U.S. Department of Labor

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

BRB No. 21-0300 BLA

SHIRLEY ANN THORNTON (Widow of BARRY LEE THORNTON) Claimant-Respondent v. ITMANN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/23/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Survivor's Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Awarding Survivor's Benefits (2020-BLA-05024) rendered on a survivor's claim filed on August 11, 2017, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Claimant established the Miner had 21.25 years of qualifying coal mine employment and a totally disabling respiratory impairment, and thus invoked the rebuttable presumption that his death was due to pneumoconiosis at Section 411(c)(4).[2] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. On the merits, it argues the ALJ erred in finding a totally disabling impairment established and that it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, filed a response brief, urging the Benefits Review Board to reject Employer's constitutional argument.

[1] Claimant is the widow of the Miner, who died on March 21, 2014. Director's Exhibit 14. Because the Miner did not establish entitlement to benefits during his lifetime, Claimant is not eligible for derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018). Claimant's previous claim for benefits was withdrawn and thus is considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibit 2; Decision and Order at 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death 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 impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 21.25 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

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.[4] 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).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 2-4. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *See California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A 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 the relevant evidence supporting a finding of 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 established total disability based on the pulmonary function studies, medical opinion evidence, and the evidence as a whole.[5] Decision and Order at 23. The ALJ considered three pulmonary function studies dated December 19,

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 6; Director's Exhibits 5, 9.

[5] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies, and there is no evidence the Miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii),(iii); Decision and Order at 21.

1995, September 16, 2003, and May 8, 2012. *Id.* at 9, 21; Director's Exhibits 1 at 54; 15. The May 8, 2012 study was the only qualifying[6] study and was included in the Miner's treatment records. Director's Exhibit 15 at 6; Decision and Order at 21. Finding the 2012 study sufficiently reliable to support a finding of total disability, he accorded it the most weight as the most recent study of record. *Id*. at 9 n.21, 21. Thus, the ALJ found Claimant established total disability under 20 C.F.R. §718.204(b)(2)(i). *Id.* at 21.

Employer argues the ALJ erred by failing to consider whether the May 8, 2012 pulmonary function study is sufficiently reliable to form a basis of entitlement, ignoring Drs. Rosenberg's and Fino's opinions that the study was invalid, and instead simply indicated the study is not subject to the quality standards, in violation of the Administrative Procedure Act (APA).[7] Employer's Brief at 6-7. Employer's argument has merit, in part.

Initially, contrary to Employer's argument, the ALJ considered whether the May 8, 2012 study was sufficiently reliable to support a finding of total disability. As Employer cites in its brief, the ALJ recognized the study was obtained in conjunction with the Miner's treatment, and thus is not subject to the quality standards set forth at 20 C.F.R. §718.103 and Appendix B. Decision and Order at 9 n. 21, 21; Employer's Brief at 7; 20 C.F.R. §718.101(b); *J.V.S. v. Arch of W. Va.* [*Stowers*], 24 BLR 1-78, 1-89, 1-92 (2008). The ALJ further considered Dr. Gallup's- the Miner's treating board-certified pulmonologist-reliance on the May 2012 study to determine the Miner's course of treatment to find the study sufficiently reliable.[8] Decision and Order at 9 n.21, 21; Director's Exhibit 15. Employer does not contest the ALJ's finding that Dr. Gallup's statements support a finding that the May 8, 2012 pulmonary function study is reliable evidence; thus, it is affirmed. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 21; Employer's Brief at 7.

However, as Employer argues, the ALJ did not address the conflicting opinions of Drs. Rosenberg and Fino beyond summarizing their opinions and stating that the quality

[6] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values in Appendix B or 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] The Administrative Procedure Act provides that 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).

[8] Dr. Gallup evaluated the Miner to determine if a thoracentesis was needed to drain fluid from his chest. Director's Exhibit 15.

standards do not apply. Employer's Brief at 7-9; Decision and Order at 9, n.21, 21. In addition to a lack of reproducibility in the tracings, Dr. Fino indicated there was premature termination to exhalation and lack of an abrupt onset to exhalation in the study and opined the values obtained demonstrated at least the Miner's minimum lung function and was "certainly not this individual's maximum lung function." Employer's Brief at 9; Employer's Exhibit 3 at 2-3. Dr. Rosenberg indicated it was impossible to assess the validity of the testing as there was no repeat testing to determine variance between the various tracings. Director's Exhibit 16. The ALJ did not address whether these opinions were well-reasoned or supported a finding that the May 2012 study was unreliable notwithstanding any reliance on the quality standards. Because the ALJ only summarized the physicians' opinions and did not explain her reasoning for the weight, if any, she accorded them as to the studies' reliability, her findings do not comply with the APA. *See* 30 U.S.C. §923(b); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thus, we vacate the ALJ's finding that the May 8, 2012 pulmonary function study is sufficiently reliable to support a finding of total disability and therefore also vacate her finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 21.

Because the ALJ's findings regarding the medical opinions are reliant in part on her findings regarding the pulmonary function studies, we must also vacate her findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 21-22.[9] Thus, we vacate the ALJ's finding that Claimant established total disability and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2); 718.305. Decision and Order at 23.

Remand Instructions

On remand, the ALJ must reconsider whether the May 8, 2012 pulmonary function study is sufficiently reliable to support a finding of total disability. *Stowers*, 24 BLR at 1-92. In addressing this issue, she must address all relevant evidence and resolve any conflicts in the evidence, explaining the weight she accords the opinions of Drs. Rosenberg and Fino. She must then weigh the pulmonary study evidence to determine if Claimant is able to establish total disability at 20 C.F.R. §718.204(b)(2)(i). The ALJ must also reconsider the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). She must further weigh all the evidence together and determine whether Claimant has established total

[9] Consequently, we do not address Employer's arguments relating to the crediting of Dr. Gallup's opinion.

disability and invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted it.[10] If, however, the ALJ finds Claimant has not established total disability and the presumption is not invoked, then the ALJ must determine if Claimant has met her burden to establish the existence of pneumoconiosis and that the Miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202(a), 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). In reaching her conclusions on remand, the ALJ must explain the bases for all of her credibility determinations and findings of fact as the APA requires. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Administrative Appeals Judge, dissenting:

I respectfully dissent with the majority opinion, as I most definitely disagree that the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i) by the most recent (by almost nine years) and qualifying pulmonary function study from the Miner's treating physician must be vacated because the ALJ did not adequately consider the opinions of Drs. Fino and Rosenberg that the test is invalid.

The most recent May 8, 2012 pulmonary function study was the only qualifying study and was included in the Miner's treatment records. Director's Exhibit 15 at 6; Decision and Order at 21. The ALJ noted that Dr. Gallup, the Miner's treating physician

[10] We decline to address as premature Employer's challenge to the ALJ's findings that it failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 14-17.

who administered the May 8, 2012 study, is a board-certified pulmonologist. Decision and Order at 21. Because Dr. Gallup relied on the study in treating the Miner and therefore had found it "provide[ed] adequate values to assess disability for treatment purposes," the ALJ found the qualifying 2012 study sufficiently reliable to support a finding of total disability and further accorded it the most weight as the most recent study of record. *Id.* at 9 n.21, 21. Thus, the ALJ found Claimant established total disability under 20 C.F.R. §718.204(b)(2)(i). *Id.* at 21.

The majority opinion specifically rejects Employer's argument that the ALJ did not consider whether the May 8, 2012 pulmonary function study was sufficiently reliable to support a finding of total disability. As Employer cites in its brief, the ALJ recognized the study was obtained in conjunction with the Miner's treatment, and thus is not subject to the quality standards set forth at 20 C.F.R. §718.103 and Appendix B. Decision and Order at 9 n. 21, 21; Employer's Brief at 7; 20 C.F.R. §718.101(b); *J.V.S. v. Arch of W. Va.* [*Stowers*], 24 BLR 1-78, 1-89, 1-92 (2008). As the majority acknowledges, the ALJ considered Dr. Gallup's reliance on the study to determine the Miner's course of treatment to support finding the study sufficiently reliable. Decision and Order at 9 n.21, 21; Director's Exhibit 15. Again, as the majority holds, Employer does not contest the ALJ's finding that Dr. Gallup's statements support a finding that the study is reliable evidence. Decision and Order at 21; Employer's Brief at 7. Thus, the majority properly affirms the ALJ's finding.

Nevertheless, the majority then accepts Employer's contention that the ALJ did not adequately consider the opinions of Drs. Fino and Rosenberg that the May 8, 2012 pulmonary function study was invalid. Although Employer asserts this, it is not true.

Contrary to Employer's argument, the ALJ did address the opinions of Drs. Rosenberg and Fino that the study was invalid. Specifically, the ALJ found that Drs. Rosenberg and Fino "questioned the validity of the test *based on quality standards, because there was no repeat testing*." Decision and Order at 21 (emphasis added). But as the ALJ properly held, the quality standards only apply to evidence developed in connection with a claim and are inapplicable to pulmonary function studies developed as part of a miner's treatment. 20 C.F.R. §718.101.[11] Specifically, in invalidating the study,

[11] For comparison purposes, the ALJ also cited to 20 C.F.R. §718.103(c). Decision and Order at 21. While 20 C.F.R. §718.103 sets forth quality standards that apply to pulmonary function tests submitted in connection with a claim for benefits, the ALJ noted that subsection (c) states that "[i]n the case of a deceased miner," non-complying tests may still "form the basis for a finding" of total disability if the ALJ finds the study is nevertheless reliable because it "demonstrate[s] technically valid results obtained with good cooperation of the miner." 20 C.F.R. §718.103(c). Thus, in the case of a deceased

Dr. Fino noted a lack of reproducibility in the tracings as a result of no repeat testing, which is a quality standard that the ALJ properly noted does not apply to a pulmonary function study developed as part of a miner's treatment. Employer's Exhibit 3 at 3. As the majority indicates, Dr. Fino also concluded there was premature termination to exhalation and lack of an abrupt onset to exhalation, and opined the values obtained demonstrated at least the Miner's minimum lung function and was "certainly not this individual's maximum lung function." *Id*. But in explaining the basis for this conclusion, he cites to the quality standards at Appendix B of Part 718. *Id.* Again, the ALJ properly noted that the quality standards at Appendix B do not apply to a pulmonary function study developed as part of a miner's treatment. Similarly, Dr. Rosenberg indicated it was impossible to assess the validity of the testing as there was no repeat testing to determine variance between the various tracings, Director's Exhibit 16, which again is a quality standard that the ALJ properly noted does not apply to a pulmonary function study developed as part of a miner's treatment.

Thus, in accordance with our standard of review, the ALJ's finding that the most recent May 8, 2012 pulmonary function study is sufficiently reliable to support a finding of total disability and therefore her finding that Claimant established total disability at 20

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miner, such as in this case, even pulmonary function tests submitted in connection with a claim for benefits that do not comply with the quality standards can nevertheless be found sufficiently reliable to support a finding of total disability. Consequently, it logically and equally follows that in the case of a deceased miner, a pulmonary function study obtained in conjunction with a miner's treatment that does not comply with the quality standards can nevertheless be found sufficiently reliable to support a finding of total disability. As previously noted, Employer does not contest the ALJ's finding in this case that Dr. Gallup's statements support a finding that the May 8, 2012 pulmonary function study is reliable evidence of total disability.

C.F.R. §718.204(b)(2)(i) should clearly be affirmed as rational, supported by substantial evidence, and in accordance with applicable law.

The ALJ further found Dr. Gallup's opinion that the Miner was totally disabled well-reasoned and well-documented and entitled to controlling weight as the Miner's long time treating pulmonologist over the contrary opinions of Drs. Fino and Rosenberg, neither of whom examined the Miner and did not adequately explain their opinions which were based on remote testing and their rejection of the most recent objective testing. Decision and Order at 22. Moreover, the ALJ found Claimant established that the Miner was totally disabled based on consideration of all of the probative medical evidence, and particularly the pulmonary function study evidence and medical opinion evidence. *Id*. Therefore, I would also affirm the ALJ's finding of total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and the evidence as a whole.

Consequently, given the affirmance of total disability and adequate qualifying coal mine employment, I would then have addressed the ALJ's findings regarding the issues Employer raised regarding rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

DANIEL T. GRESH
Administrative Appeals Judge