U.S. Department of Labor

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

BRB No. 22-0016 BLA

WALTER STEWART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 6/23/2023
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and Decision and Order Granting Benefits on Reconsideration of Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Granting Benefits and Decision and Order Granting Benefits on Reconsideration

(2018-BLA-05341) rendered on a claim filed on February 12, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 32.98 years of underground coal mine employment and found he has a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits. Pursuant to Employer's request for reconsideration, the ALJ did not disturb the award of benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and therefore erred in finding he invoked the Section 411(c)(4) presumption.[3] 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.[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).

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[1] Claimant filed a prior claim that he later withdrew. Hearing Transcript at 8. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 1.

[2] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant has 32.98 years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Reconsideration at 12.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

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 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 consider all relevant evidence and weigh the evidence supporting 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 the medical opinion evidence establishes total disability. Decision and Order on Reconsideration at 16.

Arterial Blood Gas Study Evidence

The ALJ considered six arterial blood gas studies conducted on July 8, 2016,[5] June 14, 2017,[6] August 2, 2018, August 5, 2018, and August 6, 2018. Decision and Order at 5-6, 13-15; Decision and Order on Reconsideration at 5-6. Giving greatest weight to Dr. Sargent's August 2, 2018 non-qualifying exercise study[7] and Dr. Green's August 6, 2018 qualifying exercise study, and finding them in equipoise, the ALJ determined the arterial blood gas study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order on Reconsideration at 13.

Employer argues the ALJ erred in finding Dr. Green's August 6, 2018 qualifying exercise study valid, alleging that while the ALJ did not make a mistake in finding the arterial blood gas studies do not establish disability, the August 6, 2018 study "has a bearing on the medical opinion evidence[.]" Employer's Brief at 4 n.2. We reject its argument that the ALJ erred in finding the study valid.

[5] Dr. Green administered a second study to confirm the qualifying values from the first study as the study showed significant resting hypoxemia. Director's Exhibit 10 at 24.

[6] The ALJ erroneously refers to Dr. McSharry's examination as having occurred on July 6, 2017. Decision and Order at 5.

[7] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(ii).

Dr. Green noted that he exercised Claimant for four minutes and opined that the study showed significant hypoxemia with minimal activity. Claimant's Exhibit 3 at 4. Dr. Sargent reviewed the study and opined it shows exercise-induced arterial oxygen desaturation that meets Department of Labor disability standards. Employer's Exhibit 1 at 2. Employer argued to the ALJ that Dr. Green's August 6, 2018 qualifying exercise blood gas study was taken after exercise,[8] but pointed to nothing in the record in support of its position. Employer's Closing Arguments at 7. On reconsideration, Employer again stated the study was invalid, but did not cite to anything in the record in support of its contention. Employer's Petition for Reconsideration at 2. The ALJ noted that Dr. Green's report does not indicate at what time the exercise started or ended and just indicates when the sample was collected. Decision and Order on Reconsideration at 13. She found that "there is nothing in the record that disputes the validity of Dr. Green's August 6, 2018 exercise results." *Id.* at 13, 16. Consequently, she rejected Employer's argument that the study does not meet the regulatory quality standards. *Id.* at 13.

On appeal, Employer now contends that Dr. Green's statement that the sample was taken "at the end of ambulation" establishes that he drew the sample after exercise ceased, and the ALJ erred in failing to explicitly consider this statement.[9] Employer's Brief at 5. But Employer did not raise this argument to the ALJ. *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995). Moreover, no physician opined the study was invalid or specifically stated the sample was taken after the cessation of exercise. Consequently, we reject Employer's contention that the ALJ erred in accepting Dr. Green's August 6, 2018 qualifying exercise study as a reliable study, and affirm the ALJ's determination that there is nothing in the record that disputes the reliability of Dr. Green's test. Decision and Order on Reconsideration at 13.

[8] In relevant part, 20 C.F.R. §718.105(b) states that "[if] the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless contraindicated. *If an exercise blood-gas test is administered, blood shall be drawn during exercise*." 20 C.F.R. §718.105(b) (emphasis added).

[9] Claimant contends Employer's interpretation of Dr. Green's statement is unreasonable. Claimant's Response Brief at 5.

As Employer raises no further challenges, we affirm her determination that the arterial blood gas studies are in equipoise. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order on Reconsideration at 13.

Medical Opinion Evidence

Prior to considering the medical opinion evidence, the ALJ determined Claimant's usual coal mine employment required moderately heavy exertion, lifting 50 to 100 pounds daily. Decision and Order on Reconsideration at 14. We affirm this finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ then considered the opinions of Drs. Green, McSharry, and Sargent. Decision and Order on Reconsideration at 14-16. Dr. Green opined that Claimant is totally disabled from a pulmonary standpoint based on his significant hypoxemia at rest, drop in oxygenation with exercise, abnormal pulmonary function studies, and symptoms. Director's Exhibits 10, 19; Claimant's Exhibits 2, 3. Conversely, Drs. McSharry and Sargent opined that Claimant has no pulmonary impairment. Director's Exhibit 16; Employer's Exhibit 1. The ALJ found Dr. Green's opinion the most persuasive, as he addressed the exertional requirements of Claimant's usual coal mine employment and credibly explained why the totality of the evidence supports a finding of total disability even though the objective testing was non-qualifying. Decision and Order on Reconsideration at 14-16. Thus, she found the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Reconsideration at 16.

Employer contends the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 6-12. We disagree.

After his July 8, 2016 examination of Claimant, Dr. Green opined that Claimant's resting hypoxemia and symptoms of chronic cough, wheezing, and shortness of breath render him unable to perform the exertional requirements of his usual coal mine job, lifting 50 to 100 pounds daily. Director's Exhibit 10. After reviewing Dr. McSharry's June 23, 2017 examination of Claimant, Dr. Green noted that Claimant's testing still reflected pulmonary abnormalities including a mild obstruction, mild hypoxemia at rest, and desaturation with exercise. Director's Exhibit 19. He opined Claimant is totally disabled from returning to his usual coal mine employment based on his resting hypoxemia. *Id*. After examining Claimant on August 5, 2018 and August 6, 2018, Dr. Green explained that Claimant's resting hypoxemia renders him unable to perform his usual coal mine employment requiring moderate exertion, and that his qualifying values with exercise further support a finding of total disability. Claimant's Exhibits 2, 3.

Employer contends the ALJ's errors in crediting Dr. Green's August 6, 2018 exercise blood gas study caused her to erroneously credit his opinion. Employer's Brief at

10. As we have affirmed the ALJ's determination that the study is valid, we reject Employer's arguments.[10] Moreover, Employer has failed to explain why Dr. Green's opinion that Claimant is totally disabled based on his non-qualifying *resting* arterial blood gas studies is unreliable because he also considered a qualifying *exercise* study. *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). As Employer raises no other challenges to the ALJ's weighing of Dr. Green's opinion, we affirm her determination that he provided a well-documented and well-reasoned opinion that credibly explained why Claimant is totally disabled from performing his usual coal mine employment. Decision and Order on Reconsideration at 16.

We further reject Employer's arguments that the ALJ erred in weighing the opinions of Drs. Sargent and McSharry. Employer's Brief at 7-12.

Dr. Sargent examined Claimant on August 2, 2018, and reviewed the reports from other examinations of record. Employer's Exhibit 1. He stated that the results of his testing showed mild hypoxemia at rest and moderate hypoxemia with two minutes of exercise, explaining that the change in Claimant's blood gases is "minimal and probably does not indicate any significant arterial oxygen desaturation with low-level exercise." Employer's Exhibit 1 at 1. He further opined that Claimant has no pulmonary impairment and the blood gases he obtained were not disabling. *Id*. at 2. After reviewing Dr. Green's exercise study, he acknowledged that it demonstrated qualifying values, but opined Claimant does not have a totally disabling pulmonary impairment as his pulmonary function testing was normal and "it is difficult to [ascribe] this abnormality to exposure to coal dust" and "blood gas desaturation with exercise universally occurs in the face of obvious interstitial changes on x-ray and measurable pulmonary function abnormalities." *Id*.

Contrary to Employer's argument, the ALJ permissibly found that Dr. Sargent failed to adequately explain the significance of Dr. Green's August 6, 2018 exercise blood gas study when he opined that the study was qualifying but did not address whether it indicated the presence of a disabling impairment, instead addressing whether the results could be

[10] We also reject Employer's argument that the ALJ should not have found Dr. Green's August 6, 2018 exercise study that lasted for four minutes more probative than Dr. Sargent's August 2, 2018 exercise study which only lasted for two minutes. Employer's Brief at 10. The ALJ rationally found that exercise lasting four minutes, and achieving a higher heart rate, better reflects the moderately heavy labor required by Claimant's employment than exercising for two minutes. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order on Reconsideration at 16.

attributed to coal mine dust exposure. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08, 211 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987); 20 C.F.R. §718.204(b), (c); Decision and Order on Reconsideration at 15; Employer's Brief at 7-9.

Moreover, the ALJ found Dr. Sargent's opinion that Claimant's exercise study "probably" does not demonstrate a significant arterial oxygen desaturation to be equivocal, and further found his opinion unpersuasive as he did not compare his finding of moderate hypoxemia with low level exercise to the exertional requirements of Claimant's usual coal mine employment. Decision and Order on Reconsideration at 15-16. As Employer does not challenge these findings, they are affirmed. *Skrack*, 6 BLR at 1-711.

We also reject Employer's argument that the ALJ did not adequately explain why she discredited Dr. McSharry's' opinion. Employer's Brief at 9-12. Dr. McSharry examined Claimant on June 14, 2017, and considered Dr. Green's initial July 8, 2016 examination of Claimant. Director's Exhibit 16. He opined that, although Claimant had "severe shortness of breath with wheezing," he did not have a totally disabling respiratory impairment, his pulmonary function studies were normal, and his arterial blood gas studies were "relatively unremarkable" for someone of his age. *Id.*

The ALJ has discretion to weigh the evidence, draw appropriate inferences, and determine credibility. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied as long as the reviewing court can discern what the ALJ did and why she did it). Here, the ALJ permissibly found Dr. McSharry's opinion less persuasive than Dr. Green's opinion because he did not consider the most recent evidence, including Dr. Green's qualifying August 6, 2018 exercise blood gas study. *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order on Reconsideration at 15-16. She further permissibly found that Dr. Green provided a more credible explanation for why the totality of the objective testing indicates the presence of total disability, including those from Dr. McSharry's examination. *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); Decision and Order on Reconsideration at 16. Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R.

§718.204(b)(2); Decision and Order on Reconsideration at 16. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order on Reconsideration at 16. As Employer does not challenge the ALJ's finding that it did not rebut the presumption, we affirm it. *Skrack,* 6 BLR at1-711; Decision and Order on Reconsideration at 17-20.

Accordingly, the ALJ's Decision and Order Granting Benefits and Decision and Order Granting Benefits on Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge