**U.S. Department of Labor**

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

BRB No. 22-0510 BLA

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| KENNITH J. BOWMAN | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| UPPER MILL MINING COMPANY | ) | |
| | ) | DATE ISSUED: 9/26/2023 |
| 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 William P. Farley, Administrative Law Judge, United States Department of Labor.

Kennith J. Bowman, Grundy, Virginia.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2019-BLA-05944) of Administrative Law Judge (ALJ) William P. Farley, rendered on a miner's subsequent claim filed on August 13, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish at least fifteen years of qualifying coal mine employment or a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he concluded Claimant failed to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] or establish entitlement under 20 C.F.R. Part 718. Therefore, he denied benefits.

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

[2] Claimant filed two prior claims. He withdrew his first claim, so it therefore is considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 1. Claimant filed his most recent prior claim on September 2, 2014, which the district director denied on August 3, 2016, for failure to establish total disability. Director's Exhibit 2. Where a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds "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 the district director denied his prior claim for failure to establish a totally disabling respiratory or pulmonary impairment, Claimant had to submit new evidence establishing this element of entitlement in order to obtain a review on the merits of his claim. *White*, 23 BLR at 1-3; Director's Exhibit 2.

[3] Section 411(c)(4) 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.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the denial and remand the case for the ALJ to reconsider the pulmonary function study evidence.

In an appeal filed by a claimant who is not represented by counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

## 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. 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 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).

### Pulmonary Function Studies

In his summary of the medical evidence, the ALJ indicated the parties designated four pulmonary function studies dated July 18, 2018, August 29, 2018, November 8, 2018, and January 20, 2021.[5] Decision and Order at 9. However, when weighing the evidence at total disability, he subsequently stated, without identifying the date of the study: "Only

[4] 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. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.28; Hearing Transcript at 17.

[5] The ALJ misidentified the date of this study as July 20, 2021. *See* Decision and Order at 9; Claimant's Exhibit 5.

one pulmonary function test was provided, and it did not produce qualifying values."[6] *Id.* at 17. Therefore, he found Claimant failed to establish total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer generally argues that none of the pulmonary function study evidence is qualifying. Employer's Brief at 3. The Director argues the ALJ erred by finding the January 20, 2021 study was "non-qualifying" in his summary of the evidence and states that his discussion of the pulmonary function study evidence is confusing because he initially listed four studies in his summary of the evidence, but when weighing the evidence, he stated only one study was provided. Director's Brief at 1-2. We agree with the Director's position.

At the time of the January 20, 2021 study, Claimant was 57 years old. Claimant's Exhibit 5. According to the table values listed in Appendix B of 20 C.F.R. Part 718, a qualifying FEV1 for a miner at this age and at a height of 68.9 inches[7] is 2.01 or less. Claimant's FEV1 on this study was 1.98, and thus was qualifying. *Id.* In addition, Claimant had a percentage of 55 or less when the results of his FEV1 test were divided by the results of the FVC test (1.98/3.78 = 52.38). Decision and Order at 9; Claimant's Exhibit 5; *see* Director's Brief at 1. Therefore, contrary to the ALJ's finding, the January 20, 2021 study was qualifying at 20 C.F.R. §718.204(b)(2)(i)(C).[8]

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

[7] Because the pulmonary function studies reported varying heights for Claimant ranging from 68 to 69 inches, the ALJ calculated an average height for Claimant of 68.63 inches. Decision and Order at 8-9. He then permissibly used the closest greater table height at Appendix B of 20 C.F.R. Part 718 for determining the qualifying or non-qualifying results of the studies. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114, 116 n.6 (4th Cir. 1995); *Carpenter v. GMS Mine & Repair Maintenance Inc.*, BLR , BRB No. 22-0100 BLA (Sept. 6, 2023); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8-9.

[8] The regulations provide that a pulmonary function study demonstrates total disability if it has an FEV1 value equal to or less than those listed in Appendix B, Table B1, and a percentage of 55 or less when the results of the FEV1 test are divided by the results of the FVC test. 20 C.F.R. §718.204(b)(2)(i)(C).

Further, the record shows that all four of the studies the ALJ summarized were admitted into the record. Decision and Order at 9; Hearing Transcript at 8-12; Director's Exhibits 15, 17, 18; Claimant's Exhibit 5. Therefore, when weighing the evidence, he erred in stating that only one pulmonary function study was submitted. Decision and Order at 17; *see McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to consider all relevant evidence requires remand). Consequently, we must vacate the ALJ's finding that the pulmonary function study evidence fails to establish total disability. 30 U.S.C. §923(b); 20 C.F.R. §718.204(b)(2)(i).

**Arterial Blood Gas Studies**

The ALJ correctly found that the two arterial blood gas studies, dated August 29, 2018, and November 8, 2018, are non-qualifying for total disability. Decision and Order at 10, 17; Director's Exhibits 15, 18. We therefore affirm the ALJ's determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

**Cor Pulmonale**

The ALJ noted Dr. Ajjarapu mentioned cor pulmonale in her medical report when summarizing Dr. DePonte's reading of the August 29, 2018 x-ray. Decision and Order at 18; Director's Exhibit 15. However, the ALJ permissibly found that Dr. Ajjarapu's opinion on this issue was neither well-reasoned nor well-documented because Dr. DePonte recommended further testing to confirm the existence of cor pulmonale.[9] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); Decision and Order at 18. Thus, we affirm the ALJ's determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

**Medical Opinions**

The ALJ initially noted that Claimant's usual coal mine work was as a continuous miner requiring him "to exert moderate physical exertion." Decision and Order at 5-6. He then considered the medical opinions of Drs. Ajjarapu and Rosenberg.[10] Dr. Ajjarapu

[9] Dr. DePonte commented: "Enlarged hila may represent adverpathy or enlarged pulmonary arteries and cor pulmonale (pulmonary arterial hypertension). Suggest CT to differentiate." Director's Exhibit 15.

[10] The ALJ also considered Family Nurse Practitioner Compton's opinion that Claimant's respiratory condition "has limited his ability to be active and do daily activities when he is having a[n] acute exacerbation." Director's Exhibit 17 at 6. However, the ALJ

conducted the Department of Labor-sponsored exam on August 29, 2018 and opined Claimant's pulmonary function study showed a "severe pulmonary impairment" and his blood gas study showed "mild resting hypoxia." Director's Exhibit 15 at 7. She stated Claimant's work as a continuous miner operator required him to drill coal with a moderate level of exertion and concluded he "doesn't have the pulmonary capacity to do his previous coal mine employment." *Id*. at 8.

Dr. Rosenberg examined Claimant on November 8, 2018, noting he worked in coal mine employment for twelve and a half years, operating a miner on the deck where he had to lift 50 to 100 pounds, help lift cables, do mechanical and occasional dead work, and fill in on other equipment as needed. Director's Exhibit 18. He found Claimant is not totally disabled as the mild degree of obstruction he diagnosed was not qualifying. *Id*. In a supplemental report, based on a review of additional records, including Dr. Ajjarapu's report and the July 18, 2018 pulmonary function study, Dr. Rosenberg reiterated his belief that Claimant does not have a totally disabling respiratory impairment because Claimant's FEV1 improved over time, the pulmonary function study values he obtained were non-qualifying, and the blood gas values were also non-qualifying. Employer's Exhibit 1.

The ALJ found that Dr. Ajjarapu's opinion was not well-documented or well-reasoned and therefore "entitled to less probative weight" because it was limited to her own testing and evaluation. Decision and Order at 19. The ALJ found Dr. Rosenberg's opinion was "based on all of Claimant's testing"[11] but gave it "little probative weight" because he did not address the exertion level required in Claimant's last job or the impact of Claimant's time spent in coal mine employment. *Id*. at 19-20. Therefore, the ALJ found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 20.

Because we are unable to discern the extent to which the ALJ's mischaracterization of the pulmonary function study evidence affected his weighing of the medical opinions or his weighing of the evidence as a whole, we vacate the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2).

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gave her opinion less weight because she is not a medical doctor and because she did not specifically state whether Claimant is totally disabled. Decision and Order at 19.

[11] Contrary to the ALJ's finding, Dr. Rosenberg did not consider the results of Claimant's most recent pulmonary function study, which Claimant performed on January 20, 2021 and was qualifying. *See* Decision and Order at 19-20; Director's Exhibit 18; Employer's Exhibit 1.

**Remand Instructions**

On remand, the ALJ must reconsider whether Claimant has established total disability based on the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i). He must consider all relevant pulmonary function studies and undertake a quantitative and qualitative analysis of the conflicting results in rendering his findings of fact. 20 C.F.R. §718.204(b)(2)(i); *see Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).

He must also reconsider the medical opinion evidence, taking into consideration his findings regarding the objective studies and comparing the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. 20 C.F.R. §718.204(b)(2)(iv); *see Lane v. Union Carbide Corp*., 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc*., 943 F.2d 509, 512 n.4 (4th Cir. 1991); *see also Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). In rendering his credibility findings, he must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

The ALJ must set forth his findings in detail and explain his rationale in accordance with the Administrative Procedure Act.[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the ALJ determines total disability is demonstrated by the pulmonary function studies or medical opinions, or both, he must weigh all the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *see also Shedlock*, 9 BLR at 1-198.

If the ALJ determines Claimant is totally disabled, Claimant will have established a change in one of the applicable conditions of entitlement. 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3. The ALJ must then review the entirety of the claim on the merits without

[12] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and reasons or basis therefor, on all material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

the benefit of the Section 411(c)(4) presumption.[13] If Claimant is unable to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[13] As the ALJ permissibly found, Claimant's employment records and hearing testimony support that he failed to establish at least fifteen years of qualifying coal mine employment. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 5; Hearing Transcript at 6, 14; Director's Exhibits 5-8. Therefore, even if he establishes total disability, he is unable to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge