U.S. Department of Labor

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

BRB No. 22-0429 BLA

WILLIAM ADAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOCUST GROVE INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 01/05/2024
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.[1]

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

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits[2] (2019-BLA-06173) rendered on a claim[3] filed on April 26, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had nineteen years of coal mine employment, more than fifteen years of which were qualifying for invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). He also found Claimant established a totally

[1] Employer and its Carrier (Employer) were previously represented by Paul E. Jones (Jones & Jones Law Office, PLLC), who filed Employer's Petition for Review and Brief. After briefing, but prior to the decision in this case, Jones & Jones moved to withdraw as Employer's counsel and requested additional time for all deadlines. On the same day, Ferreri Partners entered a notice of appearance on Employer's behalf. We grant Jones & Jones's motion to withdraw but deny its request for an extension as moot.

[2] The ALJ previously remanded the case to the district director to provide Claimant with a complete pulmonary evaluation prior to a hearing. Remand Order; Decision and Order at 2. In the process, two volumes of Director's Exhibits were compiled. Hearing Transcript at 5-6. We will refer to those compiled before the ALJ's remand as "Director's Exhibit A" and those compiled after remand as "Director's Exhibit B," consistent with the ALJ's citations. Decision and Order at 2 n.2; Hearing Transcript at 5-6.

[3] Claimant withdrew a prior claim. Director's Exhibit A 71. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[4] 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.

disabling pulmonary or respiratory impairment and thereby invoked the presumption. 30 U.S.C. §921(c)(4) (2018). Finally, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and thus invoked the Section 411(c)(4) presumption.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed 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.[6] 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).

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

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work. *See* 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 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). In this case, the ALJ found Claimant established total disability by pulmonary function study evidence and the evidence as a whole.[7]

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established more than fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); Decision and Order at 3-4.

[6] 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); Hearing Transcript at 13.

[7] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies or medical opinions, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iv); Decision and Order at 4-

The ALJ considered four pulmonary function studies[8] dated January 24, 2018, June 26, 2018, July 24, 2018, and September 11, 2020. Decision and Order at 6; Director's Exhibits A 19, 24, 27; Director's Exhibit B 2. He found the January 24, 2018 study, obtained as a part of Claimant's treatment, produced non-qualifying[9] results and was sufficiently reliable to use in assessing disability. Decision and Order at 8. He found the July 24, 2018 study produced valid and qualifying results pre-bronchodilator but invalid results after administration of bronchodilators. *Id.* at 10. He found the June 26, 2018 and September 11, 2020 studies invalid and thus did not consider them when assessing total disability. *Id.* at 8-10. The ALJ accorded most weight to the more recent qualifying results of the July 24, 2018 study than the earlier non-qualifying January 24, 2018 study as the "most up to date representation of Claimant's pulmonary condition" and therefore found total disability established based on the preponderance of the pulmonary function study evidence. *Id.* at 12.

5, 13-16. We affirm these findings as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[8] In his August 10, 2020 Order of Remand, the ALJ found the district director failed to meet the Department of Labor's (DOL) obligation to provide Claimant with a complete pulmonary evaluation, as the ALJ found the pulmonary function study obtained on behalf of the DOL on October 18, 2017, was invalid due to poor effort. 20 C.F.R. §725.406; Remand Order at 3. Thus, the ALJ remanded the case to the district director to obtain a second pulmonary function study and supplemental report from the examining doctor. Remand Order at 3. Dr. Alam obtained a second pulmonary function study on September 11, 2020, and provided a supplemental opinion after considering the results. Decision and Order at 2; Director's Exhibits B 2, 5. The claim was again referred to the ALJ and, as the DOL satisfied its duty to provide Claimant a second opportunity to obtain a valid pulmonary function study, the ALJ considered the merits of the case. Decision and Order at 2, 12 n.28; 20 C.F.R. §725.406(c) (if a pulmonary function study conducted during the DOL sponsored evaluation is invalid due to the "lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result").

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Employer asserts the ALJ erred in assessing the validity of the January 24, 2018 and July 24, 2018 studies.[10] Employer's Brief at 5-8. Specifically, it contends the ALJ erred in not applying the regulatory quality standards to the January 24, 2018 pulmonary function study and thus did not explain why it was sufficiently reliable other than the fact that it was obtained during treatment. Employer's Brief at 5-7. It further argues the ALJ substituted his opinion for those of the medical experts when weighing the evidence regarding the validity of the July 24, 2018 study. *Id.* at 7-8. We disagree.

When considering pulmonary function studies conducted in anticipation of litigation, an ALJ must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). Compliance with the quality standards at 20 C.F.R. Part 718, Appendix B "shall be presumed," unless there is "evidence to the contrary." 20 C.F.R. §718.103(c). 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 must then, in his role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

The quality standards, however, do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment). An ALJ must still determine, however, if treatment record pulmonary function studies are "sufficiently reliable" to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

Employer first argues the ALJ erred in assessing the validity of the January 24, 2018 pulmonary function study without reference to Appendix B and thus erred in discrediting Drs. Dahhan's, Broudy's, and Vuskovich's opinions that the study is invalid. Employer's Brief at 5-7. Initially, contrary to Employer's argument, pulmonary function studies obtained in the course of a miner's treatment[11] are not required to adhere to the quality

[10] We affirm, as unchallenged, the ALJ's findings that the June 26, 2018 and September 11, 2020 pulmonary function studies are invalid and cannot be used to assess Claimant's impairment. *See Skrack*, 6 BLR at 1-711; Decision and Order at 9, 12.

[11] Employer also suggests the study was not obtained for medical treatment, but in anticipation of litigation, because the date of the study was after Claimant filed his claim for benefits. Employer's Brief at 6. While the study was obtained after the filing of

standards in Appendix B.[12] *Stowers*, 24 BLR at 1-92. Moreover, the ALJ determined the January 24, 2018 study is non-qualifying; thus, Employer has failed to explain how the ALJ's finding regarding the validity of the study has prejudiced Employer or how finding the study invalid would make a difference in the outcome. *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); Decision and Order at 8. Thus, we affirm the ALJ's determination that the January 24, 2018 study is sufficiently reliable to assess total disability. Decision and Order at 8.

Employer next argues the ALJ erred in finding the July 24, 2018 pulmonary function study valid. Employer's Brief at 7-8. Specifically, it contends the ALJ failed to consider all of the relevant evidence and substituted his opinion for those of Drs. Broudy and Dahhan, who reviewed the study's results, particularly as to whether there is excessive variation between the tracings.[13] *Id.* at 7-8. Contrary to Employer's assertion, the ALJ addressed the relevant evidence regarding the study's validity, including the technician's notation and the reviewing physicians' medical opinions.[14] Decision and Order at 9-10; Director's Exhibit A 27 at 4.

Claimant's application, Claimant testified that Dr. Schuldheisz, the physician who administered the study, is his treating pulmonologist. Director's Exhibit A 62 at 17-19. The record further shows continuing follow-up appointments and treatment by Dr. Schuldheisz. Director's Exhibits A at 19, 21; Claimant's Exhibits 1, 6, 10. Thus, substantial evidence supports the ALJ's determination that this pulmonary function study was obtained for purposes of medical treatment. Decision and Order at 8.

[12] The experts opined the January 24, 2018 study could not be relied upon because it contained only one tracing. Director's Exhibit A 33 at 17; Employer's Exhibits 7 at 16-17; 9 at 13-14.

[13] Employer alleges the July 24, 2018 pulmonary function study report specifically provides the "percentage of change" between the tracings; however, Employer does not identify the specific data point to which it may be referring, nor is any such data apparent on our review of the cited document. Employer's Brief at 7, *citing* Director's Exhibit A 27 at 7. We also note the ALJ used the same calculations for all the pulmonary function studies and, aside from a vague reference to this "percentage of change," Employer has not challenged the accuracy of the ALJ's calculations. *See* Decision and Order at 8-11; Employer's Brief at 4-5.

[14] Dr. Vuskovich did not opine as to the validity of the July 24, 2018 study. *See* Director's Exhibit A 30; Employer's Exhibits 9, 12.

First, Dr. Dahhan also opined the study could not be relied upon to determine the extent of disability because it demonstrated poor effort. Employer's Exhibit 2, 3, 7; Decision and Order at 9-10. When asked at his deposition to explain further why he considered the study invalid, he testified that "eyeballing the curve and assessing – reviewing the values show more than [five] percent variation, and there is lack of continuation of exhalation, and premature termination of air flow." Employer's Exhibit 7 at 23-24.

As the ALJ noted, Appendix B to 20 C.F.R. Part 718 provides that a miner's effort "shall be judged unacceptable" when there is "excessive variability between the three acceptable curves." 20 C.F.R Part 718, App. B(2)(ii)(G). A test has excessive variability when the variation between the two largest FEV1 values of the three acceptable tracings "exceed[s] [five] percent of the largest FEV1 or 100 [milliliters (mL)], whichever is greater." *Id.*

The ALJ accurately noted the three largest pre-bronchodilator FEV1 values from the July 24, 2018 test are 1.21 liters, 1.19 liters, and 1.06 liters, and the three largest post-bronchodilator FEV1 values are 0.96 liters, 0.78 liters, and 0.60 liters. Decision and Order at 10; Director's Exhibit A 27 at 5. As the ALJ observed, the variation between the two largest pre-bronchodilator FEV1 values is twenty mL, or 1.7 percent of the largest value. *Id.* He thus rationally found Dr. Dahhan's opinion does not undermine the validity of the *pre-bronchodilator* values, as his opinion was based in significant part on an incorrect assessment that the test showed variability in excess of five percent.

Relatedly, the ALJ accurately found the variation between the two largest *post-bronchodilator* FEV1 values does exceed five percent and thus permissibly credited Dr. Dahhan's opinion to invalidate that aspect of the study.[15] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Keener*, 23 BLR at 1-237; 20 C.F.R. §718.103(c); Decision and Order at 9-10; Director's Exhibit A 27.

Second, the ALJ noted Dr. Broudy's opinion that the July 24, 2018 test is invalid because Claimant exhibited "poor effort." Decision and Order at 9; Director's Exhibits A 27 at 2; 33 at 13. However, the ALJ permissibly declined to credit Dr. Broudy's opinion because, when addressing Claimant's "poor effort" on which he based his invalidation, he

[15] The ALJ found the variation between the two largest post-bronchodilator FEV1 values is 180 mL, or 20.7 percent of the largest value. Decision and Order at 10. Based on our calculation, the difference is slightly lower than that found by the ALJ ((0.96-0.78) / 0.96 x 100 = 18.75 percent). In either event, the difference exceeds five percent.

conceded that "[m]ultiple trials were done and there was some repeatability finally." Decision and Order at 10; Director's Exhibit A 27 at 4.

Thus, we affirm the ALJ's finding that Drs. Broudy's and Dahhan's opinions and the technician's notes are insufficient to undermine the validity of pre-bronchodilator July 24, 2018 pulmonary function study results and thus that the study is in substantial compliance with the regulations.[16] *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *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 suspect or unreliable); Decision and Order at 9-10.

Employer next asserts the ALJ erred in finding the July 24, 2018 pulmonary function study is entitled to more weight than the January 24, 2018 study based on its recency because, it asserts, six months "is not enough passage of time." Employer's Brief at 8-10. Employer's argument is unpersuasive.

The ALJ weighed the January 24, 2018 and July 24, 2018 pre-bronchodilator studies and credited the July 24, 2018 study over the January 24, 2018 study because it is the "most up to date representation of Claimant's pulmonary condition." Decision and Order at 12. He permissibly found the more recent, qualifying pulmonary function study warrants more weight and thus that it outweighs the earlier non-qualifying study.[17] *See Woodward v.*

[16] While Employer generally argues that "the ALJ failed to consider that reliability is only one factor a physician considers to determine whether or not a study is invalid," it does not explain what other factors the reviewing physicians relied upon when assessing this study that the ALJ failed to consider, or why those factors undermine the ALJ's credibility determinations. Employer's Brief at 8.

[17] While Employer argues "courts" have held that even one year is "insignificant" when determining whether a qualifying study should be accorded more weight based on its recency, Employer points to no authority to support its contention. Employer's Brief at 8. The United States Court of Appeals for the Fourth Circuit has held two months is "insignificant when evaluating a slowly progressing condition like pneumoconiosis." *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991). The Sixth Circuit, within whose jurisdiction this case arises, has not opined on a specific, acceptable time period to apply the "later evidence rule." *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJ permissibly found several valid pulmonary function tests, conducted in a seven-month period, "sufficiently contemporaneous" to be probative and together establish total disability because a preponderance of the tests, including a preponderance of the most recent ones, were qualifying); *Woodward*, 991 F.2d at 319-20. Neither case forecloses the ALJ's permissible exercise of his discretion to find the more

Director, OWCP, 991 F.2d 314, 319-20 (6th Cir. 1993) (later evidence is more reliable indicator of miner's condition when miner's condition has worsened given the progressive nature of pneumoconiosis). Thus, we affirm the ALJ's finding that the pulmonary function study evidence supports a finding of total disability. Decision and Order at 12; 20 C.F.R. §718.204(b)(2)(i).

As Employer submits no argument regarding the ALJ's weighing all of the relevant evidence together, we further affirm his finding that Claimant established total disability when considering the record as a whole[18] and therefore invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305, 725.309; *Rafferty*, 9 BLR at 1-232; Decision and Order at 16-17. Finally, we affirm as unchallenged the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26.

recent, qualifying study by six months was worthy of more weight. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002).

[18] We affirm, as unchallenged, the ALJ's finding that Claimant's treatment records support his finding of total disability because they document that Claimant requires supplemental oxygen. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17; Claimant's Exhibits 4, 5.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge