

U.S. Department of Labor

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



BRB Nos. 22-0144 BLA
and 22-0145 BLA

RUTH HOLLAND)
(Widow of ISAAC HOLLAND))

Claimant-Petitioner)

v.)

SHAMROCK COAL COMPANY,)
INCORPORATED)

DATE ISSUED: 6/29/2023

Employer-Respondent)

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 on Remand in Living Miner's and Survivor's Claims of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Ruth Holland, Roark, Kentucky.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,¹ Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Denying Benefits on Remand in Living Miner's and Survivor's Claims (2017-BLA-05218 and 2020-BLA-05038) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on August 18, 2014,² and a survivor's claim filed on March 20, 2019, and is before the Board for a second time.

In his initial decision in the miner's claim, the ALJ credited the Miner with at least twenty years of underground coal mine employment and found he had a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). The ALJ therefore found Claimant invoked the Section 411(c)(4) presumption³ of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement.⁴ 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits. Employer appealed the ALJ's decision.

¹ Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. See *Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

² The Miner filed two prior claims for benefits. Miner's Claim (MC) Director's Exhibits 1, 2. ALJ Stuart A. Levin denied his previous claim, filed on February 12, 2001, for failure to establish any element of entitlement; that denial is final. MC Director's Exhibit 2 at 291, 723.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar 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.

⁴ Where 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 he 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)(1); *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 Miner did not establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id.*

While the miner's claim was pending on appeal, the Miner died on March 10, 2019. Survivor's Claim (SC) Director's Exhibit 6. Claimant, the Miner's widow, indicated she would pursue his claim on behalf of his estate. She also separately filed a survivor's claim.

On appeal, the Board affirmed the ALJ's finding that the Miner had at least twenty years of underground coal mine employment. *Holland v. Shamrock Coal Co., Inc.*, BRB No. 19-0125 BLA, slip op. at 3 n.4 (Mar. 31, 2020) (unpub.). However, the Board agreed with Employer's argument that the ALJ did not consider all the relevant evidence regarding the validity of the February 3, 2015 pulmonary function study and therefore vacated his finding Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 7-8. Further, because this error affected his weighing of the medical opinions on total disability, the Board vacated his finding Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 8. Thus the Board vacated his finding that Claimant established total disability and invoked the Section 411(c)(4) presumption. *Id.* The Board further vacated the award of benefits and remanded the case for further consideration of the issue of total disability. *Id.*

On remand, the ALJ credited the Miner with at least twenty years of underground coal mine employment but found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Therefore, the ALJ found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act or establish entitlement under 20 C.F.R. Part 718, and therefore denied benefits in the miner's claim. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. In the survivor's claim, he found there is no evidence the Miner's death was due to pneumoconiosis and denied benefits. 20 C.F.R. §718.205(b).

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by an unrepresented claimant, the Board addresses 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.⁵ 33

⁵ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 1 at 128; Hearing Transcript at 18, 29.

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).

To be entitled to benefits under the Act in the miner’s claim, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any one of these elements precludes an award of benefits.⁶ *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Total Disability

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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,⁷ 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). The ALJ found Claimant failed to establish total disability and thus could neither invoke the Section 411(c)(4) presumption nor establish entitlement under 20 C.F.R. Part 718.⁸ Decision and Order at 6.

⁶ There is no evidence of complicated pneumoconiosis; therefore, 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.

⁷ A “qualifying” pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A “non-qualifying” study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

⁸ The ALJ correctly found none of the three blood gas studies are qualifying and thus the blood gas study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Initial Decision and Order at 17. Because the record contains no evidence that the Miner suffered from cor pulmonale with right-sided congestive heart

Pulmonary Function Studies

In his initial decision, the ALJ considered the results of five qualifying pulmonary function studies. Decision and Order at 4-5. On Employer's appeal, the Board affirmed the ALJ's finding the July 29, 2014, August 6, 2015, November 9, 2016, and October 12, 2017 qualifying studies are invalid. MC Director's Exhibits 13, 16; MC Claimant's Exhibit 4; Employer's Exhibit 3. However, the Board vacated his finding the February 3, 2015 study from the Department-sponsored complete pulmonary examination performed by Dr. Forehand is valid. MC Director's Exhibit 12. Thus, on remand, the ALJ considered the February 3, 2015 qualifying study and a newly submitted December 28, 2012 non-qualifying study.⁹ Decision and Order at 5; MC Director's Exhibit 12; Employer's Exhibit 11. He found the February 3, 2015 study is invalid, and that the December 28, 2012 study is the only valid study in the record. Decision and Order at 5. He further found that, because the December 28, 2012 study is non-qualifying, the pulmonary function study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

With regard to the February 3, 2015 pulmonary function study, the ALJ considered the opinions of Drs. Vuskovich, Forehand, and Castle, as well as Dr. Gaziano's validation report and the report from the technician who conducted the study. Decision and Order at 5. He credited Dr. Castle's opinion and found the study is invalid. *Id.* We are unable to affirm this finding.

Pulmonary function studies are presumed valid in the absence of evidence to the contrary, and the party challenging the validity of a study must affirmatively establish the results are suspect or unreliable. 20 C.F.R. §718.103(c) (emphasis added); *see* Appendix B to 20 C.F.R. Part 718; *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The technician who conducted the study reported the Miner's cooperation and ability to understand instructions and follow directions were good, and that while some of the results did not meet the American Thoracic Society (ATS) criteria for acceptability and reproducibility due to the Miner producing less than three acceptable efforts, the Miner's best effort met the ATS criteria. MC Director's Exhibit 12 at 10-19. Dr. Gaziano opined

failure, the ALJ properly found Claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.*

⁹ On April 19, 2021, the parties filed a Joint Motion to Waive Formal Hearing and Extension of Time to Complete the Record in which they requested time to submit evidence. Employer subsequently submitted four additional exhibits, including the Miner's treatment records containing the December 28, 2012 pulmonary function study. Employer's Exhibit 11.

the results are acceptable and validated the study. *Id.* at 9. Dr. Vuskovich opined the results were not acceptable and stated the Miner “did not put forth the effort required to generate valid spirometry results.” MC Director’s Exhibit 13 at 12. Dr. Forehand found the Miner was totally disabled based, in part, on the study and rejected Dr. Vuskovich’s opinion that it is invalid, noting Dr. Vuskovich did not consider Dr. Gaziano’s validation of the study or use “the NIOSH [National Institute for Occupational Safety and Health] illustrations or other documentation to provide support for his opinion.” MC Director’s Exhibit 19 at 3. Dr. Castle opined that the flow volume loops and volume time curves showed less than maximal effort, that there was partial obstruction of the mouthpiece, and that the FEV1s were not reproducible within “the requisite [five percent].” Employer’s Exhibit 4 at 9.

The ALJ noted Dr. Vuskovich did not offer an explanation or support for his conclusion that the February 3, 2015 study was invalid. Decision and Order at 5. Thus he permissibly found Dr. Vuskovich’s opinion is not credible because he did not discuss the basis for his conclusion. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). However, the ALJ failed to render the necessary factual findings regarding Dr. Forehand’s opinion, Dr. Gaziano’s validation, or the technician’s report. While he summarized their opinions, he made no determination as to their credibility and therefore his findings do not satisfy the Administrative Procedure Act (APA).¹⁰ 5 U.S.C. §557(c)(3)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Further, while he stated that he credited Dr. Castle’s opinion, he failed to weigh it against the other relevant evidence or explain why it is credible to affirmatively establish the results of the study are invalid. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Vivian*, 7 BLR at 1-361; *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 5.

Therefore, we vacate the ALJ’s finding the February 3, 2015 pulmonary function study is not valid and that the pulmonary function study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ considered the opinions of Drs. Forehand, Rosenberg, and Castle as to whether the Miner was totally disabled. Decision and Order at 5-6; MC Director’s Exhibits

¹⁰ The Administrative Procedure Act provides 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).

12, 18; Employer's Exhibits 3-5, 10. He discredited Dr. Forehand's opinion because it relies on the February 3, 2015 pulmonary function study which the ALJ found is invalid. Decision and Order at 5-6. He further discredited the opinions of Drs. Rosenberg and Castle as not well-reasoned and found the medical opinion evidence does not establish total disability. *Id.*

At the outset, because the ALJ's error in weighing the pulmonary function study evidence affected his weighing of the medical opinion evidence, we must vacate his finding that the medical opinion evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(iv). Nevertheless, the ALJ made additional errors in weighing the opinions of Drs. Rosenberg and Castle.

Dr. Rosenberg opined the pulmonary function studies were "aborted" due to the Miner's weakness but that they showed a marked reduction of lung volumes, and the Miner may have a qualifying impairment. Employer's Exhibits 3 at 5-6; 10 at 2-3. Dr. Castle opined the Miner was unable to give a valid pulmonary function study because he had a problem with "muscular weakness in that he could not blow out long and he became quite fatigued while doing the studies." Employer's Exhibits 4 at 21; 5 at 11-12, 18. He further opined the Miner may be totally disabled due to muscular weakness impacting his breathing. Employer's Exhibit 5 at 13, 18.

The ALJ discredited Dr. Rosenberg's opinion because his reasons for opining that any impairment the Miner had was not due to coal mine dust exposure are inconsistent with the Act and equivocal. Decision and Order at 6. He further found Dr. Castle's opinion, that the breathing disability was caused by muscular weakness, was not reasoned or documented. *Id.*

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the evidence establishes the Miner had a totally disabling respiratory or pulmonary impairment, while the cause of that impairment (whether it is due to pneumoconiosis or another condition) is addressed at 20 C.F.R. §718.204(c), or in consideration of whether the Section 411(c)(4) presumption is rebutted. Because the ALJ's analysis addressed Drs. Rosenberg's and Castle's reasoning for opining that the Miner's impairment was not due to coal mine dust exposure, rather than their opinions as to whether the Miner was totally disabled, he has failed to render the necessary credibility determinations and his findings do not satisfy the APA. 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-162. Thus we vacate his finding the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

We further vacate the ALJ's findings that Claimant failed to establish total disability, 20 C.F.R. §718.204(b)(2), invoke the Section 411(c)(4) presumption, and establish entitlement to benefits. We therefore remand the case for further consideration.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant has established the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(iii).

First, he must address whether the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i). In doing so, he must determine whether the February 3, 2015 pulmonary function study is in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B.¹¹ The ALJ must address all relevant evidence and resolve any conflict in the evidence. *Rowe*, 710 F.2d at 254-55.

After addressing the validity of the February 3, 2015 pulmonary function study, the ALJ must address whether the preponderance of the evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). The ALJ must explain the bases for his credibility findings in accordance with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

The ALJ must also reconsider whether the medical opinions support the establishment of total disability. 20 C.F.R. §718.204(b)(2)(iv). He must discuss all relevant evidence, critically analyze the medical opinions, and render necessary credibility findings. *See Rowe*, 710 F.2d at 255; *McCune*, 6 BLR at 1-998. In rendering his credibility findings, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. He must explain his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability, then she will have established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption, and the ALJ may reinstate the initial award of benefits. 20 C.F.R. §718.305(b)(1).

¹¹ As noted *supra*, in the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian*, 7 BLR at 1-361; 20 C.F.R. Part 718, Appendix B. If a study that is evidence developed by a party does not conform to the quality standards, but is in substantial compliance with the standards, it may “constitute evidence of the fact for which it is proffered.” 20 C.F.R. §718.101(b). In this case, Employer has the burden to establish the results are unreliable, as it is the party challenging the validity of the study. *See Vivian*, 7 BLR at 1-361; *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc).

Alternatively, if the ALJ finds Claimant cannot establish a totally disabling respiratory impairment, the ALJ may reinstate the denial of benefits as total disability is an essential element of entitlement under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

The Survivor's Claim

Because we vacate the ALJ's determination that Claimant did not establish entitlement to benefits in the miner's claim, we also vacate his finding that Claimant is not entitled to derivative benefits in the survivor's claim under Section 422(l).

Accordingly, the ALJ's Decision and Order Denying Benefits on Remand in Living Miner's and Survivor's Claims is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge