

U.S. Department of Labor

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



BRB Nos. 22-0390 BLA & 22-0391 BLA

DORIS M. WILLIAMS)
(o/b/o and Widow of WILLIE WILLIAMS))

Claimant-Respondent)

v.)

GOLDEN OAK MINING COMPANY, LP)

and)

SECURITY INSURANCE COMPANY OF)
HARTFORD)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 11/03/2023

DECISION and ORDER

Appeal of the Decision and Order on Remand of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for
Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner,
Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals),
Washington, D.C., for the Director, Office of Workers' Compensation
Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order on Remand (2015-BLA-05159 and 2017-BLA-05921) rendered on a subsequent claim¹ filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).² This case involves a miner's claim filed on December 17, 2013, and a survivor's claim filed on November 28, 2016. Both claims are before the Board for the second time.³

In his initial Decision and Order, the ALJ determined Employer is the properly designated responsible operator. He also found the Miner established at least twenty-one years of coal mine employment, with all but six months underground, and a totally disabling respiratory or pulmonary impairment. Thus, the ALJ determined the Miner established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c),⁴ and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4)

¹ The Miner filed a prior claim on August 2, 1991, which the district director denied on January 21, 1992, because he did not establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1.

² Employer's appeal in the miner's claim was assigned BRB No. 22-0390 BLA, and its appeal in the survivor's claim was assigned BRB No. 22-0391 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

³ Claimant is the widow of the Miner, who died on October 13, 2016. Survivor's Claim (SC) Director's Exhibit 9. She is pursuing his claim on his behalf, along with her own survivor's claim. SC Director's Exhibits 6, 10.

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); *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 failed to 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 his current claim on the merits. See 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

of the Act, 30 U.S.C. §921(c)(4) (2012).⁵ He further found Employer did not rebut the presumption and awarded benefits.

Pursuant to Employer's appeal of the miner's claim, the Board affirmed the ALJ's findings that Golden Oak Mining Co. is the properly designated responsible operator, and that the Miner established at least twenty-one years of coal mine employment, with all but six months underground. *Williams v. Golden Oak Mining Co.*, BRB No. 18-0147 BLA, slip op. at 3, 6 (Apr. 29, 2019) (unpub.). The Board determined the ALJ failed to fully consider the validity of certain pulmonary function studies and, therefore, vacated his finding that the Miner established total disability at 20 C.F.R. §718.204(b)(2), invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Id.* at 9-10. Thus, the Board vacated the ALJ's Decision and Order and remanded the case for the ALJ to reconsider whether: 1) the March 26, 2014 and July 28, 2014 pulmonary function studies are in substantial compliance with the quality standards; 2) the new pulmonary function study evidence as a whole supports a finding of total disability; 3) Dr. Ajjarapu's medical opinion and the medical opinion evidence as a whole support a finding of total disability; and 4) the evidence as a whole establishes total disability. *Id.* at 10; *see* 20 C.F.R. §§718.103, 718.204(b)(2)(i), (iv); 20 C.F.R. Part 718, Appendix B.

Regarding the survivor's claim, on April 24, 2017,⁶ the district director issued a Proposed Decision and Order finding Claimant derivatively entitled to benefits under Section 422(l) of the Act, 30 U.S.C. §932(l).⁷ SC Director's Exhibit 19. Employer requested the case be forwarded to the Office of Administrative Law Judges (OALJ). SC

⁵ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability or 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

⁶ The district director initially issued a Proposed Decision and Order finding Claimant derivatively entitled to benefits on December 21, 2016. Survivor's Claim (SC) Director's Exhibit 10. However, after determining Employer did not receive it, the district director reissued the Proposed Decision and Order. SC Director's Exhibit 19.

⁷ Section 422(l) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

Director's Exhibit 25. In a January 31, 2019 Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act, the ALJ found Claimant automatically entitled to survivor's benefits pursuant to Section 422(l) of the Act based on the award of benefits in the miner's claim. Because the Board ultimately vacated the ALJ's award of benefits in the miner's claim, *Williams*, BRB No. 18-0147 BLA, slip op. at 6-10, the Board also vacated the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(l). 30 U.S.C. §932(l); *Williams v. Golden Oak Mining Co.*, BRB No. 19-0219 BLA, slip op. at 3 (Mar. 23, 2020) (unpub.). The Board noted that if the ALJ were to reinstate the award of benefits in the miner's claim on remand, he could reinstate the award of benefits in the survivor's claim as Claimant would be automatically entitled to benefits pursuant to Section 422(l). *Id.*

Pursuant to the Board's remand instructions, the ALJ ordered the Director to address the validity of the March 26, 2014 and July 28, 2014 pulmonary function studies as the Miner's 2016 death precluded a new study. *See* ALJ's May 6, 2021 Order. In response, on September 17, 2021, the Director defended the validity of the March 26, 2014 pulmonary function study and submitted a supplemental report from Dr. Ajjarapu, who had administered the study, explaining why she concluded the study was valid and reliable. The ALJ issued an Order permitting the parties to submit responsive evidence on the issue of whether the March 2014 study was valid. *See* ALJ's Dec. 2, 2021 Order. Employer objected to the admission of Dr. Ajjarapu's supplemental report and argued the March 26, 2014 pulmonary function study is invalid, but it submitted no new evidence. *See* Employer's Jan. 25, 2022 Response.

In his Decision and Order on Remand, the ALJ credited Dr. Ajjarapu's opinion to find the March 26, 2014 pulmonary function study valid. He also reconsidered the validity and reliability of all the pulmonary function studies of record. The ALJ found the pulmonary function study evidence supported finding the Miner totally disabled. Thus he found the Miner had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), and that Claimant 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), and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §725.309. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in accepting Dr. Ajjarapu's supplemental report into the record. It also contends the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging the Board to reject Employer's arguments and affirm the ALJ's award of benefits on remand.

The 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.⁸ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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 work. *See* 20 C.F.R. §718.204(b)(1). 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). 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 on pulmonary function studies, medical opinions, and the record as a whole.⁹ 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order on Remand at 9-15.

Pulmonary Function Studies

The ALJ considered eight pulmonary function studies. Decision and Order on Remand at 3-14. The November 22, 2011 and January 31, 2013 studies produced non-

⁸ 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); Hearing Tr. at 10; MC Director's Exhibits 4, 14 at 15.

⁹ In his prior Decision and Order Awarding Benefits, the ALJ determined the blood gas study evidence is insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 13; Claimant's Exhibit 12. Also, there is no evidence the Miner suffered from cor pulmonale with right-sided congestive heart failure, or complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.204(b)(2)(iii), 718.304.

qualifying values¹⁰ both before and after the administration of bronchodilators while the November 25, 2013 study produced non-qualifying values before bronchodilators.¹¹ Decision and Order on Remand at 9-11; Claimant’s Exhibits 5; 11 at 69, 72. The March 26, 2014 study produced qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values.¹² Decision and Order on Remand at 10-12; MC Director’s Exhibit 10. Finally, the July 28, 2014, September 11, 2014, November 3, 2014, and March 7, 2016 studies produced qualifying values.¹³ Decision and Order on Remand at 12-13; Claimant’s Exhibits 4; 11 at 57, 65; Employer’s Exhibit 1. Importantly, with respect to the March 7, 2016 study, the ALJ noted the qualifying pre-bronchodilator study was described as “non-reproducible” and thus not reliable; however, as there was no such statement regarding the qualifying post-bronchodilator study, he concluded it was reproducible and acceptable, and thus reliable. The ALJ accorded the qualifying post-bronchodilator study weight.

Pursuant to the Board’s instructions, the ALJ analyzed the validity of the March 26, 2014 and July 28, 2014 pulmonary function studies. He found the March 26, 2014 study is in “substantial compliance with the quality standards and Appendix B, ... is sufficiently reliable,” and entitled to substantial weight.¹⁴ Decision and Order on Remand at 2-7, 11-14. But he found the July 28, 2014 study cannot be used to demonstrate the presence or absence of a pulmonary impairment because it was not in accordance with the requirements

¹⁰ A “qualifying” pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A “non-qualifying” study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

¹¹ The November 25, 2013 study has pre-bronchodilator values only.

¹² Dr. Ajjarapu performed this study as part of the Department of Labor-sponsored pulmonary evaluation. MC Director’s Exhibit 10. The technician conducting the study rated the Miner’s cooperation and understanding as good; Dr. Gaziano reviewed the study and deemed the results acceptable. Decision and Order at 14; Decision and Order on Remand at 6-7, 11-12; MC Director’s Exhibit 10.

¹³ The July 28, 2014 study has pre-bronchodilator values only. The remaining three studies produced qualifying results both before and after the administration of bronchodilators. Claimant’s Exhibits 4; 11 at 57, 65; Employer’s Exhibit 1.

¹⁴ The ALJ also made an alternative finding that he could still give weight to the March 26, 2014 study pursuant to 20 C.F.R. §718.103(c), should the Board not affirm his finding the March 26, 2014 is in substantial compliance with the regulations and quality standards at Appendix B. Decision and Order on Remand at 12,

of 20 C.F.R. §103(b).¹⁵ *Id.* at 7-9. Additionally, he found the validity of the September 2014 study, the November 2014 study, and the March 2016 study's pre-bronchodilator values "questionable," based on comments by Dr. Jarboe and the administering technicians and thus accorded them no weight.¹⁶ *Id.* at 12.

The ALJ permissibly gave the greatest weight to the qualifying March 26, 2014 study and qualifying March 7, 2016 post-bronchodilator study¹⁷ because they are more recent and, therefore, most probative of the Claimant's disability status. Decision and Order on Remand at 13; see *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (because pneumoconiosis is a latent and progressive disease, more recent evidence may be rationally credited where it shows a miner's condition has progressed or worsened); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); see also *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). Thus, the ALJ found the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 13-14.

Employer raises numerous arguments, all concerning the ALJ's findings regarding the March 26, 2014 pulmonary function study. Employer's Brief at 6-11. Specifically, Employer argues the ALJ erred in finding the March 26, 2014 study valid and in relying

¹⁵ Pursuant to the Board's remand instructions, the ALJ determined the July 28, 2014 pulmonary function study is "deficient in several respects when compared to the quality standards." Decision and Order on Remand at 9; Claimant's Exhibit 4. He noted the individual who described the Miner's effort is not identified as a technician and is not included on the report. *Id.* Further, he determined there is no evidence Dr. Ajjarapu reviewed the July 2014 study. *Id.*

¹⁶ Dr. Jarboe found the September 11, 2014 study invalid because the Miner "failed to produce a maximum, consistent effort throughout the exhalation maneuver" and because his "efforts [were] very variable from one to another." Employer's Exhibit 1. The technician who administered the November 3, 2014 study found the results "questionable due to the patient's inability to perform the maneuvers." Claimant's Exhibit 11 at 65. On the March 7, 2016 study, the technician noted that the "[p]rebronchodilator is not reproducible." Claimant's Exhibit 11 at 57.

¹⁷ Employer does not challenge the ALJ's findings regarding the reliability or probative value of the qualifying March 7, 2016 post-bronchodilator study. Thus, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

on 20 C.F.R. §718.103(c) to give the study weight.¹⁸ *Id.* But Employer has not explained why any of the errors it alleges would make a difference, as the ALJ found the most recent qualifying March 7, 2016 post-bronchodilator pulmonary function study to be reliable and the most probative evidence of Claimant’s disability. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); Decision and Order at 14. As Employer raises no other arguments regarding the pulmonary function study evidence, and because it is supported by substantial evidence, we affirm the ALJ’s finding that the preponderance of the pulmonary function study evidence establishes total disability. Decision and Order on Remand at 14; 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ considered the medical opinions of Drs. Ajjarapu and Jarboe. Decision and Order on Remand at 14-15; MC Director’s Exhibit 10; Director’s Exhibit on Remand 1; Employer’s Exhibit 1. Dr. Ajjarapu opined the Miner was totally disabled by a respiratory or pulmonary impairment. Decision and Order on Remand at 14-15. Dr. Jarboe was unable to determine whether the Miner had a totally disabling respiratory or pulmonary impairment, and none of the Miner’s treating physicians offered an opinion on his total disability from a respiratory or pulmonary standpoint. *Id.* Thus, the ALJ found Dr. Ajjarapu’s opinion is the only medical opinion of record on the issue of total disability. *Id.* at 15.¹⁹

On remand the ALJ found his reweighing of the pulmonary function study did not affect the weight he afforded Dr. Ajjarapu’s opinion and, thus, found his original analysis of the medical opinion evidence still “appropriate.” Decision and Order on Remand at 15; Decision and Order at 15. As Dr. Ajjarapu’s opinion is the only medical opinion in the record on the issue of total disability, and the ALJ determined it is “documented” and

¹⁸ Employer also raises several arguments that the ALJ erred in requesting and admitting evidence relating to the validity of the March 26, 2014 pulmonary function study. Employer’s Brief at 6-11. Because we affirm the ALJ’s unchallenged finding that the most recent March 7, 2016 pulmonary function study is reliable and the most probative, and his finding that this study supports a finding of total disability, we need not address Employer’s arguments regarding the ALJ’s solicitation and admission of evidence relevant to the earlier March 2014 study as any alleged errors are harmless. *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).

¹⁹ Employer does not challenge this finding; thus, we affirm it. *Skrack*, 6 BLR at 1-711.

“reasoned,” he found the weight of the medical opinion evidence supports a finding of total disability. *Id.*

Employer asserts the ALJ erroneously relied on Dr. Ajjarapu’s medical opinion to determine the Miner had a totally disabling respiratory or pulmonary impairment because, absent the March 26, 2014 pulmonary function study, there is “no documented basis” for the doctor’s opinion. Employer’s Brief at 10-11. We disagree. In addition to the March 26, 2014 pulmonary function study, there are multiple reasons Dr. Ajjarapu found the Miner’s arterial blood gas study results show “mild resting hypoxemia.” MC Director’s Exhibit 10 at 37. Moreover, she diagnosed the Miner with chronic obstructive pulmonary disease (COPD) in the form of chronic bronchitis based on his reported symptoms. MC Director’s Exhibit 10 at 37; Director’s Exhibit on Remand 1 at 1.²⁰

On remand, the ALJ found his assessment of Dr. Ajjarapu’s opinion unchanged, as he did not invalidate the March 26, 2014 study. Decision and Order on Remand at 14-15. He again found the opinion reliable, documented, and reasoned. *Id.* Thus, the ALJ permissibly found Dr. Ajjarapu’s opinion entitled to great weight on the issue of total disability. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order on Remand at 14-15.

Because it is supported by substantial evidence, we affirm the ALJ’s finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). We further affirm the ALJ’s finding that Claimant established total disability when considering the record as a whole. *Rafferty*, 9 BLR at 1-232; 20 C.F.R. §718.204(b)(2); Decision and Order on Remand at 15. Thus, we affirm the ALJ’s finding that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309; Decision and Order on Remand at 15-16. Because Employer does not challenge the ALJ’s finding that it failed to rebut the presumption, we affirm it. 20 C.F.R. §718.305(d)(1); Decision and Order on Remand at 16; *see Skrack*, 6 BLR at 1-711.

Consequently, we affirm the award of benefits in the miner’s claim. Decision and Order on Remand at 17.

²⁰ Dr. Ajjarapu found the Miner’s pulmonary function study results demonstrate “severe pulmonary impairment” and that the Miner’s lung examination exhibited a “lung volume loss.” MC Director’s Exhibit 10 at 37; Director’s Exhibit on Remand 1 at 1.

Survivor's Claim

The ALJ determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(l); Decision and Order on Remand at 16-17; *see* ALJ's Jan. 31, 2019 Order. Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award of benefits in the survivor's claim, we affirm it. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Decision and Order on Remand is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge