U.S. Department of Labor

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

BRB No. 23-0225 BLA

MARK D. WILDER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ONYX ENERGY, LLC	)	DATE ISSUED: 11/17/2023
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Mark D. Wilder, Pounding Mill, Virginia.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Denying Benefits (2022-BLA-05624) rendered on a miner's subsequent[2] claim filed on September 29, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Based on the parties' stipulation, the ALJ credited Claimant with twenty-nine years of coal mine employment, with at least fifteen years qualifying for the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2018). However, she found Claimant did not establish a totally disabling respiratory or pulmonary impairment[4] and therefore could not invoke the presumption. Because Claimant failed to establish an essential element of entitlement, the ALJ denied benefits.

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

In an appeal filed without representation, the Board considers whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational,

[1] Courtney Hughes, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Hughes is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] On September 21, 2018, the district director denied, as abandoned, Claimant's prior claim, filed on May 14, 2018. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409.

[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] The ALJ accurately determined there is no evidence of record establishing Claimant has complicated pneumoconiosis and therefore he cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 4-5.

supported by substantial evidence, and in 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 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). 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[6] pulmonary function or 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 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 failed to establish total disability by any method. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 11.

Pulmonary Function Studies and Cor Pulmonale

The ALJ correctly found the only pulmonary function study, dated December 3, 2021, has non-qualifying values[7] and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 5-7; Director's Exhibit 11 at 8. Thus,

[5] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 22-23.

[6] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values 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).

[7] Only pre-bronchodilator values were obtained for this study. Director's Exhibit 8 at 11.

we affirm the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii).

Blood Gas Studies

The ALJ considered the results of two arterial blood gas studies. Decision and Order at 6-7. The December 3, 2021 study produced qualifying values at rest,[8] while the March 2, 2022 study produced non-qualifying values at rest. Director's Exhibits 11 at 11; 16 at 7, 11. Exercise testing was not conducted for either study.

The ALJ gave more weight to the non-qualifying March 2, 2022 arterial blood gas study because it is "more recent." Decision and Order at 6-7. She also noted Dr. Forehand indicated the test was "better reflective of Claimant's condition." *Id.* Thus, the ALJ concluded Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 7.

Because of the relatively short time span between the two blood gas studies, the ALJ's reliance on the March 2, 2022 study based on recency is not adequately explained. *See Greer v. Director, OWCP*, 940 F.2d 88, 90 (4th Cir. 1991) (because pneumoconiosis is a "slowly-progressing" disease, pulmonary function tests conducted two months apart "should be considered contemporaneous"); *Sunny Ridge Min. Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (affirming ALJ's total disability finding where four objective tests conducted within seven months of each other were "sufficiently contemporaneous" and a preponderance of most recent tests qualified for total disability); Decision and Order at 6-7. Moreover, the Fourth Circuit, within whose jurisdiction this case arises, has held that an ALJ must evaluate disability evidence both qualitatively and quantitatively, without resorting to mechanically crediting later evidence particularly where, as here, the evidence allegedly shows an improvement in the miner's condition. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14 (Jun. 27, 2023). However, because both contemporaneous studies are valid but conflicting, the blood gas study evidence is, at best, in equipoise; therefore, we consider the ALJ's error to be harmless. *Greer*, 940 F.2d at 90 (deeming two contemporaneous, conflicting objective studies to be in equipoise); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, as explained below, substantial

[8] Although Claimant's lay representative agreed that the results of this study, as reported on Claimant's evidence summary form, were not qualifying, that form erroneously listed the PCO2 value as 39 when the study had a value of 34.3, which is qualifying. Hearing Transcript at 25; Claimant's Evidence Summary Form; *see* 20 C.F.R. Part 718, App C. Thus, the ALJ accurately found this study qualifying. Decision and Order at 6.

evidence otherwise supports the ALJ's finding that Claimant is not totally disabled. Thus, we affirm the ALJ's finding at 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinions and Evidence as a Whole

The ALJ initially determined Claimant's usual coal mine work as a loader operator at a strip mine required "moderate levels of exertion." Decision and Order at 3-4. She then considered the medical opinions of Drs. Forehand, Fino, and Rosenberg. *Id*. at 7-10.

Dr. Forehand performed the Department of Labor's (DOL) complete pulmonary evaluation of Claimant on December 3, 2021. Director's Exhibit 11. He diagnosed Claimant with a "significant, work-limiting respiratory impairment . . . which would prevent [Claimant] from additional coal mine employment" based on the blood gas study values obtained during his evaluation. Director's Exhibit 11 at 5-6.

Dr. Fino examined Claimant on March 2, 2022, and diagnosed a "[v]ery mild obstructive lung disease" and "[v]ariable hypoxemia" but opined Claimant is not totally disabled based on "the normal FVC and FEV1 [on pulmonary function testing], the normal blood gas performed during [his] examination, and the fact the blood gases improved from 12/3/21 . . . ." Director's Exhibit 16 at 8.

As part of the DOL's pilot program for the development of supplemental opinions from physicians who perform DOL examinations, Dr. Forehand was asked to review Dr. Fino's report and objective testing, and two negative x-ray interpretations. Director's Exhibits 17, 18; *see* BLBA Bulletin Nos. 14-05 (Feb. 24, 2014) and 20-01 (Oct. 24, 2019). In his supplemental report, Dr. Forehand indicated the blood gas study conducted as part of Dr. Fino's evaluation "was more recent and is a better reflection of [Claimant's] ability to supply oxygen to his body." Director's Exhibit 18 at 2. He therefore subsequently concluded Claimant is not totally disabled from performing his usual coal mine work. *Id*.

Dr. Rosenberg conducted a review of Claimant's medical records and prepared a report dated December 29, 2022, wherein he noted the "blood gases have improved over time" and the "ventilatory measurements are normal." Employer's Exhibit 5 at 3. He too concluded Claimant is not totally disabled. *Id*.

Because all of the physicians opined Claimant does not have a respiratory or pulmonary impairment that would preclude the performance of his usual coal mine work, the ALJ permissibly found Claimant did not establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); Decision and Order at 10. She also permissibly determined

that none of Claimant's treatment records[9] "contain medical evidence sufficient for [her] to conclude that Claimant is totally disabled from a respiratory perspective." Decision and Order at 11; *see Looney*, 678 F.3d at 316-17; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993).

Having affirmed the ALJ's findings that Claimant did not establish total disability under any of the subsections at 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm, as supported by substantial evidence, the ALJ's overall finding that Claimant does not have a totally disabling respiratory or pulmonary impairment and therefore did not invoke the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 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 Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *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, an essential element of entitlement pursuant to 20 C.F.R. Part 718, the law precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[9] Claimant's treatment records contained a December 4, 2021 chest x-ray interpretation noting a history of cough and finding left posterior lung base atelectasis and no appreciable pleural effusion. Claimant's Exhibit 3 at 2. Progress notes from the same date document a cough, sinus congestion, and fever with fatigue lasting for over two weeks which had not improved, resulting in a diagnosis of bronchitis and cough. *Id*. at 11, 13. In addition, April 18, 2022 progress notes indicate he was diagnosed with pneumoconiosis during his black lung evaluation and document self-reported dyspnea which had been present for six months and had not improved. *Id*. at 6.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge