U.S. Department of Labor

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

BRB No. 24-0361 BLA

JERRY CRUSENBERRY Claimant-Petitioner v. POWELL MOUNTAIN COAL COMAPNY, INCORPORATED and Self-Insured Through PROGRESS FUELS/DUKE ENERGY, c/o HEALTHSMART CASUALTY CLAIM Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 03/27/2025 DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits on a Subsequent Claim of Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

Jerry Crusenberry, Jonesville, Virginia.

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

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

PER CURIAM:

Claimant appeals, without representation,[1] Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order on Remand Denying Benefits on a Subsequent Claim[2] (2018-BLA-05848) filed on October 7, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Board for the second time.[3]

In her initial Decision and Order Awarding Benefits on a Subsequent Claim, the ALJ found Claimant established 9.37 years of underground coal mine employment and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, she found Claimant established clinical and legal pneumoconiosis[5] and

[1] 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 she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995).

[2] This is Claimant's third claim for benefits. Director's Exhibits 1-3. Claimant withdrew his second claim. Director's Exhibit 2. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b). On June 24, 1986, the district director denied Claimant's first claim because the evidence did not establish any element of entitlement. Director's Exhibit 1.

[3] We incorporate the procedural history of this case and the Board's prior holdings, as set forth in *Crusenberry v. Powell Mountain Coal Co.*, BRB No. 21-0489 BLA (Apr. 7, 2023) (unpub.).

[4] Section 411(c)(4) 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); 20 C.F.R. §718.305.

[5] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any "chronic lung disease or

a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.201(a)(1), (2), 718.202(a), 718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement,[6] 20 C.F.R. §725.309(c), and awarded benefits.

In consideration of Employer's appeal, the Board affirmed the ALJ's findings that Claimant established 9.37 years of coal mine employment, clinical and legal pneumoconiosis, and a change in an applicable condition of entitlement. *Crusenberry v. Powell Mountain Coal Co.*, BRB No. 21-0489 BLA, slip op. at 3 n.6, 5 (Apr. 7, 2023) (unpub.). The Board vacated the ALJ's finding that Claimant established total disability because the ALJ did not provide an adequate rationale for discrediting Employer's physicians regarding the validity of the pulmonary function study evidence. *Id.* at 6-8.

On remand, the ALJ found the two qualifying pulmonary function studies were invalid and entitled to no weight and Claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(i). The ALJ also found the evidence as a whole did not support a finding that Claimant is totally disabled and thus denied benefits. 20 C.F.R. §718.204(b)(2).

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

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*

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impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] 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 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); *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 prior claim for failing to establish any element of entitlement, Claimant was required to submit new evidence establishing at least one element to have the claim reviewed on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

Mines, Inc., 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

To be entitled to benefits under the Act, 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. Failure to establish any one of these elements precludes an award of benefits. *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 (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,[8] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).[9]

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[7] 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 Exhibit 5.

[8] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] In her initial decision, the ALJ accurately found there are no qualifying arterial blood gas studies and no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order Awarding Benefits on a Subsequent Claim at 16; *Crusenberry*, BRB No. 21-0489 BLA, slip op. at 6 n.11. The

Pulmonary Function Studies

In accordance with the Board's remand instructions, the ALJ reconsidered the three pulmonary function studies dated April 27, 2016, March 8, 2017, and March 26, 2019, taking into consideration the conflicting evidence regarding their validity and whether they are in substantial compliance with the quality standards.[10] Decision and Order at 3-5. The ALJ accurately found the April 27, 2016 study produced non-qualifying results, the March 8, 2017 study produced qualifying results pre- and post-bronchodilator, and the March 26, 2019 study produced qualifying results pre-bronchodilator and bronchodilators were not administered. Decision and Order at 3-5; Director's Exhibits 18 at 4-6; 22 at 17-18; Claimant's Exhibit 5. The ALJ further found the March 8, 2017 and March 26, 2019 studies are invalid and entitled to no weight while the non-qualifying April 27, 2016 study is entitled to "full probative weight." Decision and Order at 3-5. She therefore concluded Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 5.

When weighing pulmonary function studies, the ALJ must determine whether they 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). 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). "In the absence of evidence to the contrary, compliance with the [quality standards in] Appendix B shall be presumed." 20 C.F.R.

Board affirmed the ALJ's finding that the medical opinion evidence is "inconclusive" as to the presence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). *Crusenberry*, BRB No. 21-0489 BLA, slip op. at 8-9 n.13. Additionally, as there is no evidence of complicated pneumoconiosis, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3) (2018); *see* 20 C.F.R. §718.304.

[10] Because the studies reported a range of heights from sixty-eight to seventy-one inches for Claimant, in her initial decision the ALJ permissibly calculated an average height of 69.6 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order Awarding Benefits on a Subsequent Claim at 9-10; Decision and Order at 3-4. She then properly used the closest greater table height of 69.7 inches set forth at Appendix B of 20 C.F.R. Part 718 for determining whether the studies are qualifying. *See Carpenter v. GMS Mine & Repair Maint. Inc.*, 26 BLR 1-33, 1-38-39 (2023); Decision and Order Awarding Benefits on a Subsequent Claim at 9.

§718.103(c). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

In considering the validity of the March 8, 2017 study, the ALJ weighed the administering technician's comments against the opinions of Drs. Rosenberg and Castle. Decision and Order at 4; Director's Exhibit 22 at 4-5, 17-18; Employer's Exhibits 1 at 7-8, 10-12; 3. The technician conducting the study indicated Claimant demonstrated understanding and gave "good effort" during the testing. Director's Exhibit 22 at 18. Dr. Rosenberg opined that Claimant's "poor health" prevented any valid studies from being obtained, noting the variability in the March 8, 2017 pre- and post-bronchodilator FEV1 and FVC results and that Claimant's effort during the testing could have been greater. Director's Exhibit 22 at 3-5; Employer's Exhibit 1 at 7-8, 10-12. Dr. Castle reviewed this study's results and tracings and opined the flow-volume loops showed significant variability with less than maximal efforts; therefore, he concluded the study was "probably technically invalid." Employer's Exhibit 3 at 8-9, 24.

The ALJ permissibly found Dr. Rosenberg's and Castle's opinions more persuasive and entitled to greater weight than the administering technician's notations based on their board certifications in internal medicine and pulmonary diseases and higher level of medical education, and because their opinions were consistent with one another regarding Claimant's efforts. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536 (4th Cir. 1998) ("experts' respective qualifications are important indicators of the reliability of their opinions") (citations omitted); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 4; Director's Exhibit 22 at 38-39; Employer's Exhibit 11. We therefore affirm her determination that the study is invalid, unreliable, and entitled to no weight. Decision and Order at 4.

In considering the validity of the March 26, 2019 study, the ALJ weighed the administering technician's notes against Dr. Vuskovich's opinion. Decision and Order at 4-5; Claimant's Exhibit 5; Employer's Exhibit 7. The technician conducting the study indicated Claimant demonstrated "great effort" and cooperation. Claimant's Exhibit 5. Dr. Vuskovich opined the study is invalid because Claimant did not put forth sufficient effort to generate valid FVC and FEV1 results as demonstrated by the flow volume loops and volume time tracings, his deep breath efforts were variable, his initial efforts were not maximum efforts and thereby artificially lowered his FEV1 result, and his respiratory rate and tidal volume were insufficient to generate a valid MVV result. Employer's Exhibit 7. The ALJ permissibly found Dr. Vuskovich's opinion more persuasive and entitled to greater weight than the administering technician's notations based on his board certification in occupational medicine and higher level of medical education. *See Stallard*, 876 F.3d at 670; *Hicks*, 138 F.3d at 536; *Adkins*, 958 F.2d at 52-53; Decision and Order at

5; Employer's Exhibit 9. We thus affirm her determination that the study is invalid and entitled to no weight. Decision and Order at 4-5.

Because the ALJ permissibly discredited the March 8, 2017 and March 26, 2019 qualifying studies, and the April 27, 2016 study is nonqualifying, we affirm the ALJ's conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 4-5. The ALJ then weighed all the evidence together, like and unlike, and permissibly determined Claimant did not establish that he is totally disabled. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 5.[11]

Claimant has the burden of establishing entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because Claimant did not establish total disability, a required element of entitlement, benefits are precluded under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2); *see also Anderson*, 12 BLR at 1-112.

[11] As previously noted, see note 9 *supra*, the Board previously affirmed the ALJ's findings that the other categories of evidence did not support the establishment of total disability.

Accordingly, we affirm the ALJ's Decision and Order on Remand Denying Benefits on a Subsequent Claim.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge