U.S. Department of Labor

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

BRB No. 21-0487 BLA

WAYNE G. PORTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WINDSOR COAL COMPANY	)	
	)	
and	)	
	)	
EAST COAST RISK MANAGEMENT, LLC	)	DATE ISSUED: 8/31/2022
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2020-BLA-05108) rendered on a subsequent claim[1] 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 twenty-seven years of underground coal mine employment based on the parties' stipulation, and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[3] Furthermore, she found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[4] It also contends she erred in finding it did not rebut the presumption. Claimant responds in support of the award of

[1] Claimant filed two prior claims. On August 2, 2006, the district director denied his initial claim, filed on January 10, 2006, because he failed to establish total disability. Director's Exhibit 1. Claimant withdrew a later claim, and thus it is considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 2.

[2] 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.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she 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); *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 Claimant's prior claim was denied for failure to establish a totally disabling respiratory or pulmonary impairment, Claimant had to establish this element in order to obtain review of the merits of his claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[4] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established twenty-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 2, 5.

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.[5] 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).

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 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). 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 arterial blood gas studies, medical opinions, and record as a whole.[6] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 27-31. Employer argues the ALJ erred in weighing the blood gas study and medical opinion evidence. Employer's Brief at 3-18.

Arterial Blood Gas Studies

The ALJ weighed four blood gas studies dated December 6, 2017, October 18, 2018, May 15, 2019, and July 23, 2020. Decision and Order at 8, 28. The May 15, 2019 study

[5] 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); Hearing Transcript at 29, 40-41.

[6] The ALJ found the pulmonary function studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 27-28.

produced qualifying values[7] at rest but non-qualifying values with exercise; the December 6, 2017 and July 23, 2020 studies produced qualifying values during exercise but non-qualifying values at rest; and the October 18, 2018 study produced non-qualifying values at rest and during exercise. *Id*.; *see* Director's Exhibit 53; Claimant's Exhibits 2, 11; Employer's Exhibit 2. The ALJ found the qualifying July 23, 2020 exercise study entitled to the most weight because it is the most recent test, exercise testing is more probative of Claimant's respiratory capacity to perform work, and it is supported by the qualifying December 6, 2017 exercise study and May 15, 2019 resting study. Decision and Order at 28. Thus she found the weight of the blood gas study evidence establishes total disability. *Id*.

Employer asserts the ALJ incorrectly found the July 23, 2020 resting blood gas study qualifying, and thus erred in finding the weight of the blood gas study evidence establishes total disability. Employer's Brief at 5. We reject this argument as the ALJ neither found the July 23, 2020 resting study qualifying nor relied on it to find total disability; as noted, she gave greatest credit to the July 23, 2020 *exercise* study, which Employer does not address.[8] Thus, any error the ALJ made in mentioning the most recent study as qualifying is harmless. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 28.

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

[8] The ALJ specifically listed the July 23, 2020 resting blood gas study as non-qualifying, and also stated the "July 23, 2020 [study] produced qualifying values during exercise, but not at rest." Decision and Order at 8, 28. Two paragraphs after noting that the July 23 study did not produce qualifying results at rest, and after stating that she considered the most recent exercise study most important, the ALJ cited the qualifying most recent exercise blood gas study; in addition, she cited the most recent resting blood gas study, and an earlier qualifying exercise study (from December 6, 2017), as supporting a finding of disability. D&O at 28. The reference to the resting blood gas study may have been intended as a reference to the qualifying resting study of May 15, 2019, which was the *next*-most-recent study. In any event, given her statements about how she weighed the evidence and her recognition that the most recent resting study was non-qualifying, we consider her slip in including mention of the most recent resting study an inadvertent and harmless error.

The ALJ permissibly found the qualifying July 23, 2020 exercise blood gas study entitled to the most weight because Claimant performed it most recently and exercise testing is a better predictor of Claimant's ability to perform his usual coal mine employment. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co*., 2 BLR 1-972, 1-977 (1980); Decision and Order at 28. As it is supported by substantial evidence, we affirm the ALJ's finding the arterial blood gas studies establish total disability. *See* 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 28.

Medical Opinions

The ALJ considered the medical opinions of Drs. Werntz, Basheda, Rosenberg, Sood, and Go. Decision and Order at 28-31. Drs. Werntz, Basheda, and Rosenberg opined Claimant is not totally disabled by a respiratory or pulmonary impairment, whereas Drs. Sood and Go opined he is. Director's Exhibit 53; Claimant's Exhibits 4, 6, 6a; Employer's Exhibits 2, 2a, 7-9. The ALJ found Drs. Werntz, Basheda, and Rosenberg did not persuasively explain why Claimant is not disabled, and thus gave their opinions less weight than those of Drs. Sood and Go, which she found reasoned and documented and entitled to significant weight. Decision and Order at 28-31. She thus found the medical opinion evidence establishes total disability. *Id.*

Employer argues the ALJ erred in discrediting Dr. Werntz's opinion. Employer's Brief at 7-8. We are not persuaded. Dr. Werntz examined Claimant on May 15, 2019, and opined the resting and exercise blood gas studies from that examination are normal, and thus Claimant has adequate pulmonary capacity to perform his usual coal mine employment. Director's Exhibit 53. He further opined Claimant's ability to "exercise to 7.8 [metabolic equivalents] METS with [blood gas] changes" indicates he can meet the demands of his usual coal mine employment. *Id.*

The ALJ found Dr. Werntz's statement that the May 15, 2019 resting blood gas study he conducted is normal is incorrect, as the study actually produced qualifying values at rest using the DOL regulatory standards. Decision and Order at 28; Director's Exhibit 53. She further found he did not adequately explain how Claimant's ability to exercise to 7.8 METS establishes he is not disabled from his usual coal mine employment or identify any medical authority supporting that opinion. *Id.* at 28-29. As the ALJ was correct as to the facts and acted within her discretion, she permissibly found Dr. Werntz's opinion not reasoned and documented, and entitled to reduced weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 28-29.

Employer next argues the ALJ erred in discrediting the opinions of Drs. Basheda and Rosenberg. Employer's Brief at 10-13. We disagree.

Dr. Basheda opined the December 6, 2017 blood gas study shows mild resting and exercise hypoxemia that is not "clinically disabling," and the May 15, 2019 resting blood gas study shows hypoxemia. Director's Exhibit 53; Claimant's Exhibit 2; Employer's Exhibits 2 at 8, 2a at 3. He further opined all thirteen of Claimant's pulmonary function studies demonstrate evidence of obstruction, and Claimant has chronic obstructive pulmonary disease. Employer's Exhibits 2 at 23, 2a at 6-7, 8 at 18-19, 21. He stated that, according to the American Medical Association (AMA) guidelines, the level of obstruction seen on Claimant's October 18, 2018 and May 15, 2019 pulmonary function studies would not prevent him from performing his usual coal mine employment. Employer's Exhibits 2 at 25, 2a at 7.

Dr. Rosenberg opined Claimant has some impairment, evidenced by his pulmonary function studies showing a mild degree of airflow obstruction and a mildly reduced diffusing capacity, and his variable blood gas studies indicating a degree of hypoxemia. Employer's Exhibits 7 at 9-10, 7a at 2-3, 9 at 18, 23. He further opined Claimant's gas exchange abnormalities were qualifying, at times, but that Claimant is not disabled because his current pulmonary function and blood gas studies are not qualifying. Employer's Exhibits 7 at 10, 7a at 3.

Contrary to Employer's argument, the ALJ permissibly discredited the opinions of Drs. Basheda and Rosenberg because they did not explain why Claimant would be able to perform the specific exertional requirements of his usual coal mine employment despite his mild obstructive impairment and the hypoxemia that they observed. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 441; Decision and Order at 30-31.[9]

[9] Claimant testified his last job in the mines was working as a shift foreman. Hearing Trasncript at 25. He explained he was a "working foreman," working along with the miners under his direction. *Id.* at 26. He noted the job involved "quite a bit of walking" but the heaviest part of job was "the breakdowns because the motors and the belt and all that was heavy, heavy equipment, heavy stuff." *Id.* Drs. Rosenberg and Basheda both noted the exertional requirements of Claimant's last job; however, the ALJ has considerable discretion in assessing the adequacy of an explanation and acted within the scope of her discretion in finding that Drs. Basheda and Rosenberg did not explain how Claimant would be able to meet the exertional requirements of his usual coal mine employment. *See*

Employer argues the ALJ erred in crediting Dr. Sood because he incorrectly opined the May 15, 2019 resting blood gas study produced qualifying results and relied on the December 6, 2017 and December 11, 2018 blood gas studies which it contends are not in the record.[10] Employer's Brief at 14. Because Dr. Sood correctly identified the May 15, 2019 resting blood gas study as qualifying, and the December 6, 2017 and December 11, 2018 blood gas studies are part of the record,[11] we reject Employer's argument.[12] Director's Exhibits 43, 53; Claimant's Exhibits 2, 6a at 20.

Finally, Employer generally argues the ALJ should have assigned less weight to the opinions of Drs. Sood and Go because they failed to address the non-qualifying pulmonary

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Westmoreland Coal Co. v. Cochran, 718 F.3d 319, 324 (4th Cir. 2013)*; Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-15 (4th Cir. 2012).

[10] The December 6, 2017 blood gas study was originally part of Dr. Celko's Department-sponsored complete pulmonary evaluation of Claimant which the ALJ struck from the record. Hearing Transcript at 8-9. However, Claimant separately submitted the study as affirmative evidence. Claimant's Exhibit 2; Hearing Transcript at 14, 16. Claimant submitted the December 11, 2018 blood gas study on December 21, 2018. Director's Exhibit 43.

[11] Likewise, we reject Employer's argument that Dr. Go's opinion improperly relies on the December 6, 2017 and December 11, 2018 blood gas studies because they are outside the record. Employer's Brief at 16-17; Director's Exhibit 43; Claimant's Exhibit 2.

[12] Employer also argues the ALJ erred in crediting Dr. Sood's opinion because his conclusion that Claimant could not perform his last coal mine job is inconsistent with the results of an arterial blood gas study Dr. Werntz conducted indicating Claimant could perform up to 7.8 metabolic equivalents (METS). Employer's Brief at 15. However, Employer never raised this issue to the ALJ below, but only challenged Dr. Sood's opinion on the basis that he considered arterial blood gas studies not contained in the record. Employer's Closing Brief at 13. Although Employer summarily stated in its closing brief that Dr. Sood "failed to explain his opinions regarding the abnormal diffusion capacity and improvement in arterial blood gas studies," its argument did not sufficiently challenge Dr. Sood's conclusions such that the ALJ would have reached or considered the argument Employer now raises before us on appeal, that Dr. Sood's conclusion is inconsistent with Dr. Werntz's blood gas study testing. *See id.*, Employer's Brief at 15. Therefore, because Employer has only raised this argument for the first time on appeal, the Board will not consider it. *See McKinney v. Benjamin Coal Co.*, 6 BLR 1-529, 1-531 (1983).

function and blood gas studies and based their opinions on older objective studies.[13] Employer's Brief at 14-15, 17-18. Contrary to Employer's contention, Drs. Sood and Go based their opinions on evidence including the most recent studies which were conducted in 2020 and also discussed the non-qualifying testing. Claimant's Exhibit 4 at 13, 15-16; Claimant's Exhibit 6 at 5-8, 11; Claimant's Exhibit 6a at 20. We consider Employer's arguments to be a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).[14]

We thus affirm the ALJ's determination that the medical opinion evidence supports finding total disability.[15] Decision and Order at 31., Because we have rejected Employer's contentions of error, we affirm her finding that all the relevant evidence, when weighed together, establishes total disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 31. We therefore affirm the ALJ's finding Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309.

[13] Dr. Sood summarized the results of the July 23, 2020 arterial blood gas study. Claimant's Exhibit 6a at 14-15. He also noted his conclusion that Claimant was totally disabled was based, in part, on the qualifying exercise portion of this study. *Id.* at 20. Similarly, Dr. Go summarized the results of the July 23, 2020 arterial blood gas study and explained its significance to his conclusion Claimant was totally disabled. Claimant's Exhibit 4 at 10, 15-16.

[14] Employer also argues Dr. Go's opinion should be discredited because he considered an inaccurate smoking history. Employer's Brief at 15-18, 22-23. However, the relevant inquiry is whether the Miner had a totally disabling respiratory impairment; the cause of that impairment is addressed at disability causation, or in consideration of rebuttal of the Section 411(c)(4) presumption. *See, e.g., Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

[15] Because the ALJ provided valid reasons for discrediting Dr. Rosenberg's opinion on total disability, we need not address Employer's remaining argument the ALJ improperly discredited Dr. Rosenberg for focusing on a single set of studies. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 13.

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,[16] 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.[17]

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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ weighed the opinions of Drs. Basheda and Rosenberg.[18] Employer's Exhibits 2, 2a, 7-9. She discredited their opinions because she found them inadequately reasoned and contrary to the regulations, and thus concluded Employer did not disprove legal pneumoconiosis. Decision and Order at 38-41.

[16] "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).

[17] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. Decision and Order at 32-33.

[18] The ALJ also considered the opinions of Drs. Sood and Go. *Id.* at 33-37. Dr. Sood opined Claimant has clinical and legal pneumoconiosis. Claimant's Exhibits 6, 6a. Dr. Go did not address whether Claimant has clinical pneumoconiosis, but did opine Claimant has legal pneumoconiosis. Claimant's Exhibit 4. Because neither physician's opinion aids Employer in rebutting the presumption of clinical and legal pneumoconiosis, we need not address Employer's arguments regarding the ALJ's weighing of their opinions. Employer's Brief at 13, 16, 21-23.

Employer summarizes the medical opinions of record and generally argues the evidence establishes Claimant does not have legal pneumoconiosis, but it identifies no error in the ALJ's analysis or credibility findings on this issue. Employer's Brief at 18-23. Because Employer has not identified any specific error, we affirm the ALJ's finding it did not rebut the presumption that Claimant has legal pneumoconiosis. *See 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); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

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).

The ALJ discredited the opinions of Drs. Basheda and Rosenberg on disability causation for the same reasons she found them not credible on legal pneumoconiosis, and thus found Employer did not rebut the presumption by establishing "no part of [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); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 41-42. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's total disability is caused by legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 41-42.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge