U.S. Department of Labor

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

BRB No. 22-0026 BLA

SUNNY E. OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOUR O MINING CORPORATION	)	
	)	
and	)	
	)	
FRONTIER INSURANCE COMPANY c/o VIRGINIA PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION	)	DATE ISSUED: 7/13/2023
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Sunny E. Owens, Clinchco, Virginia.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Denying Benefits (2020-BLA-05325) rendered on a subsequent claim filed on July 3, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act).

The ALJ found that Claimant established more than fifteen years of qualifying coal mine employment but failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, she found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] or establish entitlement to benefits under 20 C.F.R. Part 718. Thus, the ALJ denied benefits.

[1] Vicki Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but she does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] This is Claimant's third claim for benefits. Director's Exhibits 1-3. His second claim was withdrawn and thus is considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 2. Claimant filed his first claim on July 22, 2008. Director's Exhibit 1. On May 5, 2009, the district director denied benefits for failing to establish any element of entitlement. *Id*. No further action was taken. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's first claim for failing to establish any element of entitlement, Claimant was required to submit new evidence establishing at least one element to warrant review of this subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is 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.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, did not file a response.

In an appeal filed without representation, the Board considers whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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).

Total Disability

To invoke the Section 411(c)(4) presumption or establish entitlement to benefits under 20 C.F.R. Part 718, Claimant must establish he is totally disabled. 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.[5] 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[6] pulmonary function studies or 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 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 failed to establish total disability by any means.[7] Decision and Order at 8-9, 14.

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[4] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 9.

[5] The ALJ found Claimant's usual coal mine employment was working as a roof bolter, which required heavy labor. Decision and Order at 4.

[6] 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 exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] As the ALJ found, there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 9. In addition, the ALJ correctly found no evidence of complicated pneumoconiosis; thus,

Pulmonary Function Studies

The ALJ considered four pulmonary function studies conducted on June 13, 2018, September 19, 2018, June 13, 2019, and December 16, 2020,[8] applying a height of 69.7 inches.[9] Decision and Order at 7; Director's Exhibits 10, 11, 13; Employer's Exhibit 2. She found that two of the studies meet the regulatory guidelines for total disability while two do not; however, none of the studies are qualifying. Decision and Order at 7-8. While the MVV values in the two 2018 studies are qualifying, the FEV1 values are not; thus, the studies do not qualify for total disability.[10] *See* Appendix B of 20 C.F.R. Part 718; 20 C.F.R. §718.204(b)(2)(i). Any error in finding some of the studies "meet" the guidelines is harmless, however, as the ALJ nevertheless found the pulmonary function studies do not support a finding of total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 8. Thus, we affirm her finding that Claimant did not establish total disability based on the pulmonary function study evidence. Decision and Order at 8; 20 C.F.R. §718.204(b)(2)(i).

Claimant cannot 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 3 n.9.

[8] Also of record is a pulmonary function study dated October 29, 2018, submitted as a treatment record. Employer's Exhibit 3. The ALJ did not address this evidence. Any error, however, is harmless as the study's values are non-qualifying. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Appendix B of 20 C.F.R. Part 718; Employer's Exhibit 3.

[9] As differing heights were recorded, the ALJ calculated an average height of 69.63 inches. Decision and Order at 7. She then used the closest greater table height of 69.7 inches for determining whether the pulmonary function studies are qualifying. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114, 116 n.6 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 7.

[10] The ALJ included post-bronchodilator values for the September 19, 2018 study in her chart summarizing the pulmonary function study evidence, which are qualifying for Claimant's age and height. Decision and Order at 7; Appendix B of 20 C.F.R. Part 718. However, no post-bronchodilator values were actually obtained in this study; thus, the inclusion of these values appears to have been in error. *See* Director's Exhibit 10 at 18.

Arterial Blood Gas Studies

Next, the ALJ assessed three arterial blood gas studies conducted on September 19, 2018, June 13, 2019, and December 16, 2020. Decision and Order at 8-9; Director's Exhibit 10, 13; Employer's Exhibit 2. Each study included values obtained at rest and with exercise. Director's Exhibits 10, 13; Employer's Exhibit 2. All the results were non-qualifying except one of the two exercise samples collected on September 19, 2018. Decision and Order at 8; Director's Exhibit 10. According the most weight to the exercise studies as more indicative of Claimant's ability to perform exertional work and noting only one of the exercise studies produced qualifying values, the ALJ concluded the blood gas studies do not support total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 8-9, 13. As the ALJ permissibly found the single qualifying exercise blood gas study outweighed by the other non-qualifying exercise studies, *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000), we affirm her finding that the arterial blood gas studies do not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinions

Finally, the ALJ considered the medical opinions of Drs. Raj**,** McSharry, and Sargent.[11] Decision and Order at 9-14; Director's Exhibits 10, 13; Employer's Exhibits 2, 4, 5. Dr. Raj opined that Claimant is totally disabled based on the drop in oxygenation in his blood gases during exercise and shortness of breath with exertion. Director's Exhibit 10. Drs. McSharry and Sargent disagreed, indicating Claimant could meet the exertional requirements of his last coal mining job, as he demonstrated improved oxygenation with exercise. Director's Exhibit 13; Employer's Exhibits 2, 4, 5. The ALJ found the opinions of Drs. McSharry and Sargent to be well-reasoned and persuasive and credited their opinions over Dr. Raj's opinion, which she found less comprehensive and unreasoned. Decision and Order at 13-14.

Dr. Raj, the only physician to find total disability, relied on one of the qualifying exercise blood gas samples obtained as part of his examination. Director's Exhibit 10. A second sample was subsequently obtained during exercise that was non-qualifying. *Id.* Dr. Raj opined that hypoxemia at any point during exercise is "suggestive of some form of underlying pulmonary impairment." *Id.* at 2. Drs. McSharry and Sargent disagreed with

[11] Also of record are selected treatment records from Dr. Raj. Claimant's Exhibit 4. The ALJ did not discuss these records; however, Dr. Raj does not address impairment or respiratory or pulmonary function in the treatment records beyond references to findings from Claimant's "disability examination." *Id.* Thus, any error is harmless. *See Larioni*, 6 BLR at 1-1278.

Dr. Raj's reliance on the qualifying exercise blood gas study because the blood was drawn at the beginning of exercise rather than at its peak. Employer's Exhibits 4, 5. Dr. McSharry stated that the exercise study "done at the onset of exercise is . . . not indicative of what the body's response to exercise is, but it is just what happens instantaneously with exercise" and is not meaningful in terms of determining injuries to the lungs. Employer's Exhibit 4 at 12-13. He noted that after exercise in multiple studies, including Dr. Raj's study at the maximum amount of exercise Claimant could do, he produced non-qualifying values. Decision and Order at 13; Employer's Exhibit 4 at 12-15. Similarly, Dr. Sargent explained it is normal to have a drop in blood gases at the beginning of exercise which resolves as the individual continues to exercise. Employer's Exhibit 5 at 11-13. He indicated that peak exercise is the best indicator of an individual's ability to perform exertional work, which was demonstrated in Claimant's case as his oxygenation improved while he continued to exercise. *Id.* at 12, 14-15.

In resolving the conflict in the medical opinions, the ALJ concluded that Drs. McSharry and Sargent convincingly explained why the blood gases obtained at peak exercise are a more reliable indicator of Claimant's respiratory ability to perform his usual coal mining work rather than a blood gas sample Dr. Raj obtained at the beginning of exercise. Decision and Order at 14. The ALJ also found their opinions well-reasoned and documented based on their review of the records, consideration of the objective testing, and understanding of Claimant's usual coal mine employment.[12] *Id.* In contrast, the ALJ found Dr. Raj's opinion unreasoned because she found the doctor did not explain why Claimant's blood gas measurements improved with continued exercise. *Id.*

The regulations do not specify the point during exercise at which blood must be drawn. *See* 20 C.F.R. §718.105(b). Further, as the trier-of-fact, the ALJ may accept the opinion or theory of any medical expert deemed credible. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Thus, she permissibly accorded greater weight to the opinions of Drs. McSharry and Sargent over Dr. Raj's opinion, which she found inadequately explained and less documented. *See Compton*, 211 F.3d at 211; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (ALJ has exclusive power to make credibility determinations and resolve inconsistencies in the evidence).

[12] Dr. McSharry indicated Claimant's last job was working as a roof bolter, with "significant heavy labor all day long." Employer's Exhibit 4 at 7. Dr. Sargent indicated the majority of Claimant's employment was working as a roof bolter and opined he has the respiratory capacity to do "any job in the mining of coal" a man his age would be expected to do. Employer's Exhibit 2 at 2-3.

We therefore affirm the ALJ's finding that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14.

As none of the categories of evidence support a finding of total disability, we further affirm the ALJ's finding that Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 14. As Claimant failed to establish a required element of entitlement, we further affirm the denial of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge