

U.S. Department of Labor

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



BRB No. 21-0029 BLA

CLARK BRINEGAR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY PROCESSING COMPANY,	)	
INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL	)	DATE ISSUED: 09/24/2021
SOUTH/CHARTIS	)	
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner, (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Kyle L. Johnson, (Fogle Keller Walker PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2016-BLA-05701) rendered on a subsequent claim filed on February 3, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act).<sup>1</sup>

The ALJ credited Claimant with at least twenty-two years of surface coal mine employment in conditions substantially similar to those in an underground mine. He also found Claimant has a totally disabling respiratory or pulmonary impairment, establishing a change in an applicable condition of entitlement and invoking the Section 411(c)(4) presumption.<sup>2</sup> 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 725.309. He further determined Employer failed to rebut the presumption. Thus he awarded benefits commencing February 2015, the month the claim was filed.

On appeal, Employer does not challenge the award of benefits. Rather, it argues the ALJ erred in determining the date for the commencement of benefits.<sup>3</sup> Claimant filed a response brief in support of the ALJ's finding regarding the date for the commencement of benefits. 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

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<sup>1</sup> This is Claimant's second claim for benefits. ALJ Donald W. Mosser denied Claimant's initial claim on March 20, 2009 because he failed to establish total disability. 20 C.F.R. §718.204(b)(2); Director's Exhibit 1.

<sup>2</sup> 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) (2012); 20 C.F.R. §718.305.

<sup>3</sup> We affirm, as unchallenged on appeal, the ALJ's finding that Claimant is entitled to benefits. Decision and Order at 28; see *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

accordance with applicable law.<sup>4</sup> 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).

Benefits commence in the month a miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not ascertainable from all the relevant evidence, benefits commence in the month the claim was filed, unless credited evidence establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Green*, 790 F.2d at 1119 n.4; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In a subsequent claim, benefits may not be paid for any period before the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

We agree with Employer’s argument that the ALJ erred in assigning the date that benefits commence in this case as the month that the claim was filed, February 2015. Employer’s Brief at 7-10. Review of the ALJ’s Decision and Order reflects he credited evidence that establishes Claimant was not totally disabled due to pneumoconiosis at a time subsequent to that date.

Specifically, in finding Claimant totally disabled, the ALJ first weighed the conflicting pulmonary function testing.<sup>5</sup> 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 7-9. The ALJ acknowledged pulmonary function studies Claimant performed on April 1, 2015 and December 28, 2017 are non-qualifying,<sup>6</sup> whereas studies he performed on October 14, 2018, December 20, 2018, and January 31, 2020 are qualifying.<sup>7</sup> *Id.* He found

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<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibits 23, 24; Hearing Tr. at 17.

<sup>5</sup> The ALJ found the arterial blood gas testing does not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 9-10.

<sup>6</sup> A “qualifying” pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A “non-qualifying” study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

<sup>7</sup> The ALJ found pulmonary function studies administered on February 1 and 7, 2017 are qualifying, but found them invalid. Decision and Order at 7-9.

each study “may accurately represent Claimant’s respiratory condition at the time it was performed,” but concluded the qualifying studies are entitled to greater weight because they were taken more recently. *Id.* Thus he found Claimant established total disability based on this evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9.

With respect to the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ noted Dr. Everhart opined Claimant is not totally disabled based, in part, on the non-qualifying April 1, 2015 pulmonary function study. Decision and Order at 11; Director’s Exhibit 10. The ALJ found the doctor’s opinion supported by the non-qualifying objective testing taken as part of his examination of Claimant. Decision and Order at 10. He assigned the opinion diminished weight, however, because it is not based on the most recent objective testing, as Dr. Everhart did not “have the opportunity to address the subsequent qualifying” pulmonary function testing when rendering his opinion. *Id.* at 11.

In contrast, Drs. Rosenberg, Jarboe, Nader, and Raj opined Claimant is totally disabled. Dr. Rosenberg initially opined Claimant is not totally disabled based, in part, on the non-qualifying pulmonary function studies Dr. Everhart administered in 2015. Employer’s Exhibit 5. He changed his opinion, however, and opined Claimant is totally disabled after reviewing the qualifying October 14, 2018, December 20, 2018, and January 31, 2020 pulmonary function studies and a qualifying December 20, 2018 blood gas study. Employer’s Exhibits 7 at 10, 29-30; 11. He specifically indicated Claimant was not totally disabled in 2015, but thereafter became totally disabled. Employer’s Exhibit 11. Drs. Jarboe and Nader also opined Claimant is totally disabled based on the 2018 pulmonary function and arterial blood gas testing. Claimant’s Exhibit 2; Employer’s Exhibit 4. Dr. Raj opined he is totally disabled based on the 2020 pulmonary function and arterial blood gas testing. Claimant’s Exhibit 3. The ALJ found the opinions of Drs. Rosenberg, Jarboe, Nader, and Raj well-reasoned and documented. Decision and Order at 13. Thus he found Claimant established total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13.

Most importantly, in ascertaining the date benefits should commence in this case, the ALJ reiterated that “Dr. Everhart examined Claimant on April 1, 2015 [and] found Claimant not disabled based on the non-qualifying objective testing” administered during that examination. Decision and Order at 28. Because the non-qualifying April 1, 2015 pulmonary function study “corroborated Dr. Everhart’s opinion,” the ALJ concluded “there is *credible evidence* that Claimant was not totally disabled due to pneumoconiosis at the time Dr. Everhart examined” Claimant in April 2015. *Id.* (emphasis added). In light of the fact that Claimant’s December 28, 2017 pulmonary function study is also non-qualifying, the ALJ concluded “Claimant’s reliable [pulmonary function studies] are non-qualifying up until October 14, 2018, at which point each subsequent [study] is qualifying for total disability.” *Id.* Notwithstanding, the ALJ concluded “the record does not contain

medical evidence establishing exactly when Claimant became totally disabled” and therefore determined the filing date should be the date that benefits commence. *Id.*

As discussed above, however, benefits may commence in the month the claim was filed, unless credited evidence establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. *See Edmiston*, 14 BLR at 1-69 (if medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of the filing date, unless uncontradicted medical evidence indicates that the miner was not totally disabled at some point subsequent to the filing date); *Owens*, 14 BLR at 1-50. Because the ALJ found credible evidence that Claimant was not totally disabled at a point subsequent to the filing date, the ALJ was precluded from using the month of the filing date as the month benefits should commence. *Id.* Based on the foregoing, we vacate the ALJ’s commencement date finding.

Although the Board has authority to modify the commencement date, doing so is not appropriate under these circumstances. 20 C.F.R. §725.503(b), (d)(1); *see Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 328 (6th Cir. 2014). While the ALJ found “the record does not contain medical evidence establishing exactly when Claimant became totally disabled,” he failed to address the credible medical evidence establishing Claimant was not disabled for a period of time between the filing date of the claim in February 2015 and Claimant’s qualifying October 14, 2018 pulmonary function study. Decision and Order at 28. Resolving this issue requires weighing the evidence, which the Board is not empowered to do. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Thus we remand this case for the ALJ to reconsider and determine the commencement date.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration of his commencement date finding.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge