U.S. Department of Labor

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

BRB No. 20-0452 BLA

CHARLES FREEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PATRIOT MINING, LLC	)	
	)	DATE ISSUED: 10/29/2021
Employer-Petitioner	)	
	)	
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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Tennessee, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2017-BLA-05863) rendered on a claim filed pursuant to the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on October 24, 2014.[1]

The ALJ found Claimant established 32.43 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found 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),[2] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[3] He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and thus erred in finding he invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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

[1] This is Claimant's fourth claim for benefits. The district director denied Claimant's most recent prior claim, filed on September 17, 2013, because he failed to establish total disability. 20 C.F.R. §718.204(b)(2); Director's Exhibit 1.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] 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)(1); *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 did not establish total disability in his most recent prior claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim. *Id*.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 32.43 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6, 14.

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 Associates, Inc.*, 380 U.S. 359 (1965).

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. 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 the relevant evidence supporting a finding of total disability against the 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 established total disability based on the medical opinions.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-17. He considered the opinions of Drs. Everhart, Green, McSharry, and Raj that Claimant is totally disabled, and Dr. Sargent's opinion that he is not. Director's Exhibits 10, 13; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 7. He assigned little weight to Dr. McSharry's opinion because he found it equivocal. Decision and Order at 17. He found Dr. Sargent's opinion not credible because it is not supported by the doctor's own examination or Claimant's treatment records. *Id*. at 16-17. In contrast he found the opinions of Drs. Everhart, Green, and Raj well-reasoned and documented. Decision and Order at 11-12, 14-17.

Employer argues the ALJ erred in crediting Dr. Everhart's opinion because the doctor diagnosed total disability based, in part, on an invalid pulmonary function study. Employer's Brief at 6-10. Employer's argument has no merit.

---

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6; Hearing Transcript at 32.

[6] The ALJ found the pulmonary function and arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 9-11, 15.

Dr. Everhart examined Claimant and conducted a November 8, 2014 pulmonary function study.[7] Director's Exhibit 10. He opined it evidenced moderate to severe airway obstruction. *Id.* He concluded Claimant is totally disabled "based on symptoms of severe dyspnea, chronic bronchitis, small nodules in all lung fields bilaterally with a profusion of 2/1, and [the November 8, 2014 pulmonary function testing] showing FEV1 at 59% predicted and MVV at 47% predicted." *Id.* Although the ALJ found the November 8, 2014 study non-qualifying[8] for total disability, he did not determine it is invalid. Decision and Order at 10, 15 (generally noting that the validity of the qualifying studies has been questioned, but the remaining studies, including the November 8, 2014 study, are non-qualifying).

Although in a separate section of his Decision and Order the ALJ stated that Drs. Everhart, Green, and Raj each relied on pulmonary function testing "deemed invalid," Decision and Order at 15, this statement was in error as it relates to Dr. Everhart's opinion. As noted, the ALJ did not find the November 8, 2014 study that Dr. Everhart relied on to be invalid, nor was there a basis for him to do so. Pulmonary function studies are presumed to be in substantial compliance with the quality standards unless there is "evidence to the contrary." 20 C.F.R. §718.103(c). Employer did not argue or submit any evidence[9] before the ALJ to support a finding that the November 8, 2014 study is invalid and thus forfeited any such challenge.[10] *Joseph Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (party

[7] Employer incorrectly states Dr. Everhart conducted a pulmonary function study on December 12, 2016. Employer's Brief at 11.

[8] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained 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] No medical opinion in the record invalidates the November 8, 2014 study. Dr. McSharry opined it "did not achieve Department of Labor standards for disability" but he did not opine the study is invalid. Director's Exhibit 13 at 4. Dr. Sargent generally opined the pulmonary function study *he* conducted is invalid because Claimant "was either unwilling or unable to generate valid pulmonary function testing," and stated "this has been the case with numerous previous exams." Employer's Exhibit 1 at 1. He did not, however, specifically opine the November 8, 2014 study is invalid.

[10] Employer does not identify before the Board any basis to conclude the November 8, 2014 study is invalid.

alleging objective study is invalid has a "two-part obligation at the hearing": "specify in what way the study fails to conform to the quality standards" and "demonstrate how this defect or omission renders the study unreliable"); Employer's Post-Hearing Brief at 7-8 (alleging only the qualifying studies taken on December 12, 2016, September 19, 2017, October 20, 2017, and June 19, 2018 are invalid). Because the ALJ did not find Dr. Everhart's pulmonary function study invalid, Employer's argument that the physician should be discredited for relying on an invalid study is without merit.

Moreover, the ALJ's error in stating Dr. Everhart relied on invalid pulmonary function testing is harmless because the ALJ nevertheless credited his opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The ALJ permissibly found his opinion well-reasoned and documented because the "underlying documentation and data is adequate to support [his] conclusions," his opinion is "based on medically acceptable clinical and laboratory diagnostic techniques,"[11] and his conclusion is "consistent with the symptoms, findings, diagnoses and treatment contained in the medical records."[12] Decision and Order at 15-16; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

We also reject Employer's assertion that the ALJ erred in according less weight to Dr. Sargent's opinion. Employer's Brief at 11-16. Dr. Sargent opined Claimant is not totally disabled because "it is unlikely that [he] is suffering from any respiratory impairment." Employer's Exhibit 1. The ALJ found this conclusion conflicted with Dr.

---

[11] Contrary to Employer's argument, the fact that the ALJ found the weight of the pulmonary function study evidence to be non-qualifying does not preclude a finding of total disability based on Dr. Everhart's reasoned medical opinion. Employer's Brief at 6-10. The regulations specifically provide that total disability may be established based on a physician's reasoned opinion that a miner cannot perform his or her usual coal mine employment, even when the pulmonary function and arterial blood gas studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997).

[12] Employer also argues Dr. Everhart's opinion is not credible because he did not consider subsequent pulmonary function studies. Employer's Brief at 11. We reject this argument. An ALJ is not required to discredit a physician who did not review all of a miner's medical records when his opinion, as is the case here, is otherwise well-reasoned, documented, and based on his own examination and objective test results. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

Sargent's own assessment that Claimant had "difficulty taking and sustaining a deep inspiratory/expiratory maneuver" during his examination. Employer's Exhibit 1; Decision and Order at 16.

The ALJ also noted that the treatment records "consistently note symptoms of shortness of breath, cough, sputum production, and wheezing," along with "diagnoses of chronic obstructive pulmonary disease, chronic bronchitis, chronic airway obstruction, coal workers' pneumoconiosis, and shortness of breath." Decision and Order at 16, *citing* Director's Exhibits 10, 13; Claimant's Exhibits 1, 2, 4, 5. The ALJ permissibly found Dr. Sargent's medical opinion not credible because it is "inconsistent with his own examination and the symptoms, findings, diagnoses, and treatment contained in the medical records." Decision and Order at 16; *see Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole.[13] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm his finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305, 725.309. Because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm the award of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17-21.

[13] Because Claimant established total disability based on Dr. Everhart's opinion, we need not address Employer's argument that the ALJ erred in weighing the opinions of Drs. Raj and Green. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 6-10.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge