U.S. Department of Labor

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

BRB No. 21-0254 BLA

ROBERT J. HAFNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DAKOTA WESTMORELAND CORPORATION	)	DATE ISSUED: 4/11/2022
	)	
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Awarding Benefits (2019-BLA-05908) 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 claim filed on May 21, 2018.

The ALJ found Claimant established at least thirty years of surface coal mine employment in conditions substantially similar to those in an underground mine 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,[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. Alternatively, Employer argues the ALJ erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging affirmance of the ALJ's rejection of Drs. Castle's and Farney's opinions that the August 6, 2018 qualifying exercise arterial blood gas study actually produced normal results. The Director also urges affirmance of the ALJ's finding that this study produced qualifying results and thus is evidence of total disability.

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 accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[1] 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.

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

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit because Claimant performed his coal mine employment in North Dakota.

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

To invoke the Section 411(c)(4) presumption, a claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 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).

The ALJ found Claimant established total disability based on the arterial blood gas study evidence, the medical opinion evidence, and the evidence as a whole.[4] 20 C.F.R. §718.204(b)(2); Decision and Order at 16-19.

Arterial Blood Gas Studies

Employer argues the ALJ erred in finding Claimant established total disability based on the arterial blood gas study evidence. Employer's Brief at 15-21. We disagree.

The ALJ considered two arterial blood gas studies dated December 9, 2003 and August 6, 2018. Decision and Order at 8, 17-18; Director's Exhibit 18; Employer's Exhibit 1. He found Claimant established total disability based on the August 6, 2018 exercise study. Decision and Order at 17-18.

We reject Employer's argument that the ALJ erred in failing to explain how he weighed the conflicting arterial blood gas studies. Employer's Brief at 14-15.

See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] The ALJ found Claimant did not establish total disability based on the pulmonary function study evidence, and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 16-18.

The ALJ noted the December 9, 2003 and August 6, 2018 resting arterial blood gas studies produced non-qualifying results,[5] while the August 6, 2018 exercise blood gas study produced qualifying results.[6] Decision and Order at 17. He also noted Drs. Farney and Castle indicated the August 6, 2018 exercise study produced normal or non-qualifying results "for [Claimant's] age and the altitude" based on the Manual of Uniform Laboratory Procedures from the Intermountain Thoracic Society. *Id.* Considering the regulations, he stated "[t]he relevant inquiry is whether the arterial blood gas studies 'show the values listed in Appendix C to this part.'" *Id.* at 18, *citing* 20 C.F.R. §718.204(b)(2)(ii). He determined the August 6, 2018 exercise study produced qualifying values based on the table values listed in Appendix C to 20 C.F.R. Part 718 for the applicable altitude range of 3,000 to 5,999 feet.[7] *Id.*

In his role as the fact-finder the ALJ is granted broad discretion in evaluating the credibility of the evidence of record. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). The ALJ permissibly assigned greatest weight to the most recent study conducted on August 6, 2018, which produced qualifying results during exercise. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990) (ALJ may consider amount of time separating studies); Decision and Order at 18.

Employer raises no further error with respect to the ALJ's weighing of the arterial blood gas studies. We therefore affirm, as supported by substantial evidence, his finding

[5] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[6] The December 9, 2003 arterial blood gas study does not include any exercise blood gas results. Employer's Exhibit 8.

[7] As the ALJ recognized, the August 6, 2018 exercise blood gas study was performed at an altitude of 3,000 to 5,999 feet above sea level and produced an arterial pCO2 value of 34.5. Decision and Order at 17-18; Director's Exhibit 16. Under the regulatory criteria, blood gas studies performed at this altitude and with this arterial pCO2 value are qualifying for total disability if they produce a corresponding arterial pO2 value equal to or less than 60. 20 C.F.R. Part 718, Appendix C. The August 6, 2018 exercise blood gas study produced an arterial pO2 value of 57.7 and is therefore qualifying. Director's Exhibit 16.

that the August 6, 2018 exercise arterial blood gas study established total disability.[8] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP* [*Ondecko*], 990 F.2d 730 (3d Cir. 1993); 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 18.

Medical Opinions

With respect to the medical opinion evidence, the ALJ discredited Drs. Farney's and Castle's opinions that Claimant does not have a totally disabling respiratory or pulmonary impairment as inadequately reasoned. Decision and Order at 19 Employer's Exhibits 3, 5, 7. He found Dr. Krefft's opinion that Claimant is totally disabled from a pulmonary impairment credible and sufficient to establish total disability. Decision and Order at 19; Director's Exhibit 16; Employer's Exhibit 2.

Dr. Farney noted the August 6, 2018 exercise arterial blood gas study produced qualifying results based on the Department of Labor's (DOL) table values listed in Appendix C to 20 C.F.R. Part 718. Employer's Exhibit 3 at 7. He further stated the DOL's "tables are only grossly adjusted for elevation and different barometric pressures and are not standardized for exertion." *Id*. Additionally, he listed a chart with tables that "show the predicted PaO2 that would be found at various elevations with the qualifying PaO2" for each elevation. *Id*. Considering that chart, Dr. Farney stated "[t]hese tables show that the PaO2 of 58 mmHg obtained at 5,280 feet in Denver, [Colorado] would have been 64 mmHg if the [arterial blood gas study] had been obtained at 3,000 feet, which would have been qualifying (and vice versa)." *Id*. Moreover, he referenced the Intermountain Thoracic Society's *Clinical Pulmonary Function Testing: A Manual of Uniform Laboratory Procedures* and found the exercise study results "basically within normal limits."[9] Employer's Exhibit 7 at 21-25.

[8] The regulations provide that evidence which meets the standards of the arterial blood gas test values listed in Appendix C to Part 718 shall, absent contrary probative evidence, establish total disability. 20 C.F.R. §718.204(b)(2).

[9] When asked why he preferred the Intermountain Thoracic Society's *Clinical Pulmonary Function Testing: A Manual of Uniform Laboratory Procedures* as opposed to the Department of Labor's (DOL) tables, Dr. Farney stated "this and other sources look at the precise elevation [and] the precise barometric pressure." Employer's Exhibit 7 at 21-23. He noted the DOL's tables are "relatively imprecise." *Id*. at 23. He explained "the [DOL] averages or it assumes everything between 3,000 feet and sea level is the same, where in fact the barometric pressure varies by, if I'm doing my math correctly, about 80 millimeters of pressure. So that's a big difference." *Id*. at 24.

Similarly, Dr. Castle noted the August 6, 2018 exercise arterial blood gas study "showed a decline in PO2 to a level of 57.7 mmHg" and "[t]he barometric pressure on that day was 632 mmHg." Employer's Exhibit 5 at 19. He also stated "the predicted lower limit of normal for a man his age (67 years) at the barometric pressure (632 mmHg) would be 56 mmHg" using "the prediction equation" from the Intermountain Thoracic Society's manual. *Id*. He concluded "that based upon proven scientific data taken from the *Clinical Pulmonary Function Testing: A Manual of Uniform Laboratory Procedures*, [Claimant] had a PO2 on that given date that was within the normal range even with exercise." *Id*.

The ALJ discredited both doctors' opinions. Decision and Order at 18-19. He determined Drs. Farney and Castle "relied on their claims that if Claimant's exercise blood gas study was done at lower altitude, it would be normal, or non-qualifying."[10] He permissibly rejected their view because it conflicts with DOL regulations: contrary to Employer's argument, the Department considered the effects of age and altitude when it promulgated the Appendix C tables following notice and comment rulemaking. *See Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 1430 (10th Cir. 1984) (ALJ "may reject or accord little weight to the opinion of a physician whose basic medical assumptions are contrary to the findings and purposes of the Act"); *Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 313 (4th Cir. 2012) (upholding ALJ's discounting of expert opinion that "finds no support in the Department's regulations").

Thus the ALJ permissibly discredited their opinions because they believed the August 6, 2018 exercise arterial blood gas study produced non-qualifying results, contrary to his finding that the study produced qualifying results based on the DOL's table listed in Appendix C to 20 C.F.R. Part 718. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fagg v. Amax Coal Co*., 12 BLR 1-77, 1-79 (1988) ("It is the role of the [ALJ], as the trier of fact, to determine both the credibility of the evidence and the inferences to be drawn from it."); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985) ("Where there is a rational basis for the [ALJ's] credibility determination, the determination must be upheld."); Decision and Order at 19. As Drs. Farney's and Castle's opinions are the only contrary medical opinions of record, substantial evidence supports

[10] The ALJ noted "Dr. Farney claimed that Claimant had some decrease in his pO2 with exercise, which was much more likely to occur at elevation, and with more severe exercise." Decision and Order at 18. He stated Dr. Farney opined "Claimant might have more trouble if he were at higher elevations, but he should be able to do a lot of ordinary and even mild to moderately strenuous activities." *Id*. at 18-19. In regard to Dr. Castle, he noted the doctor stated "Claimant does not have evidence of a disabling abnormality of blood gas transfer mechanisms." *Id*. at 19. The ALJ stated Dr. Castle "concluded that Claimant's arterial blood gas results, adjusted for age and altitude, were normal." *Id*.

the ALJ's determination that the medical opinion evidence does not undermine the totally disabling results of the August 6, 2018 exercise arterial blood gas study.[11] Decision and Order at 19.

Consequently, we affirm, as supported by substantial evidence, the ALJ's finding that Claimant established total respiratory disability when considering the record as a whole.[12] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 19. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[13] or that "no part

[11] We need not address Employer's argument that the ALJ erred in crediting Dr. Krefft's opinion and finding the medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 16-21. As Dr. Krefft diagnosed total disability, his opinion is not contrary to the qualifying arterial blood gas study evidence. Even if the ALJ were to accord Dr. Krefft's opinion no weight, the medical opinion evidence could not affect the ALJ's decision that the arterial blood gas study evidence establishes disability. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987). Thus Employer has not explained how the "error to which [it] points could have made any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] Employer asserts the ALJ failed to properly consider the non-qualifying pulmonary function studies as contrary probative evidence. Employer's Brief at 15. We disagree. Because they measure different types of impairment, non-qualifying pulmonary function studies do not necessarily call into question valid and qualifying arterial blood gas studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Thus, we affirm the ALJ's permissible finding that "there is no contrary probative evidence" that outweighed the qualifying exercise arterial blood gas study. Decision and Order at 19.

[13] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to rebut the presumption by either method.[14]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Farney and Castle to disprove legal pneumoconiosis. Both doctors opined Claimant has chronic obstructive pulmonary disease (COPD) and emphysema caused by cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 3, 5, 7. The ALJ found their opinions inadequately explained and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 23-26.

Employer argues the ALJ applied the wrong legal standard when discrediting Drs. Farney's and Castle's opinions, contending he required each doctor to "rule out" coal mine dust exposure as a causative factor of Claimant's COPD. Employer's Brief at 6-9. We disagree. The ALJ correctly stated "Employer must establish that Claimant's impairment is not 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 22; *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i). Moreover, he discredited their opinions because he found them inadequately reasoned and therefore insufficient to support their own conclusions, not because they failed to meet a particular legal standard. *See Minich*, 25 BLR at 1-155 n.8; Decision and Order at 25, 26.

Employer also argues the ALJ erred in weighing the opinions of Drs. Farney and Castle. Employer's Brief at 11. We disagree. The ALJ discredited their opinions because he permissibly found neither physician "adequately explain[ed] why Claimant's significant history of coal dust exposure was not a contributing or aggravating factor to his respiratory impairment." Decision and Order at 26; *see Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); 20 C.F.R. §718.201(a)(2), (b).

[14] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 21.

The ALJ also observed Dr. Castle opined Claimant's COPD is due to cigarette smoking and unrelated to coal mine dust exposure because Claimant's pulmonary function testing revealed a reduced FEV1/FVC ratio, which the doctor indicated is inconsistent with legal pneumoconiosis. Decision and Order at 25; Employer's Exhibit 5 at 18. The ALJ permissibly found Dr. Castle's rationale unpersuasive because the regulations "allow[] a claimant to establish disability solely on the basis of a qualifying FEV1 accompanied by an FEV1/FVC value equal to or less than 55%." Decision and Order at 25; *see Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); 20 C.F.R. §718.204(b)(2)(i)(C).

Employer generally argues Drs. Farney's and Castle's opinions are well-reasoned and documented on the issue of legal pneumoconiosis. Employer's Brief at 10, 16-22. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in discrediting Drs. Farney's and Castle's opinions, we affirm his finding that Employer did not disprove legal pneumoconiosis.[15] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 26. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26-27. He discredited the disability causation opinions of Drs. Farney and Castle because they failed to diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 27. Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that Claimant does not have legal pneumoconiosis, which we have rejected. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v.*

[15] Because the ALJ provided valid reasons for discrediting Drs. Farney's and Castle's opinions, we need not address Employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 11-14, 21-22.

Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order at 27. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge