U.S. Department of Labor

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

BRB No. 24-0405 BLA

DANNY M. VUKONICH Claimant-Respondent v. CHEVRON MINING, INCORPORATED/CHEVRON CORPORATION and BROADSPIRE/CRAWFORD Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 05/13/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Cameron Blair (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2023-BLA-05615) rendered on a claim filed on September 19, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty years of coal mine employment in underground coal mines or surface coal mines in conditions substantially similar to those of an underground mine and a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2). Thus he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief, unless requested.

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, but he withdrew it. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306.

[2] 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); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 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 6-7.

[4] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit because Claimant performed his last coal mine employment in New Mexico. *See*

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

To invoke the Section 411(c)(4) presumption, a claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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. *See* 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. Alabama By-Products, Inc.*, 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). 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).

The ALJ found Claimant established total disability based upon the arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, and medical opinions.[5] 20 C.F.R. §718.204(b)(2)(ii)-(iv); Decision and Order at 19-23. Employer contends the ALJ erred in finding Claimant established total disability based on this evidence. Employer's Brief at 9-18.

Arterial Blood Gas Studies

Employer contends the ALJ erred in weighing the arterial blood gas study evidence. Employer's Brief at 9-10. We hold its arguments are not persuasive.

The ALJ considered two arterial blood gas studies Claimant performed on September 9, 2015, and October 16, 2018. Decision and Order at 19-20; Director's Exhibit 18 at 2; Employer's Exhibit 5 at 24. The September 9, 2015 study produced non-qualifying resting and exercise results.[6] Employer's Exhibit 5 at 24. The October 16, 2018 study

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. 24; Director's Exhibits 4, 9.

[5] The ALJ found the pulmonary function studies do not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 19.

[6] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

produced non-qualifying resting values but qualifying exercise values. Director's Exhibit 18 at 2. The ALJ permissibly assigned greater weight to the 2018 study because Claimant performed it more recently. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (given the progressive nature of pneumoconiosis, when tests show a miner's condition "has worsened," all "other considerations aside, the later evidence is a more reliable indicator of the miner's condition than an earlier one."); *Kincaid v. Island Creek Coal Co*., 26 BLR 1-43, 1-50-52 (2023); Decision and Order at 20. He also permissibly assigned greater weight to the exercise results over the resting results because they more accurately reflect Claimant's functional capacity to perform the exertional requirements of his usual coal mine work.[7] *Coen v. Director, OWCP*, 7 BLR 130, 1-31-32 (1984); Decision and Order at 20.

Employer argues the ALJ erred in finding the October 16, 2018 exercise blood gas study supports total disability. Employer's Brief at 9-10. It argues that Dr. Sood reported qualifying values after Claimant exercised for four minutes, but that Claimant reached peak exercise at six minutes with those latter values being non-qualifying.[8] *Id*. As it argues total disability must be assessed at peak exercise for a blood gas test to support total disability, it asserts this test is non-qualifying. *Id*. We are not persuaded.

Initially, we note Employer does not cite any medical evidence to support its contention that Claimant reached peak exercise at six minutes rather than four minutes. It thus requests the Board to substitute our opinion for that of a medical expert, which we cannot do. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

[7] The ALJ noted that in Employer's closing brief, it cited a non-qualifying resting arterial blood gas study Claimant performed on March 9, 2020. Decision and Order at 19-20; Employer's Closing Brief at 5; Employer's Exhibit 1 at 13. The ALJ correctly noted Employer did not designate any such evidence on its Evidence Summary Form. Decision and Order at 20. Nonetheless, he found that this study would be entitled to less weight because it only contains resting blood gas study results and thus does not undermine the credible exercise blood gas study results. *Id.* As it is unchallenged, we affirm this finding. *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Skrack*, 6 BLR at 1-711.

[8] Claimant exercised for a total of six minutes and seventeen seconds. Director's Exhibit 18 at 2. The blood gas test produced a pCO2 of 31 and pO2 of 53 at four minutes of exercise. *Id*. at 2, 6. These are qualifying values for total disability. Appendix B, 20 C.F.R. Part 718. The test produced a pCO2 of 34 and pO2 of 56 at six minutes. *Id*. at 7. These are non-qualifying values. Appendix B, 20 C.F.R. Part 718.

Regardless, we note that Dr. Sood's medical report and the documentation corresponding with the blood gas test support the conclusion that Claimant reached peak exercise at four minutes. Specifically, Dr. Sood reported that Claimant exercised by way of the "Bruce protocol - [six minutes and seventeen] seconds – up to 3.4 [miles per hour and] 14% elevation," and he "stopped because of leg fatigue [and] dyspnea without EKG [changes] of ischemia." Director's Exhibit 23 at 4-5. He further noted that at "peak activity," Claimant's "heart rate reached . . . 176 beats per minute or 108% predicted, the maximum speed was 3.4 miles per hour, and elevation was 14%." *Id*.

When reporting the qualifying results of the blood gas study, Dr. Sood stated he drew Claimant's blood at the 2:55 PM timestamp. Director's Exhibit 18 at 2. He also noted that at this time, Claimant had a pulse rate of 176. *Id*. Thus, the blood draw performed at 2:55 PM corresponds with a pulse rate of 176, which in turn corresponds with Dr. Sood's reference to "peak activity." *Id*. The notations associated with Claimant's blood gas study results reflect that the four minute exercise time corresponds with a blood draw taken at 2:55 PM. Employer's Exhibit 18 at 6. Thus the record supports the conclusion that Claimant reached peak exercise at four minutes when performing the October 16, 2018 blood gas study. Thus, we reject Employer's argument that the ALJ erred in finding the October 16, 2018 blood gas study supports total disability. *Id*.

As it is supported by substantial evidence, we affirm the ALJ's finding that the arterial blood gas study evidence supports total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 20.

Medical Opinions

Before weighing the medical opinions, the ALJ found Claimant's usual coal mine employment was working as a heavy equipment operator which required medium exertion. Decision and Order at 21 n.18.

Next, the ALJ considered the opinions of Drs. Sood, Green, and Tuteur. Decision and Order at 21-23; Director's Exhibit 23; Claimant's Exhibit 1; Employer's Exhibit 1. Drs. Sood and Green opined Claimant is totally disabled from his usual coal mine employment based on a blood gas exchange impairment. Director's Exhibit 23 at 5-6; Claimant's Exhibit 1 at 9. In contrast, Dr. Tuteur opined Claimant is not totally disabled because neither the pulmonary function studies nor the arterial blood gas studies reflect a disabling pulmonary impairment. Employer's Exhibit 1 at 3. The ALJ credited the opinions of Drs. Sood and Green because they are reasoned, documented, and consistent with the qualifying blood gas testing; moreover, he found the physicians understood the exertional requirements of Claimant's usual coal mine employment. Decision and Order

at 23. He discredited Dr. Tuteur's opinion as inadequately reasoned and contrary to the blood gas testing. *Id*.

As Employer does not challenge the ALJ's discrediting of Dr. Tuteur's opinion, we affirm this finding.[9] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23. Thus, the ALJ's finding that the contrary medical opinion evidence does not undermine that Claimant established total disability based on the arterial study evidence is supported by substantial evidence.[10] 20 C.F.R. §718.204(b)(2) (qualifying arterial blood gas studies "shall establish" total disability "[i]n the absence of contrary probative evidence"). And because there is no other evidence undermining the arterial blood gas study evidence, we therefore affirm the ALJ's conclusion that Claimant established total disability, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and thus invoked the Section 411(c)(4) presumption.

We further affirm, as unchallenged, the ALJ's finding that Employer did not rebut the presumption. *See Skrack*, 6 BLR at 1-711.

[9] We also affirm as unchallenged the ALJ's finding Dr. Tuteur's exclusion of cor pulmonale with right-sided congestive heart failure is unpersuasive. *Skrack*, 6 BLR at 1-711; Decision and Order at 20.

[10] Employer argues the ALJ erred in weighing the opinions of Drs. Sood and Green because the ALJ erred in identifying Claimant's usual coal mine employment and in finding both doctors had an accurate understanding of Claimant's work. Employer's Brief at 14-18. Because we affirm the ALJ's finding that Claimant established total disability through arterial blood gas testing at 20 C.F.R. §718.204(b)(2)(ii), and Dr. Tuteur's contrary opinion does not undermine the blood gas study evidence, we need not address Employer's argument that the ALJ erred in considering the opinions of Drs. Sood and Green, as any error in finding total disability established based on their medical opinions is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Similarly, although Employer argues the ALJ erred in finding Claimant established total disability by establishing pneumoconiosis and cor pulmonale with right-sided congestive heart failure, any error by the ALJ in making this finding is harmless as this evidence does not undermine the arterial blood gas study evidence. *Id*.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge