U.S. Department of Labor

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

BRB No. 22-0013 BLA

SAMUEL LEE DIALS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SMC COAL TERMINAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 04/14/2023
Self-Insured Through SHELL MINING, c/o SMART CLAIMS	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

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

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor, Andrea J. Appel, Counsel for Administrative Appeals),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2020-BLA-05831) rendered on a claim filed on July 30, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of twenty-two years and three months of underground coal mine employment, and found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found he invoked 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).[1] The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding Claimant is totally disabled and thus erred in finding he invoked the presumption. Employer also argues the ALJ erred in finding it failed to rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Benefits Review Board to reject Employer's challenge to the constitutionality of the Section 411(c)(4) presumption.

The 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

[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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged, the ALJ's finding of twenty-two years and three months of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

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 & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

Employer summarily "objects to the application of 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(*l*) because section 1556 of the Affordable Care Act, Pub. Law 111-148, reviving these provisions, violates Article II of the United States Constitution." Employer's Brief at 2. We agree with the Director's argument that Employer has failed to adequately brief its challenge to the constitutionality of the Section 411(c)(4) presumption. *See* 20 C.F.R. §802.211(b); *see also Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57 (1994); Director's Brief at 2. Moreover, even had Employer set forth arguments with respect to the constitutionality of the Affordable Care Act and the severability of its amendments to the Act, those arguments are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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

To invoke the Section 411(c)(4) presumption, 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 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 medical opinion evidence and the evidence as a whole.[4] Decision and Order at 5-12.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 11.

[4] The ALJ determined that the pulmonary function studies and arterial blood gas studies do not establish total disability and there is 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 4-8.

Before weighing the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the ALJ addressed the exertional requirements of Claimant's usual coal mine work as a water pumper. Decision and Order at 4-5. He considered Claimant's testimony that this job involved installing water pumps and laying water lines, and that he was required to walk and stand for most of his shift and lift more than 100 pounds. *Id.*; Director's Exhibit 4. Claimant testified he was required to drag and lift water lines and pumps weighing from fifty to 200 pounds, lift rock dust bags weighing fifty pounds, help install brattices by filling holes with cinder blocks, and perform belt and power moves. Decision and Order at 4-5 (citing Hearing Transcript at 13-15). He noted the belt structure he had to move was heavy and that heavy lifting was a regular part of his job. Hearing Tr. at 15. Based on this evidence, the ALJ found Claimant's usual coal mine work "involved heavy and very heavy manual labor." Decision and Order at 5. We affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ then considered the medical opinions of Drs. Shah and Sood that Claimant is totally disabled, and the opinions of Drs. Rosenberg and Zaldivar that he is not. Decision and Order at 8-11; Director's Exhibits 13, 15, 19, 22, 25; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3, 8. He found Drs. Shah's and Sood's opinions well-documented and reasoned because both physicians explained that Claimant's objective test results show an impairment that prevents him from performing the heavy and very heavy manual labor required by his job. Decision and Order at 8-10. On the other hand, he accorded little weight to the contrary opinions of Drs. Rosenberg and Zaldivar because he inferred both physicians believed Claimant's objective test results had to be qualifying for him to be totally disabled. Decision and Order at 10-11. Additionally, he found neither physician adequately addressed whether Claimant could perform his usual coal mine work with the mild to moderate impairment they agreed he has. Decision and Order at 10-11. Consequently, the ALJ found the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 12.

Employer argues the ALJ erred in crediting the opinions of Drs. Shah and Sood when they relied on preponderantly nonqualifying objective studies[5] and failed to explain why they concluded Claimant is totally disabled. Employer's Brief at 2-5. We disagree.

A physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *Cornett v. Benham Coal, Inc.*, 227 F.3d

[5] 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).

569, 577 (6th Cir. 2000) (even a nonqualifying pulmonary function study reflecting a mild impairment may be totally disabling); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); 20 C.F.R §718.204(b)(2)(iv).

As the ALJ found, Drs. Shah and Sood explained why they believe a respiratory or pulmonary impairment prevents Claimant from performing his usual coal mine work despite his non-qualifying pulmonary function and blood gas studies. Dr. Shah opined that Claimant's November 9, 2018 pulmonary function studies showed severely reduced total lung capacity, a severe restrictive ventilatory defect, and mild decrease in single-breath carbon-monoxide diffusing capacity. Director's Exhibit 13 at 10. Although Claimant's pulmonary function study values were nonqualifying, Dr. Shah opined that a person with an FVC value of 56% of predicted and total lung capacity of 48% of predicted would be unable to perform the heavy physical labor Claimant described. Director's Exhibit 19 at 2; Claimant's Exhibit 1 at 18. Similarly, Dr. Sood noted Claimant's six-minute walk test conducted on July 27, 2021, reflected an estimated peak oxygen consumption of 10.9 milliliters per kilogram per minute, a level Dr. Sood opined was consistent with a Class IV impairment, the "most severe category," per the American Medical Association Guide to the Evaluation of Permanent Impairment. Claimant's Exhibit 2 at 14. He concluded this impairment would leave Claimant unable to perform the heavy or very heavy work required in his usual coal mine work. *Id.*

Substantial evidence supports the ALJ's conclusion that Drs. Shah and Sood understood the physical requirements of Claimant's usual coal mine work and sufficiently explained why they found Claimant to be totally disabled considering the objective testing of record. We therefore reject Employer's allegation of error and affirm the ALJ's finding the opinions of Drs. Shah and Sood well-reasoned and documented.[6] *See Jericol Mining,*

[6] Employer further argues the ALJ erred in crediting Drs. Shah's and Sood's disability opinions when, it alleges, neither physician explained why they attributed Claimant's impairment to pneumoconiosis rather than his heart disease, obesity, and sleep apnea. Employer's Brief at 2-3. But explanations regarding the cause of Claimant's disabling respiratory or pulmonary impairment are not relevant at 20 C.F.R. §718.204(b)(2); they are addressed at 20 C.F.R. §718.305(d) when the ALJ considers whether Employer has rebutted the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(a) ("If . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.").

Inc. v. Napier, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Employer next contends substantial evidence does not support the ALJ's inference that Drs. Rosenberg and Zaldivar believe Claimant's objective studies had to be qualifying for him to be totally disabled. Employer's Brief at 4. We need not address this contention, as Employer does not challenge the ALJ's other reason for discrediting Drs. Rosenberg's and Zaldivar's opinions, namely, they failed to adequately address Claimant's ability to perform the heavy manual labor required by his usual coal mine work despite his mild to moderate restrictive impairment. Decision and Order at 11. Therefore, we affirm the ALJ's credibility determination. *See Skrack*, 6 BLR at 1-711.

We affirm the ALJ's finding that the medical opinions establish total disability. 20 C.F.R §718.204(b)(2)(iv). We also affirm his finding Claimant established total disability based on the evidence as a whole. 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. Thus, we affirm his determination that 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,[7] 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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ found Employer failed to establish rebuttal by either method.[8] Decision and Order at 12-17.

[7] "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). The definition includes "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).

[8] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 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)(1)(i)(A). The United States Court of Appeals for the Sixth Circuit holds that this standard requires Employer to show Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). Employer meets the "in part" standard if it establishes coal mine dust exposure "had at most only a *de minimis* effect on [Claimant's] lung impairment." *Id.* at 407.

Employer relies on the opinions of Drs. Rosenberg and Zaldivar that Claimant does not have legal pneumoconiosis, but instead suffers from restriction related to obesity. Director's Exhibit 22; Employer's Exhibits 2, 3, 8. The ALJ found neither physician adequately addressed whether coal mine dust exposure contributed to, or substantially aggravated, Claimant's moderate reduction in pulmonary capacity. Decision and Order at 14-16. He therefore found neither opinion sufficiently reasoned to rebut legal pneumoconiosis.

Employer contends the ALJ misunderstood and mischaracterized Dr. Rosenberg's opinion when he discredited Dr. Rosenberg's opinion that Claimant's reduced FEV1/FVC ratio on pulmonary function testing was consistent with restriction caused by obesity.[9] Employer's Brief at 6. We need not address this issue. The ALJ also discredited Dr. Rosenberg's opinion that Claimant's restrictive impairment could be related to coal mine dust only if Claimant had advanced pneumoconiosis, finding it inconsistent with the definition of legal pneumoconiosis. Decision and Order at 15. Additionally, he discredited Dr. Rosenberg's opinion because he did not address the etiology of Claimant's chronic bronchitis. *Id.* Employer has not challenged either of these findings. Thus, we affirm them. *See Skrack*, 6 BLR at 1-711. Therefore, we affirm the ALJ's finding that Employer failed to rebut the presumption that Claimant has legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 14-16. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

[9] Employer does not challenge the ALJ's reasons for discrediting Dr. Zaldivar's opinion that Claimant does not have legal pneumoconiosis. We therefore affirm them. *See Skrack*, 6 BLR at 1-711; Decision and Order at 15-16.

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ discredited Drs. Rosenberg's and Zaldivar's opinions on disability causation because they opined Claimant does not have legal pneumoconiosis, contrary to the ALJ's finding. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 17-18. Although Employer alleges the ALJ erred in finding it failed to rebut disability causation, it makes no specific argument apart from its argument regarding legal pneumoconiosis, which we have rejected. Employer's Brief at 5-6. Thus, we affirm the ALJ's finding that Employer failed to establish "no part" of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge