U.S. Department of Labor

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

BRB No. 21-0014 BLA

ANGELA HENSLEY (o/b/o RUBY HICKS, deceased Widow of ARTHUR HICKS)	)	
Claimant-Petitioner	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	
and	)	
	)	DATE ISSUED: 3/24/2022
SELF-INSURED THROUGH PITTSTON COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Angela Hensley, Castlewood, Virginia.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Denying Benefits (2018-BLA-05181) rendered on a survivor's claim[2] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with twenty-one years of underground coal mine employment based on the parties' stipulation, but found Claimant did not establish the Miner had a totally disabling pulmonary or respiratory impairment at the time of his death. 20 C.F.R. §718.204(b)(2). He therefore found Claimant did not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish the Miner had either clinical or legal pneumoconiosis, or that his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b). Thus, he denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial, but argues the ALJ erred in finding at least fifteen years of coal mine employment. The Director, Office of Workers' Compensation Programs, has not filed a substantive response.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

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[1] The Miner died on November 30, 2011. Director's Exhibit 14. His widow filed this survivor's claim on September 19, 2013, but she died on May 27, 2014, while it was pending before the district director. Director's Exhibit 25. Claimant, the widow's daughter, is pursuing this survivor's claim as the executor of her estate. On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995).

[2] Because the Miner never established entitlement to benefits during his lifetime, Claimant is not eligible for derivative survivor's benefits at Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

[3] 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); *see* 20 C.F.R. §718.305.

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).

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

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, Claimant must establish he "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 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).

Pulmonary Function Studies

The ALJ considered seven pulmonary function studies. Decision and Order at 4-5. The Miner performed studies on November 2, 1984, November 26, 1984, February 3, 1999, August 9, 1999, and April 5, 2006, that produced qualifying results.[5] Director's Exhibit 13. He also performed studies on June 1, 1998 and February 17, 1999, that produced non-qualifying results. *Id.*

The ALJ summarily found the February 3, 1999, August 9, 1999, and April 5, 2006 qualifying studies are invalid because Dr. Castle "reported" they are invalid.[6] Decision

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6, 8.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[6] Dr. Castle opined the February 3, 1999 study was invalid due to hesitation at the onset of exhalation. Employer's Exhibit 1. He found the August 9, 1999 study invalid because there were no tracings or data with which to validate it. *Id.* Dr. Castle further

and Order at 7, 13; *see* Employer's Exhibits 1, 2. He discredited both qualifying studies taken in November 1984 because the Miner performed them fourteen years before the June 1, 1998 non-qualifying study. *Id.* at 13. He found, because the most recent valid pulmonary function study did not produce qualifying values,[7] the pulmonary function study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 5. We are unable to affirm the ALJ's finding.

The ALJ's analysis of the pulmonary function study evidence is flawed for multiple reasons. First, he erred by invalidating the February 3, 1999, August 9, 1999, and April 5, 2006 qualifying studies. When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[8] 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). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see 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 unreliable); 20 C.F.R. Part 718, Appendix B. 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 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

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opined the April 5, 2006 study could not be validated due to the lack of volume time curves and an inadequate number of flow volume loops. *Id.*

[7] The February 17, 1999 study is the most recent pulmonary function study to produce non-qualifying results. Director's Exhibit 13. Dr. Castle opined this study was invalid due to hesitation at the onset of exhalation. Employer's Exhibit 1. The only remaining study to produce non-qualifying results is the June 1, 1998 study, which Dr. Castle indicated "generally appears to be valid." *Id.*

[8] An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

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).

The ALJ summarily found the February 3, 1999, August 9, 1999, and April 5, 2006 qualifying studies are invalid because Dr. Castle opined they are invalid. Decision and Order at 5; *see* Employer's Exhibits 1, 2. However, the ALJ failed to critically analyze Dr. Castle's opinion, render any findings as to whether his opinion is reasoned and documented with respect to the validity of each of these studies, or otherwise explain why he found this opinion credible. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must still conduct an appropriate analysis of the evidence to support his conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). It is particularly necessary for the ALJ to critically analyze Dr. Castle's opinion in this case because Employer, as the party challenging the validity of these studies, has the burden to establish the results are unreliable. *Vivian*, 7 BLR at 1-361.

Moreover, the ALJ did not discuss conflicting evidence in this case.[9] *Addison*, 831 F.3d at 252-53; *Hicks*, 138 F.3d at 533; *McCune*, 6 BLR at 1-998. Dr. Michos validated the February 3, 1999 study. Director's Exhibit 1. The technician who conducted the April 5, 2006 study stated "[s]pirometry data is acceptable and reproducible." Director's Exhibit 13. The technicians who conducted the February 3, 1999 and August 9, 1999 studies stated the Miner showed good effort and cooperation on each test. Director's Exhibit 13.

The ALJ also erred by failing to render a finding as to whether the Miner performed any of the pulmonary function studies as part of his medical treatment and not in anticipation of litigation. *Addison*, 831 F.3d at 252-53; *Hicks*, 138 F.3d at 533; *McCune*, 6 BLR at 1-998. This finding is necessary because, as discussed above, the quality standards 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 Stowers*, 24 BLR at 1-92. Thus, the ALJ's Decision and Order does not satisfy the Administrative Procedure Act (APA).[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C.

[9] The ALJ also did not discuss Dr. Castle's opinion with respect to the November 26, 1984, June 1, 1998, and February 3, 1999 pulmonary function studies.

[10] The Administrative Procedure Act requires every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of

§932(a); *Addison*, 831 F.3d at 252-53; *Hicks*, 138 F.3d at 533; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Furthermore, the ALJ erred by crediting, based solely on recency, the non-qualifying studies over the qualifying studies he did not find invalid. The United States Court of Appeals for the Fourth Circuit has held it is irrational to credit evidence solely because of recency where the miner's condition has improved. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also, Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). In explaining the rationale behind the "later evidence rule," the court reasoned "a later test or exam is a more reliable indicator of [a] miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *Adkins*, 958 F.2d at 51-52. As the test results do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id*. at 52. But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply" because one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id*. The ALJ must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id*. Thus the ALJ erred in crediting the more recent non-qualifying studies over the early qualifying studies for no reason other than when the Miner performed them.

Based upon the foregoing errors, we vacate the ALJ's determination that Claimant did not establish total disability based on the pulmonary function study evidence.[11] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 14.

Medical Opinions

Dr. Robinette provided the only medical opinion of record, and he opined the Miner was totally disabled by a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 9-11. Dr. Robinette treated the Miner from November 1984 to March 2011 and prepared a medical opinion dated June 19, 2013. Director's Exhibit 13. He stated the Miner had subjective, though longstanding, symptoms of cough, congestion, shortness of

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fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[11] The ALJ accurately found the four arterial blood gas studies, conducted on November 2, 1984, June 1, 1998, February 17, 1999, and August 9, 1999, are non-qualifying for total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 13; Director's Exhibits 12, 20. Thus we affirm these findings.

breath, and dyspnea. *Id.* at 2. He noted a November 1984 pulmonary function study revealed "an FEV1 of 1.32 or [thirty-nine percent] of predicted" and an FVC of 2.53 that is fifty-six percent "predicted," and a chest x-ray done at that time showed "mild perihilar and interstitial pulmonary fibrosis." *Id.*

Dr. Robinette stated pulmonary function testing the Miner performed in 1998 revealed a "restrictive pulmonary disorder," and x-rays again revealed interstitial lung disease. Director's Exhibit 13 at 3. He specifically stated pulmonary function testing revealed an FEV1 value that was sixty-seven percent of predicted and an FVC value that was fifty-nine percent of predicted, and lung volume testing suggested the presence of restriction. *Id.* After again examining the Miner in August 1999, Dr. Robinette opined pulmonary function testing the Miner performed at that time was consistent with a "moderately severe restrictive ventilatory" impairment. *Id.* He concluded the Miner had a "moderate functional impairment based on the reduction of his forced vital capacity and restrictive ventilatory defect" in 1999. *Id.*

After further examining the Miner in 2003, Dr. Robinette again noted pulmonary function testing conducted at that time evidenced a "moderate restrictive lung defect," and the defect was not responsive to bronchodilator therapy. Director's Exhibit 13 at 3. He stated the last time he examined the Miner was in March 2011. On "the basis of [his] evaluations in 1984 to the date of [the Miner's] death," Dr. Robinette concluded the Miner "had evidence of an occupational pneumoconiosis" and "a restrictive ventilatory defect which was moderate in severity which was unchanged." *Id.* He concluded the "pulmonary disease was so severe that [the Miner] was unable to work as an underground coal miner and his condition was chronic and irreversible." *Id.*

The ALJ discredited Dr. Robinette's opinion because "his records do not document that [the Miner] had a 'severe' pulmonary disease." Decision and Order at 13. The ALJ's assessment of Dr. Robinette's opinion is inconsistent with applicable law.

Although it is within the ALJ's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts and to assess the evidence of record and draw his own conclusions and inferences from it, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999), the interpretation of medical data is for the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Thus, to the extent that the ALJ discredited Dr. Robinette's opinion because he found the underlying pulmonary function studies do not demonstrate a severe pulmonary impairment, the ALJ erroneously substituted his opinion for that of the physician. *See Marcum*, 11 BLR at 1-24. Thus, we vacate the ALJ's discrediting of Dr. Robinette's opinion and his finding that

the medical opinion evidence does not establish total disability.[12] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20-21.

We further vacate his finding the evidence, when weighed together, does not establish total disability. 20 C.F.R. §718.204(b)(2). Because we have vacated the ALJ's finding Claimant failed to establish total disability, we also vacate his finding Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits, and we remand this case for further consideration of the issue of total disability.

Coal Mine Employment

Employer generally argues Claimant only had fourteen years of coal mine employment.[13] Employer's Response Brief at 3. The ALJ accurately noted the parties stipulated to twenty-one years of underground coal mine employment. Decision and Order at 2; Hearing Transcript at 7; Employer's Brief to ALJ at 3. Stipulations of fact fairly entered into are binding on the parties. *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013). As Employer is bound by its stipulation the Miner worked for twenty-one years in underground coal mine employment, we affirm this finding. *Id.*

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. §§718.305(b)(1)(iii), 718.204(b)(2).

He must first address whether the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i). He should render a finding as to whether any

[12] We further note the ALJ acknowledged Dr. Castle's contrary medical opinion that the Miner was not totally disabled, but erred by not rendering any credibility finding or otherwise indicating what weight, if any, he assigned the opinion. *Addison*, 831 F.3d at 252-53; *Hicks*, 138 F.3d at 533; *McCune*, 6 BLR at 1-998; Decision and Order at 13; Employer's Exhibits 1, 2.

[13] Employer's argument in its response brief is in support of another method by which the ALJ may reach the same result and deny benefits. Employer's Response Brief at 3. Therefore, this argument is properly before the Board, and no cross-appeal is required. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

studies were performed as part of the Miner's medical treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see Stowers*, 24 BLR at 1-92. For any such studies, he must evaluate whether they are sufficiently reliable to support a finding of total disability notwithstanding the inapplicability of the regulatory quality standards. 65 Fed. Reg. at 79,928. For any pulmonary function studies performed in anticipation of litigation, the ALJ must assess whether they are in substantial compliance with the regulatory quality standards. *See Keener*, 23 BLR at 1-237. In doing so, the ALJ must be cognizant that compliance with the quality standards is presumed. 20 C.F.R. §718.103(c). Further, Employer has the burden to establish the results are unreliable, as it is the party challenging the validity of these studies. *See Vivian*, 7 BLR at 1-361.

The ALJ must also reconsider whether the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(i). The ALJ should consider that a physician may offer a reasoned medical opinion diagnosing total disability even if the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Moreover, an ALJ may assign controlling weight to a treating physician's opinion based on the nature and duration of their relationship with the miner and the frequency and extent of their treatment. 20 C.F.R. §718.104(d); *see Soubik v. Director, OWCP*, 366 F.3d 226, 235 (3d Cir. 2004).

In evaluating the pulmonary function study and medical opinion evidence on the issue of total disability, the ALJ must discuss all relevant evidence, critically analyze the medical opinions, and render necessary credibility findings. *Addison*, 831 F.3d at 252-53; *Hicks*, 138 F.3d at 533; *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 Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. He must also explain his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability, then she has invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1). The ALJ must then determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). As the burdens of proof on remand may

shift, we decline to address the issues of disease and death causation. 20 C.F.R. §§718.202, 718.205(c).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge