U.S. Department of Labor

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

BRB No. 21-0303 BLA

BENNY L. HARRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENAMERICAN RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 8/30/2022
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision & Order Granting Benefits of Noran J. Camp, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Noran J. Camp's Decision & Order Granting Benefits (2019-BLA-05039) rendered on an initial claim filed on November 1, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] He further found Employer did not rebut the presumption and therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and invoked the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive 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 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 & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[1] 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 7.

[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); Decision and Order at 4 n.9; Hearing Transcript at 24.

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. *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).

The ALJ found Claimant established total disability based on the medical opinions and in consideration of the evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 28. Employer argues the ALJ erred in crediting the opinions of Drs. Krefft and Chavda, while discrediting Drs. Broudy's and Selby's opinions.[5] Employer's Brief at 4-8. We disagree.

Dr. Chavda conducted the Department of Labor's complete pulmonary evaluation of Claimant on December 13, 2016. Director's Exhibit 14. He diagnosed moderate obstructive lung disease but opined Claimant is not totally disabled because Claimant's

[4] The ALJ considered three pulmonary function studies, and found one invalid and the results of the remaining two studies in equipoise; furthermore, he noted none of the blood gas studies established 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 10-11, 25-26; Director's Exhibits 14 at 12, 22; 20 at 3; 21 at 21, 30; Employer's Exhibit 4 at 4, 6.

[5] Employer argues the ALJ erred in weighing the opinions of Drs. Tuteur and Selby; however, its Evidence Summary Form lists opinions from Drs. Broudy and Selby as its two affirmative medical reports, while Claimant identified Dr. Tuteur's opinion as one of his two affirmative reports. Employer's Brief at 4; Employer's May 7, 2019 Evidence Summary Form at 5; Claimant's April 30, 2019 Evidence Summary Form at 5. We consider Employer's reference to Dr. Tuteur a scrivener's error. The ALJ did not rely on Dr. Tuteur's opinion that Claimant is totally disabled because the doctor did not address whether Claimant can return to his usual coal mine work from a pulmonary standpoint. Decision and Order at 28; Claimant's Exhibit 3.

post-bronchodilator pulmonary function study was non-qualifying[6] for total disability. *Id.* at 10-11. In a supplemental report, Dr. Chavda primarily focused on the pre-bronchodilator results, opining the "FEV1 prebronchodilator is low enough for him to be totally disabled . . . [and that] he meets the criteria as per Department of Labor guidelines with low FEV1 and MVV for total pulmonary disability."[7] *Id.*

The ALJ found Dr. Chavda's supplemental opinion adequately reasoned and sufficient to support a finding that Claimant is totally disabled. Decision and Order at 26-27. Employer contends Dr. Chavda's opinion is not credible because it is "contradictory," having first stated Claimant is not totally disabled but later changing his opinion. Employer's Brief at 6. Contrary to Employer's contention, the ALJ specifically noted "the credibility of Dr. Chavda's opinions is somewhat adversely affected by his failure to explain the contradiction between his initial conclusion and his subsequent findings."[8] Decision and Order at 27. However, the ALJ permissibly credited Dr. Chavda's supplemental opinions and deposition testimony[9] as supporting a finding of total disability

[6] 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).

[7] Dr. Chavda reiterated his opinion of total disability in a subsequent report and at his deposition. Director's Exhibit 25 at 2; Employer's Exhibit 7 at 29, 46-48, 54.

[8] Initially, Dr. Chavda opined Claimant is not totally disabled, relying on the non-qualifying post-bronchodilator values from the pulmonary function study he conducted on December 13, 2016. Director's Exhibit 14 at 11. When asked by the district director to clarify his opinion, Dr. Chavda focused on Claimant's qualifying pre-bronchodilator values from the December 13, 2016 study, as well as his low DLCO, and concluded those values indicated Claimant is totally disabled. Director's Exhibit 23 at 1. Dr. Chavda's change in opinion is consistent with the Department of Labor's caution against relying on post-bronchodilator results in determining total disability. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("[T]he use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.").

[9] At his deposition, Dr. Chavda testified Claimant's FEV1 on pulmonary function testing is "quite low" and "most likely [he] cannot carry on a job continuously for eight hours in bending positions and lifting the way he has to lift to do the job." Employer's

because Dr. Chavda explained that Claimant's pre-bronchodilator FEV1 values on pulmonary function testing would preclude him from performing the exertional requirements of his last coal mine job. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 27; Director's Exhibits 14 at 10-11; 23 at 1; 25 at 2; Employer's Exhibit 7 at 29, 46-48, 54.

Employer also asserts "Dr. Chavda seems to rely solely on his pulmonary function study and the evidence from his exam." Employer's Brief at 6. Employer fails to sufficiently brief its point. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); Sarf *v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Regardless, the ALJ permissibly found Dr. Chavda's opinion reasoned and documented based on his physical examination, Claimant's work history, the objective testing, and the rationale he provided for why Claimant is totally disabled. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08, 211 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusions). Thus, we affirm the ALJ's reliance on Dr. Chavda's opinion.

Moreover, we are not persuaded by Employer's argument regarding the ALJ's crediting of Dr. Krefft's opinion that Claimant is totally disabled. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The ALJ accurately noted Dr. Krefft opined Claimant has a disabling obstructive impairment based on his December 12, 2016 qualifying pre-bronchodilator pulmonary function study.[10] Decision and Order at 27; Claimant's Exhibit 12 at 5-6. He further noted Dr. Krefft opined Claimant would be unable to perform his last coal mine job as a pinner, which involved daily frequent heavy lifting, inserting up to 250 pins, each weighing more than 10-15 pounds, and walking up to a mile. Decision and Order at 27; Claimant's Exhibit 12 at 6.

Employer argues Dr. Krefft's "opinions should have been given less deference" because she did not examine Claimant and relied on Claimant's report of his symptoms instead of objective evidence. Employer Brief at 5. Contrary to Employer's contention,

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Exhibit 6 at 46-47. Dr. Chavda concluded Claimant is "totally disabled to do his coal mine job." *Id*. at 47.

[10] We affirm, as unchallenged, the ALJ's finding that the December 12, 2016 pulmonary function study is valid. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25-26.

there is no requirement that a non-examining physician's opinion be given less weight than an examining physician's opinion. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Collins v. J&L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999). And, as noted above, Dr. Krefft relied on objective testing, in addition to symptoms, specifically stating her "impairment assessment is based primarily on [Claimant's] ventilatory compromise from his pulmonary function testing[.]" Claimant's Exhibit 12 at 5.

Employer also contends Dr. Krefft's opinion cannot support a finding of total disability because she addressed the issue of total disability in terms of Claimant's ability to wear respiratory protection and merely advised Claimant should not return to work in a dusty environment. *Id*. at 5-6, *citing Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989). We disagree. As the ALJ permissibly found, Dr. Krefft discussed the objective evidence along with Claimant's symptoms and explained that Claimant's moderate pulmonary impairment shown on pulmonary function studies would preclude him from performing his usual coal mine employment.[11] *Id*. We therefore affirm the ALJ's finding that Dr. Krefft's opinion is reasoned and sufficient to support a finding that Claimant is totally disabled. S*ee Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); Decision and Order at 15; Claimant's Exhibit 12.

We further reject Employer's assertion that the ALJ erred in finding Dr. Broudy's opinion not credible. Employer's Brief at 6-7. The ALJ permissibly rejected Dr. Broudy's opinion Claimant is not totally disabled because he failed to discuss Claimant's impairment in relation to the specific demands of his usual coal mine work.[12] *See Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and

[11] Employer alleges Dr. Krefft addressed Claimant's ability to perform his usual coal mine work solely from the viewpoint of his ability to wear respiratory protection. However, her opinion can be read as concluding Claimant is totally disabled *and* would have difficulty wearing a mask due to his respiratory impairment and symptoms. Claimant's Exhibit 12 at 5-6.

[12] Employer also generally contends the ALJ erred in rejecting Dr. Selby's opinion that Claimant is not totally disabled. However, Employer's brief does not explain with any specificity why the ALJ erred in finding Dr. Selby's opinion unpersuasive because he did not adequately address the exertional requirements of Claimant's usual coal mine work. Decision and Order at 27-28; Employer's Brief at 4-8; *see* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987). Thus, we affirm the ALJ's discrediting of Dr. Selby's opinion.

relate them to the miner's impairment); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); Decision and Order at 28; Employer's Exhibits 1 at 5; 11 at 4.

Employer's arguments on total disability are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). As substantial evidence supports the ALJ's credibility determinations, we affirm his finding that the medical opinion evidence establishes total respiratory disability at Section 718.204(b)(2)(iv). Decision and Order at 28. Furthermore, we affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability.[13] 20 C.F.R. §718.204(b)(2); Decision and Order at 28.

We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305. Because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm the award of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28-38.

[13] Contrary to Employer's contention, the ALJ adequately explained his weighing of the evidence as a whole, as he permissibly relied on the opinions of Drs. Krefft and Chavda. Employer's Brief at 7. The ALJ found these physicians evaluated the non-qualifying pulmonary function studies but concluded Claimant nonetheless had an impairment that would preclude the performance of his usual coal mine work. Decision and Order at 11-19. While the blood gas studies were non-qualifying, pulmonary function studies and blood gas studies measure different types of impairment. *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, the non-qualifying blood gas studies do not outweigh the medical opinions diagnosing total disability based on the pulmonary function studies. 45 Fed. Reg. at 13,682; Decision and Order at 28. We further note that 20 C.F.R. §718.204(b)(2)(iv) specifically contemplates the situation in which the ALJ gives weight to medical opinions concluding that the Claimant is totally disabled, even though total disability cannot be shown by the pulmonary function and arterial blood gas studies.

Accordingly, we affirm the ALJ's Decision & Order Granting Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge