U.S. Department of Labor

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

BRB No. 21-0295 BLA

EDDIE D. CURTIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY	)	
	)	DATE ISSUED: 4/27/2022
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 and Order Denying Employer's Motion for Reconsideration of John P. Sellers, III, 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.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration

(2018-BLA-06286) rendered on a claim filed on July 31, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-seven years of surface coal mine employment in conditions substantially similar to those in an underground mine, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined 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 excluding evidence it submitted post-hearing. It also argues he erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption and that it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

Evidentiary Issue

Employer argues the ALJ erred in excluding Employer's Exhibit 17, a June 1, 2020 medical treatment record from Dr. Adams, which Employer submitted post-hearing. Employer's Brief at 21-23. We disagree.

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[1] Section 411(c)(4) provides a rebuttable presumption a miner's total disability is 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 Claimant established thirty-seven years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 18.

[3] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 14; Hearing Transcript at 44-45.

Documentary evidence that was not submitted to the district director may be received in evidence, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). Evidence not exchanged within the twenty-day time frame may still be admitted at the hearing with the written consent of the parties, or on the record at the hearing, or upon a showing of good cause. 20 C.F.R. §725.456(b)(3). If the parties do not waive the twenty-day requirement or good cause is not shown, the ALJ shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3). Because the ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn the disposition of an evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The ALJ held a hearing in this claim on May 21, 2019. Subsequently, Employer submitted, and the ALJ admitted into the record, a July 27, 2020 supplemental report from Dr. Rosenberg. Decision and Order at 3; Employer's Exhibits 15, 16. Thereafter the ALJ held two telephonic conferences with the parties on October 14, 2020 and October 16, 2020 to resolve a number of outstanding evidentiary issues. October 14 and 16, 2020 Telephone Conference Transcripts. On October 21, 2020, fifteen months after the hearing for this claim and six days after the second post-hearing conference call, Employer submitted Dr. Adams's June 1, 2020 treatment record to the ALJ. As it was untimely, the ALJ held in his Decision and Order Awarding Benefits that he would not consider it. Decision and Order at 3.

Employer requested reconsideration and explained that Dr. Rosenberg's office had omitted the treatment record from his report and did not inform Employer of this error until October 21, 2020. Mot. for Recon. at 2-3 (unpaginated). It argued the ALJ should admit this evidence because it is "relevant, if not dispositive," as it reflects Claimant may have experienced an aneurysm after the hearing which "likely explains [Claimant's] variable exercise test results." Mot. for Recon. at 2-3. In his responsive order, the ALJ held Employer failed to establish good cause for the late submission of this report because it had been given multiple opportunities to submit evidence after the hearing, such as the October 2020 conference calls, and it did not formally request leave to admit Dr. Adams's report. Order on Mot. for Recon. at 2.

In challenging this finding, Employer has not explained how the ALJ abused his discretion. It generally cites the "disruptions of the COVID 19 pandemic" to explain its

failure to submit Dr. Adams's report in a timely manner.[4] Employer's Brief at 22. It did not make this good cause argument before the ALJ, nor does it explain how the "COVID 19 pandemic" supports a good cause basis for admitting this evidence more than a year after the hearing. It further does not contest that it failed to formally request leave for admission of the evidence. Thus we reject its argument. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 591 (6th Cir. 2021) (parties forfeit arguments before the Board not first raised to the ALJ); *Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

We therefore affirm the exclusion of Employer's Exhibit 17. *See McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Blake*, 24 BLR at 1-113; Decision and Order at 3-4; Order on Mot. for Recon. at 2.

Invocation of the Section 411(c)(4) Presumption – 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.[5] *See* 20 C.F.R. §718.204(b)(1). 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 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).

[4] Employer also argues that Claimant did not oppose its request to submit Dr. Adams's report. Employer's Brief at 22. We note that Claimant responded to Employer's Motion for Reconsideration indicating his opposition to admitting this evidence. Cl. Res. to Mot. for Recon. at 2-3 (unpaginated).

[5] We affirm, as unchallenged on appeal, the ALJ's finding Claimant's usual coal mine employment was as a maintenance worker and heavy equipment operator, and that it required heavy manual labor. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6-7.

The ALJ found Claimant established total disability based on the arterial blood gas study and medical opinion evidence, and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 16. Employer does not challenge the ALJ's finding that the blood gas study evidence establishes total disability. *See* Employer's Brief at 9-10 ("ALJ's finding (relying on the exercise [blood gas] samples) is likely a determination that falls within an ALJ's discretionary power to make."). Thus we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the ALJ erred in weighing the medical opinion evidence and the evidence as a whole. Employer's Brief at 8-19. We disagree.

The ALJ found Drs. Green and Nader opined that Claimant is totally disabled by a respiratory or pulmonary impairment, and Drs. Basheda and Rosenberg opined that he is not. Decision and Order at 10-16; Director's Exhibits 23, 26; Claimant's Exhibits 2, 3, 6; Employer's Exhibits 1, 3, 11-13, 15, 16. He found the opinions of Drs. Green and Nader reasoned and documented, and the opinions of Drs. Basheda and Rosenberg unpersuasive and inconsistent with the weight of the objective test results. Decision and Order at 10-16.

Drs. Green and Nader

Employer argues the ALJ erred in finding the opinions of Drs. Green and Nader support a finding of total disability. Employer's Brief at 10-14. It first maintains that Dr. Green questioned the "value of the . . . exercise blood gas testing" in his deposition because he conceded that the exercise studies demonstrate only "transient oxygen debt" rather than a permanent condition. Employer's Brief at 10-11. It asserts the ALJ failed to weigh this aspect of Dr. Green's opinion when finding it credible. *Id*. This argument has no merit.

Dr. Green testified Claimant's resting blood gas study demonstrates significant hypoxemia. Director's Exhibit 26 at 14-15. With respect to the exercise blood gas testing, Dr. Green explained Claimant walked on a treadmill for one minute and sixteen seconds before he had to stop because his heart rate became elevated. *Id*. at 15-16. Dr. Green twice drew Claimant's blood "at different intervals of exercise" within that time frame. *Id*. He opined the resultant exercise samples demonstrate significant hypoxemia and are qualifying under the regulations. *Id*.

[6] The ALJ found Claimant did not establish total disability based on the pulmonary function studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 7-8.

After Employer's counsel asked if it is possible for an individual who exercises for less than two minutes to go "into oxygen debt early in an exercise study that would later resolve," Dr. Green responded as follows:

> Yes, I suppose you can, but this gentleman, you know, was impressively hypoxemic for the first two minutes. At any point and time this degree of hypoxemia is harmful. So whether or not he would go back up in oxygenation, which we [were not] able to document because he [was not] able to exercise that far, then he still is harmed by the presence of hypoxemia even if it's transient. Transient hypoxemia is harmful.

Id. at 27-28. He later reiterated he could not predict whether Claimant's "oxygenation [was] going to improve at two to four minutes," but what is evidenced is Claimant "was in a harmful situation at the beginning of his exercise with hypoxemia." *Id*. at 29. He also definitively stated that in his opinion Claimant was totally disabled. *Id*. at 31. Thus, contrary to Employer's characterization of the facts, Dr. Green did not question the value of the exercise blood gas testing; he opined Claimant is totally disabled based on hypoxemia demonstrated in his blood gas studies. *Id*. at 30, 31, 34.

Employer also argues neither Dr. Green nor Dr. Nader opined Claimant is totally disabled due to a pulmonary or respiratory impairment standing alone because they opined Claimant's disabling hypoxemia[7] could be due in part to obesity or cardiac disease, both extrinsic conditions unrelated to the lungs. Employer's Brief at 12-14, 18-19. This argument has no merit because the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant's respiratory or pulmonary condition precludes the performance of his usual coal mine work. The etiology of Claimant's respiratory or pulmonary condition concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or on rebuttal of the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.204(a), (c), 718.305(d)(1); *Bosco v. Twin Pines Coal Co.*, 892 F.3d 1473, 1480-81 (10th Cir. 1989).

Employer asserts the ALJ erred in crediting Dr. Nader's opinion because he did not "consider the other contrary testing." Employer's Brief at 12. We disagree. An ALJ is not required to discredit a physician who did not review all of a miner's medical records if

[7] Dr. Green opined Claimant has significant hypoxemia evidenced by blood gas testing and "is totally disabled from a pulmonary capacity standpoint." Director's Exhibit 23 at 4; Claimant's Exhibit 2 at 5. Similarly, Dr. Nader opined Claimant gets hypoxemic with exercise, is "totally disabled from a pulmonary capacity standpoint," and his chronic cough, wheezing, shortness of breath, and mucus expectoration also contribute to his total pulmonary disability. Claimant's Exhibit 3 at 5.

the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner and objective test results. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984). As Employer raises no further challenge, we affirm the ALJ's finding the opinions of Drs. Green and Nader are reasoned and documented. *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); Decision and Order at 12-13, 16.

Drs. Basheda and Rosenberg

We also reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Basheda and Rosenberg. Employer's Brief at 12-18.

Employer asserts the ALJ failed to explain why he discredited Dr. Basheda's opinion. Employer's Brief at 16. We disagree. Dr. Basheda opined pulse oximetry testing is a better measure of respiratory capacity than blood gas studies, and the six-minute pulse oximetry testing he conducted establishes Claimant has no respiratory impairment despite the qualifying exercise blood gas studies. Employer's Exhibits 3 at 13, 12 at 16-18. The ALJ was not persuaded that a six-minute pulse oximetry walk test is a valid substitute for an exercise blood gas study as "the regulations provide for a finding of total disability based upon arterial blood gas studies, not pulse oximetry." Decision and Order at 15-16. He permissibly found "Dr. Basheda's preference for the pulse oximetry and six-minute walk test" is not an adequate reason to give it more weight than the qualifying exercise blood gas studies, thereby undermining Dr. Basheda's rationale. Decision and Order at 16; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

The ALJ also noted Dr. Basheda "dismissed the qualifying exercise blood gases as limited in nature due to the Claimant's inability to exercise very long." Decision and Order at 16; *see* Employer's Exhibits 3, 12. The ALJ found, however, that the two qualifying exercise arterial blood gas studies Claimant performed on October 31, 2017 and April 16, 2019 are valid. Decision and Order at 9-10. He specifically discredited the opinions of Drs. Basheda and Rosenberg invalidating these studies because "their reasons . . . are not supported by the regulations" and are unpersuasive.[8] *Id*. Employer has not identified any

[8] Both Dr. Rosenberg and Dr. Basheda questioned whether Claimant exercised long enough to achieve a target heart rate such that the exercise blood gas testing is accurate. Employer's Exhibits 11-13, 15. The ALJ noted the regulations require the "technician to note the duration and type of exercise and the pulse rate at the time the blood sample is drawn," but they do not prescribe a minimum duration of exercise or require the miner to achieve a certain pulse rate. Decision and Order at 9, *citing* 20 C.F.R. §718.105(c). He found, "if exercise for a particular length of time or the achievement of a certain pulse rate

error in the ALJ's finding that the October 31, 2017 and April 16, 2019 exercise studies are valid. Thus we affirm this finding. *Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984); 20 C.F.R. §802.211(b). Insofar as Dr. Basheda assumed the October 31, 2017 and April 16, 2019 exercise studies are invalid when opining Claimant is not totally disabled, the ALJ permissibly rejected his opinion. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 16.

We also reject Employer's argument the ALJ erred in discrediting Dr. Rosenberg's opinion.[9] Employer's Brief at 16-17, 29. In concluding Claimant is not totally disabled, Dr. Rosenberg opined if the blood gas study results are corrected for the barometric pressure at the test site, the values would have been "much higher" and well above the qualifying threshold. Employer's Exhibits 11 at 15-16, 24-25, 16 at 7-8. The ALJ permissibly found Dr. Rosenberg's opinion unpersuasive because the regulations already account for the effects of elevation in Appendix C to Part 718. *Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed. App'x. 551, 560 (4th Cir. 2004) (upholding ALJ's discrediting an opinion that contradicts Appendix C); *Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055 (10th Cir. 1990); Decision and Order at 14; Order on Mot. for Recon. at 2-3.

Dr. Rosenberg also opined that Claimant is not totally disabled, in part, because the qualifying exercise blood gas studies are invalid. Employer's Exhibit 11 at 12-14, 26. He conceded if the blood gas study Dr. Green administered was valid, it would support a finding of total disability. *Id.* at 25. As discussed above, the ALJ found the qualifying exercise blood gas studies are valid. Decision and Order at 9-10. Thus the ALJ permissibly rejected Dr. Rosenberg's opinion as contrary to his finding the exercise blood gas studies are valid. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 15.

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was critical to the validity of a study, these factors would be present in the regulations." *Id.*

[9] Employer asserts the ALJ erred in not finding Dr. Rosenberg is the most qualified physician. Employer's Brief at 16. Because the ALJ found Dr. Rosenberg's opinion is not credible, Employer has not identified how finding him more qualified would have made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Decision and Order at 15.

Thus, we affirm the ALJ's determination Claimant established total disability based on the arterial blood gas study and medical opinion evidence,[10] and the evidence as a whole.[11] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 10, 16. We therefore affirm his determination Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 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[12] or "no part 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 did not establish rebuttal by either method.

Employer does not specifically challenge the ALJ's finding it failed to rebut the presumed existence of legal pneumoconiosis. Decision and Order at 23-25. We therefore affirm it. 20 C.F.R. §718.305(d)(1)(i)(A); *see Cox*, 791 F.2d at 446-47; *Skrack*, 6 BLR at 1-711. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding

[10] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Rosenberg and Basheda, we need not address Employer's additional arguments regarding the weight the ALJ assigned their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-9, 12-18.

[11] Employer argues the ALJ erred by failing to address whether the normal single breath carbon monoxide diffusion capacity (DLCO) test in the record undermines the qualifying arterial blood gas testing. Employer's Brief at 10, 16. Employer has not identified medical evidence in the record the ALJ failed to weigh supporting this argument. Thus we decline to address this argument. *Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

[12] 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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). 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).

Claimant does not have pneumoconiosis.[13] Therefore, we affirm the ALJ's conclusion Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

The ALJ also found Employer did not rebut the presumption by establishing "no part of the Claimant's respiratory or pulmonary total disability is caused by pneumoconiosis." Decision and Order at 26, *citing* 20 C.F.R. §718.305(d)(1)(ii). Because Employer raises no specific arguments on disability causation apart from its assertion the ALJ erred in finding it failed to rebut the presumption of clinical pneumoconiosis,[14] we affirm the ALJ's determination Employer failed to prove no part of Claimant's total disability was caused by legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27.

[13] Because we affirm the ALJ's findings on legal pneumoconiosis, we need not address Employer's arguments on clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 5-7, 13 n.7, 19-21.

[14] To the extent Employer argues Dr. Green's opinion that Claimant's total disability is caused by a combination of obesity and pneumoconiosis is insufficient to establish he is totally disabled by pneumoconiosis standing alone, we find no merit in this argument. Employer's Brief at 12. Because Claimant has invoked the Section 411(c)(4) presumption, total disability due to pneumoconiosis is presumed, and Dr. Green's opinion that Claimant's disability is due to both pneumoconiosis and obesity is insufficient to show no part of his total disability is caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Claimant's Exhibit 2.

Accordingly, the ALJ's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge