employer of its potential liability in this case.

⁷ As it is unchallenged, we affirm the ALJ's finding Claimant's usual coal mine work required heavy to very heavy exertion. *Skrack*, 6 BLR at 1-711; Decision and Order at 10-11.

⁸ The ALJ found Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas studies, and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 18-20.

3 at 22. Dr. Raj concluded he could not determine whether Claimant is totally disabled because Claimant could not produce valid pulmonary function studies during his examination. Director's Exhibit 32 at 3-4, 8-9. The ALJ found Dr. Raj's opinion equivocal and therefore unable to confirm or dispute a finding of total disability.⁹ Decision and Order at 39-40. By contrast, he found Dr. Alam's opinion credible, supported by the treatment records, and more persuasive than the contrary opinions of Drs. Dahhan and Jarboe.

Employer argues the ALJ erred in finding Dr. Alam's opinion credible and sufficient to establish total disability. Employer's Brief at 7-16. We disagree.

In his treatment records, Dr. Alam documented chronic symptoms of cough, wheezing, excessive sputum, pleuritic chest pain, and dyspnea, which were aggravated by Claimant's daily living activities. Claimant's Exhibit 2. He diagnosed chronic obstructive pulmonary disease (COPD) based on Claimant's symptoms and prescribed a range of inhaled, nebulized, and oral medications in addition to supplemental oxygen and rotating antibiotic injections for Claimant's pulmonary condition. *Id.* He opined that, despite the treatment provided, Claimant's lung function was progressively worsening. *Id.* at 66.

In his report, Dr. Alam opined that Claimant was unable to perform valid pulmonary function studies due to cough-related syncope which caused Claimant to faint when forcefully exhaling and could be dangerous if repeated. Claimant's Exhibit 4 at 1. He opined Claimant is totally disabled based on his chronic bronchitis with symptoms of cough, sputum production, and shortness of breath; Claimant's October 14, 2010 x-ray which was read as positive for simple clinical pneumoconiosis; and his "maximum treatment[.]" Claimant's Exhibits 3 at 20, 4 at 1; Director's Exhibit 32 at 25. Dr. Alam further confirmed at his deposition that Claimant could not perform his former coal mine employment given his respiratory symptoms and disease presentation. Claimant's Exhibit 3 at 27-28.

The ALJ noted that Claimant's positive x-ray finding could not support a finding of total disability standing alone, but Dr. Alam's consideration of Claimant's other respiratory symptoms constituted relevant and persuasive evidence of Claimant's disability. Decision and Order at 38. The ALJ further stated that although Dr. Alam did not explain what he meant by "maximum treatment," his treatment notes from MCHC establish that he was treating Claimant for respiratory symptoms associated with COPD and coal workers' pneumoconiosis (CWP), and he progressed Claimant from two to five prescriptions

⁹ We affirm, as unchallenged on appeal, the ALJ's finding Dr. Raj's opinion equivocal on the issue of total disability. See *Skrack*, 6 BLR at 1-711; Decision and Order at 40.

throughout the course of that treatment. Decision and Order at 39, 39 n.38; Claimant's Exhibit 2. Based on Dr. Alam's opinion, the ALJ found that Claimant would not be able to perform the heavy to very heavy labor required of his usual coal mine work. Decision and Order at 39.

Contrary to Employer's arguments, the ALJ permissibly found Dr. Alam's opinion reasoned and documented because Dr. Alam considered the objective testing evidence and ultimately relied on Claimant's symptoms and treatment history to explain why his respiratory condition renders him incapable of performing his previous coal mine work. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 441 (4th Cir. 1997); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physician's identification of miner's respiratory symptoms with various activities constitutes a "reasoned medical opinion"); *Jordan v. Benefits Review Bd. of the U.S. Dep't of Labor*, 876 F.2d 1455, 1460 (11th Cir. 1989) (physician's discussion of miner's symptoms are relevant evidence that ALJ must consider absent evidence that "the listed limitations are the patient's rather than the doctor's conclusions").

Employer further asserts the ALJ erred in inferring that Claimant is totally disabled based on the pulmonary treatment outlined in Claimant's treatment records. Employer's Brief at 9-12. We disagree.

Treatment records may support a finding of total disability if they provide sufficient information from which the ALJ can reasonably infer a miner was unable to do his last coal mine job. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board [Raines]*, 758 F.2d 1532, 1534 (11th Cir. 1985). Contrary to Employer's contention, the ALJ reasonably inferred that Claimant is unable to perform the heavy to very-heavy labor required of his usual coal mine job based on the extensive treatment he is receiving for his chronic pulmonary symptoms as established by Claimant's treatment records. *See Poole*, 897 F.2d at 894; Decision and Order at 39. We therefore affirm the ALJ's finding Dr. Alam's opinion and treatment records credible and sufficient to establish total disability.

Employer additionally argues the ALJ erred in assigning lesser weight to the opinions of Drs. Jarboe and Dahhan. Employer's Brief at 16-20. We disagree.

Dr. Jarboe opined that the presence of any pulmonary impairment cannot be established as Claimant has not produced a valid pulmonary function study since 2004. Employer's Exhibits 5 at 8-9; 11 at 20. He diagnosed Claimant with chronic bronchitis but opined that the condition is unlikely to have resulted from coal dust exposure. Employer's Exhibits 5 at 8; 11 at 17, 19. He further opined that Claimant is not totally disabled as

Claimant's valid pulmonary function studies, taken before 2004, and arterial blood gas studies of record are non-qualifying.¹⁰ Employer's Exhibits 5 at 8-9; 11 at 20.

Dr. Dahhan noted Claimant's arterial blood gas and valid pulmonary function studies did not indicate any impairment as they are non-qualifying, and he opined Claimant is not totally disabled. Employer's Exhibits 3 at 13, 20; 6 at 5. He acknowledged Claimant's symptoms of cough, sputum production, and dyspnea but opined that they are non-specific symptoms not tied to particular diagnoses. Employer's Exhibit 3 at 8-9.

The ALJ determined, however, that Claimant's inability to complete a pulmonary function study or obtain qualifying testing does not necessarily indicate he has no totally disabling pulmonary impairment. Decision and Order at 38. He also recognized the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. Decision and Order at 38.

Contrary to Employer's contention, the ALJ permissibly discredited the opinions of Drs. Jarboe and Dahhan because they conflated the issues of total disability and total disability causation and failed to address whether Claimant is totally disabled by the acknowledged pulmonary diagnoses and symptoms regardless of his non-qualifying objective tests.¹¹ See *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). We therefore affirm the ALJ's finding the medical opinions and treatment records establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 40.

As Employer raises no additional arguments, we affirm the ALJ's finding Claimant established total disability based on his consideration of the evidence as a whole, 20 C.F.R. §718.204(b)(2), and thus invoked the Section 411(c)(4) presumption. See *Rafferty*, 9 BLR

¹⁰ 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).

¹¹ Because the ALJ permissibly credited Dr. Alam's total disability opinion, found Dr. Raj's opinion "does not confirm or dispute" total disability, and discredited the opinions of Drs. Jarboe and Dahhan, the only opinions that Claimant is not totally disabled, we need not address Employer's argument regarding the weight the ALJ afforded Dr. Alam's opinion due to his status as Claimant's treating physician. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 14-15.

at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 40. We also affirm, as unchallenged on appeal, his finding Employer failed to rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 49-50. We therefore affirm the award of benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge