U.S. Department of Labor

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

BRB No. 22-0397 BLA

ASTOR FIELDS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAPPHIRE COAL COMPANY	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSRUANCE	)	DATE ISSUED: 5/12/2023
	)	
Employer/Carrier Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, PSC) Pikeville, Kentucky, for Employer.

Before: BOGGS, BUZZARD, and ROLFE, Administrative Appeals Judges

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2019-BLA-05959) rendered on a subsequent[1] claim filed on

[1] Claimant filed an initial claim on March 24, 1994, which the district director denied for failure to establish any element of entitlement. Director's Exhibit 1. Claimant

September 28, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined that the claim was timely field. He found Claimant established at least fifteen years of qualifying coal mine and a totally disabling pulmonary or respiratory impairment. Thus, he found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c),[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[3] He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the ALJ's determination that the claim was timely filed. It also argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office Workers' Compensation Programs, declined to file a brief.[4]

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

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filed two claims in 2015 and 2016 which he withdrew. Director's Exhibit 2, 3. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, he must establish "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 Claimant's prior claim was denied for failure to establish any element of entitlement, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. 20 C.F.R. §725.309(c)(3), (4).

[3] Section 411(c)(4) of the Act 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); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's finding of at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

accordance with applicable law.[5] 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, 362 (1965).

Timeliness of Claim

Section 422(f) of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have "been communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. §725.308(a). A miner's claim is presumed to be timely filed. 20 C.F.R. §725.308(b). Thus, to rebut the timeliness presumption, Employer must show the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the Miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 593-96 (6th Cir. 2013).

Employer relies on Dr. Alam's November 18, 2010 treatment note and Claimant's July 26, 2018 deposition testimony to support its assertion that Claimant did not timely file his claim within three years of a medical determination of total disability due to pneumoconiosis. Employer's Brief at 4-9 (citing Director's Exhibit 30 at 24; Employer's Exhibit 18 at 64). The ALJ found none of Claimant's treatment records, including Dr. Alam's November 18, 2010 treatment note,[6] diagnose Claimant as totally disabled due to

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 24; Director's Exhibit 6.

[6] Dr. Alam's November 18, 2010 treatment note states in relevant part:

> S: Aster [sic] is here today for a follow up. He is a gentleman who has a history of severe COPD, emphysema and coal workers pneumoconiosis. Currently trying to get his disability, he also brought forms for his insurance that has [sic] been filled out. We have made him disabled since October 13, 2010 since his FEV 1 has dropped significantly he has more than thirty years of underground coal mining. He has significant cough with sputum production lately which has gotten worse.
>
> . . . .

pneumoconiosis. Decision and Order at 5-7. He therefore found Claimant's treatment records insufficient to trigger the statute of limitations. *Id.* at 7. Further finding Claimant's July 26, 2018 deposition testimony does not indicate Dr. Alam communicated to Claimant that his 2011 or 2012 breathing impairment was due to pneumoconiosis,[7] the ALJ found Employer failed to rebut the presumption that Claimant timely filed his claim. *Id.* at 8.

Employer contends substantial evidence does not support these findings.[8] Employer's Brief at 4-8. We disagree.

> A: Patient with emphysema, coal workers pneumoconiosis and chronic bronchitis. Further worsening of his lung function because of dropping FEV1 and continuing in the mines.

Employer's Exhibit 18 at 64.

[7] At his July 26, 2018 deposition, Claimant testified as follows:

> Q: Did [Dr. Alam] tell you that you had black lung.
>
> A: Yes.
>
> Q: Did he tell you anything else about it?
>
> A: No.
>
> Q: Did he say if you had a really bad case of black lung or you were just starting to have problems?
>
> A: He didn't say.
>
> Q: Did he tell you your breathing was so bad that you wouldn't be able to work?
>
> A: Yes.
>
> Q: Okay. And when did he tell you that?
>
> A: I'd say about 2000 – when I went to him 2011 or something, it might be '12.

Director's Exhibit 30 at 24.

[8] The ALJ found Claimant's testimony at the formal hearing "not probative on the issue of whether Dr. Alam communicated to [Claimant] in 2010 that he is totally disabled due to pneumoconiosis." Decision and Order at 7. Employer does not challenge this finding. *See Skrack*, 6 BLR at 1-711.

Employer contends Dr. Alam's November 18, 2010 treatment note constitutes a medical determination of total disability due to pneumoconiosis because it diagnoses both pneumoconiosis and "disability." Employer's Brief at 4, 7. But this is not the proper standard. In order for a medical determination to trigger the statute of limitations, it must diagnose *total* disability *due to* pneumoconiosis. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). Although the ALJ found Dr. Alam's treatment note states Claimant is "disabled," he accurately observed it does not diagnose Claimant as "totally disabled" or unable to perform his usual coal mine work and does not identify pneumoconiosis as the cause of Claimant's disability. Decision and Order at 6; Employer's Exhibit 18 at 64. The ALJ thus permissibly found Dr. Alam's November 18, 2010 treatment note does not constitute a medical determination of total disability due to pneumoconiosis that could trigger the statute of limitations. *See Brigance*, 718 F.3d at 593-94; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 6.

Employer next asserts that Claimant's July 26, 2018 deposition testimony that "Dr. Alam in 2011 or 2012 diagnosed pneumoconiosis and breathing so bad that [C]laimant would not be able to work" establishes Dr. Alam communicated to Claimant a diagnosis of total disability *due* to pneumoconiosis. *See* 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); Employer's Brief at 7 (referencing Director's Exhibit 30 at 24). Contrary to Employer's argument, the ALJ permissibly found this testimony insufficient because Claimant did not indicate Dr. Alam attributed his breathing trouble to pneumoconiosis.[9] *See Brigance*, 718 F.3d at 593-94; Decision and Order at 7-8. As neither Dr. Alam's treatment notes nor Claimant's testimony establish that Dr. Alam communicated to Claimant a diagnosis of total disability due to pneumoconiosis three years before he filed this claim, we affirm the ALJ's finding Employer did not rebut the presumption that Claimant timely filed his claim. *Brigance*, 718 F.3d at 595-96.

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

[9] As noted above, *see* n.7, Claimant testified Dr. Alam told him that his "breathing was so bad [he] wouldn't be able to work." Director's Exhibit 30 at 24. He also stated Dr. Alam told him he had black lung disease but "did not tell [him] anything else about it" or say whether he "had a really bad case of black lung or [was] just starting to have problems." *Id*. As the ALJ found, Claimant did not testify that Dr. Alam attributed his breathing problems to black lung disease. Decision and Order at 7-8.

work.[10] 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,[11] 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). Employer challenges the ALJ's findings that Claimant established total disability based on the pulmonary function studies, medical opinions, and in consideration of the evidence as a whole.[12]

Pulmonary Function Studies

The ALJ considered thirteen pulmonary function studies. Decision and Order at 11-17. Because the studies reported varying heights, he averaged them to find Claimant is 68.42 inches tall. Relying on Appendix B and applying the closest table height of 68.5 inches and Claimant's age at the time of each study, the ALJ assessed whether the studies produced qualifying values. Decision and Order at 12 n. 73.

The ALJ initially found the seven treatment studies predating Claimant's September 28, 2017 filing of this claim were predominantly non-qualifying but found them less probative of Claimant's current pulmonary condition than the six studies conducted after that date.[13] *Id.* at 13-17. He found Claimant's July 31, 2018 study invalid but concluded the studies dated December 15, 2017, July 23, 2018, July 30, 3028, October 7, 2019, and

[10] The ALJ found Claimant's usual coal mine employment as an electrician and repairman required heavy manual labor. Decision and Order at 11; Director's Exhibit 7 at 1, 2.

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

[12] The ALJ found Claimant did not establish total disability based on the pulmonary function study evidence 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 10, 18.

[13] The ALJ found Claimant's treatment pulmonary function studies dated October 8, 2008 and March 28, 2011 are invalid. Decision and Order at 15. He found Claimant's treatment studies dated October 24, 2006; June 23, 2010; October 13, 2010; December 9, 2010; and July 23, 2015, valid but non-qualifying. *Id.* at 12, 14-15.

December 6, 2019 are valid.[14] Giving determinative weight to the pre-bronchodilator studies, all five of which produced qualifying values, the ALJ concluded Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 17.

Employer contends the ALJ erred in finding the December 15, 2017, July 23, 2018, July 30, 3028, October 7, 2019, and December 6, 2019 studies support a finding of total disability.[15] Employer's Brief at 8-15. We disagree.

Initially, we reject Employer's assertion that the ALJ erred in finding the pre-bronchodilator studies more probative of Claimant's condition because the ALJ's finding "is not based on science and appears to be a vestige of the 'true doubt rule.'" Employer's Brief at 15. Contrary to Employer's assertion, the ALJ permissibly found the pre-bronchodilator studies better reflect Claimant's pulmonary or respiratory disability. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (use of a bronchodilator does not provide an adequate assessment of the miner's disability, although it may aid in determining the presence or absence of pneumoconiosis); *see Napier*, 301 F.3d at 713-14; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 16-17.

We also reject Employer's assertion that the ALJ erred in averaging Claimant's heights reported on all thirteen pulmonary function studies when calculating Claimant's average height. Employer's Brief at 11-12. Employer asserts the ALJ should have averaged only the heights reported on the six studies he credited as most probative of Claimant's current pulmonary condition.[16] *Id.* Contrary to Employer's assertion, the ALJ was obligated to consider all relevant evidence and permissibly averaged all the studies' recorded heights to determine Claimant's actual height. *See Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951) ("substantiality of evidence must take into account

[14] The ALJ found Claimant's July 23, 2018 pulmonary function study did not include post-bronchodilator results, his July 30, 2018 test produced qualifying post-bronchodilator results, while his October 7, 2019 and July 6, 2019 studies produced non-qualifying post-bronchodilator results. Decision and Order at 13.

[15] Employer does not contest the ALJ's decision to credit Claimant's post-claim-filing pulmonary function studies as most probative of his current condition. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (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); Decision and Order at 17; Employer's Brief at 9, 15.

[16] We note Employer submitted six of the seven pulmonary function studies that it asserts should have been excluded from the ALJ's height calculation. Claimant's Exhibit 3 at 8; Employer's Exhibits 14 at 47, 18 at 63, 70, 75, 79, 89.

whatever in the record fairly detracts from its weight"); *Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir.1984) (finding which does not encompass discussion of contrary evidence does not warrant affirmance). As Employer does not otherwise challenge the ALJ's calculation that the average of Claimant's thirteen reported height measurements is 68.42 inches, and when rounded up to the closest table value is 68.5 inches, we affirm the ALJ's determination to assess Claimant's pulmonary function studies using a table height of 68.5 inches. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) (ALJ must make a factual finding to determine the miner's height when studies conflict); Decision and Order at 12 n.73. As Employer does not challenge the ALJ's findings that the December 15, 2017, October 7, 2019, and December 6, 2019 pulmonary function studies are valid and produced qualifying pre-bronchodilator values at this height, we affirm them. *See Martin*, 400 F.3d at 305; Decision and Order at 12. We therefore affirm the ALJ's finding that Claimant established total disability by a preponderance of pulmonary function study evidence.[17] *See Martin*, 400 F.3d at 305; Decision and Order at 17.

Medical Opinions

The ALJ also weighed five medical opinions as to whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18-25. He found the opinions of Drs. Green, Raj, and Nader that Claimant is totally disabled to be well-reasoned and persuasive and rejected the contrary opinions of Drs. Vuskovich and Dahhan. Decision and Order at 18-23; Director's Exhibits 13, 21, 26; Claimant's Exhibits 1, 2; Employer's Exhibit 2, 5, 9, 10, 19.

Employer generally asserts the ALJ's errors in weighing the pulmonary function studies improperly influenced the weight he accorded the medical opinions. Employer's Brief at 14-15. However, having affirmed the ALJ's weighing of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i), we reject Employer's general contention and affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).

[17] Employer argues the ALJ erred in finding Claimant's qualifying July 23 and July 30, 2018 pulmonary function studies are valid. Employer's Brief at 9-11. However, Employer fails to show why remand is required. Even if the ALJ were to have found these studies invalid, and therefore not probative evidence of Claimant's condition, the three remaining pre-bronchodilator studies the ALJ found valid and probative are qualifying. Thus, substantial evidence would continue to support the ALJ's finding of total disability based on the qualifying December 15, 2017, October 7, 2019, and December 6, 2019 pre-bronchodilator studies. *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).

See Morrison v. Tenn. Consol. Coal Co., 644 F.3d 473, 478 (6th Cir. 2011); Decision and Order at 25.

We further affirm the ALJ's conclusion that the evidence, weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order on Remand at 13. Thus, we affirm the ALJ's findings that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1), 725.309(c); Decision and Order at 26.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not rebut the presumption under either method. Because Employer does not challenge this finding, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 35-36.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge