U.S. Department of Labor

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

BRB No. 20-0428 BLA

BRENDA S. WARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINNACLE MINING COMPANY LLC	)	
	)	
and	)	
	)	
ENCOVA INSURANCE	)	DATE ISSUED: 12/14/2021
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds) Norton, Virginia, for Claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC) Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits (2018-BLA-06306) rendered on a claim filed on June 17, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-seven years and three months of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant 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 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 established total disability and invoked the presumption. Employer also contends the ALJ erred in finding it did not rebut the presumption.[2] Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges.

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 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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 24-26. Employer cites the district court's

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if she has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant performed her last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 10-16.

rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id.* Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act 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

A miner is totally disabled if her pulmonary or respiratory impairment, standing alone, prevents her from performing her 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). The ALJ found Claimant established total disability on the record as a whole based on the blood gas studies and medical opinions, and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis. Decision and Order at 27-28. Employer alleges the ALJ erred in finding the blood gas studies and medical opinions establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv).[4]

Blood Gas Studies

The ALJ considered four arterial blood gas studies. Dr. Nader's November 11, 2017 study produced non-qualifying[5] values at rest and qualifying results after 4.63[6] minutes of exercise. Decision and Order at 12; Director's Exhibit 14 at 17. Dr. Zaldivar's April 30,

[4] The pulmonary function tests were uniformly non-qualifying and thus Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 11; Director's Exhibits 14, 21; Claimant's Exhibit 1; Employer's Exhibit 10. The ALJ further found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 11-12. We affirm these findings as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

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

[6] The ALJ mistakenly referenced six minutes.

2018 study produced non-qualifying results at rest and no exercise test was conducted.[7] Decision and Order at 12; Director's Exhibit 21 at 4, 19. Dr. Raj's February 19, 2019 study produced non-qualifying results at rest and after 3.25 minutes of exercise. Decision and Order at 12; Employer's Exhibit 10 at 3. Dr. Raj obtained two resting studies on April 22, 2019, both of which produced qualifying values. Decision and Order at 12; Claimant's Exhibit 1 at 4, 15.

In resolving the conflict in the blood gas study evidence, the ALJ noted Dr. Zaldivar questioned whether the testing and laboratory procedures at Norton Community Hospital may have affected the qualifying values obtained during Dr. Nader's November 2017 exercise study and Dr. Raj's April 2019 resting studies. Decision and Order at 25. The ALJ gave little weight to Dr. Zaldivar's opinion and found the studies valid and sufficiently reliable. *Id*. The ALJ gave little weight to the non-qualifying February 2019 3.25-minute exercise study because she found it "[does] not demonstrate Claimant's condition during significant and valid exercise." *Id*. at 12. The ALJ also stated that she gave greatest weight to the two qualifying April 2019 resting studies because they were the most recent of record. *Id*. She concluded Claimant established total disability based on a preponderance of the blood gas study evidence. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 12.

Initially, we disagree with Employer's argument the ALJ erred in rejecting Dr. Zaldivar's opinion that the November 2017 and April 2019 studies conducted at the Norton Community Hospital for Drs. Nader and Raj were not properly conducted and, therefore, are not reliable for assessing total disability under the regulatory standards. Employer's Brief at 9-10. Dr. Zaldivar alleges, without any specific foundation, that the studies' qualifying values may reflect clinically insignificant losses in oxygen due to the blood samples possibly not being placed on ice between blood draw and analysis.[8] Employer's Exhibit 13 at 52-60. The ALJ permissibly gave no weight to Dr. Zaldivar's opinion because: Dr. Zaldivar conceded Dr. Nader's blood samples were analyzed within seven

[7] Dr. Zaldivar determined an exercise test was contraindicated because Claimant has coronary artery disease and was on anticoagulants. Decision and Order at 12; Director's Exhibit 21 at 4, 9.

[8] Dr. Zaldivar cited a medical article recommending blood samples be placed in an ice bath upon collection because there is a "greater loss of oxygen through the walls of the plastic syringe when it is not submerged in ice." Employer's Exhibit 8 at 52, 59-60. However, he conceded the article does not specify the timeframe within which oxygen loss increases at room temperature, the American Thoracic Society (ATS) clinical practice guidelines recommend blood be analyzed within thirty minutes if left at room temperature, and Dr. Nader's 2017 exercise study and Dr. Raj's 2019 resting studies comply with this ATS guideline. *Id*. at 52-53, 56.

minutes which is "well within the guidelines from the American Thoracic Society;"[9] Dr. Nader explained the American Academy of Respiratory Care protocol states that blood gas analysis "should be performed within 10-15 minutes *on room temperature*;" and because the Norton Community Hospital blood gas laboratory is accredited through the American College of Pathologists. Decision and Order at 25; Director's Exhibit 24 at 3 (emphasis added). Employer fails to identify any specific errors in these findings. Employer's Brief at 9-10; *see* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm the ALJ's determination that the November 2017 and April 2019 studies are valid and reliable.[10] *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable); Decision and Order at 25.

Employer's only other challenge to the ALJ's weighing of the blood gas study evidence is that he erred in not crediting the February 2019 non-qualifying exercise test. Employer's argument is two-fold. First, it asserts the ALJ improperly acted as medical expert in finding the February 2019 exercise study does not reflect "significant and valid exercise." Employer's Brief at 7. Employer cites the Board's unpublished decision in *Wolfe v. W. Va. CWP Fund*, BRB No. 14-0338 BLA, slip op. at 5 n.9 (May 13, 2015)

[9] The ALJ found the November 2017 exercise study was analyzed within seven minutes, and both April 2019 resting studies were analyzed within five minutes. Decision and Order at 25; Director's Exhibit 24 at 5; Claimant's Exhibit 1 at 15, 16.

[10] Employer also contends the ALJ failed to consider Dr. Zaldivar's explanation that "it is unclear what protocols were followed and whether Ms. Ward was sitting after the test." Employer's Brief at 9. Contrary to Employer's argument, as we hold above, the ALJ considered and permissibly rejected, as not credible and unsupported, Dr. Zaldivar's opinion that the study is invalid because Norton Community Hospital may not have followed proper procedures in conducting its blood gas testing. The ALJ also credited Dr. Nader's contrary opinion that Norton Community Hospital's testing complies with American Academy of Respiratory Care protocol and the blood gas laboratory is accredited through the American College of Pathologists. Moreover, Dr. Zaldivar's other critiques are likewise highly speculative and similarly without evidentiary support. *See, e.g.*, Director's Exhibit 21 at 3 ("Unless it is described otherwise, I do not believe that [Claimant] had any kind of blood gas study while she was walking."); Director's Exhibit 21 at 4 ("One also cannot help but wonder whether she sat at the end of the walk because if so, then it is definitely not any kind of exercise test); Director's Exhibits 21 at 4 ("while sitting, the obese individual will collapse the lower portion of the lungs preventing oxygen exchange"); Employer's Exhibit 13 at 19 ("I had no details [about the study];" and "I do not know what [the reduced pO2 value] means really.").

(unpub.), for the proposition that an ALJ is "not authorized to determine the significance of [objective test conditions] independent of a physician's explanation of how such factors may affect the test results." Employer's Brief. at 7. Second, because Employer maintains the February 2019 study is entitled to full weight, it argues the test should be credited over the more recent qualifying resting studies because exercise studies, in general, better reflect Claimant's ability to perform her usual coal miner work. Employer's arguments lack merit. *Id*. at 7-8.

In *Wolfe*, the Board affirmed an ALJ's reliance on qualifying exercise blood gas studies lasting seven minutes in duration over two non-qualifying exercise studies, one lasting two minutes and the other four-and-a-half minutes in duration. *Wolfe*, BRB No. 14-0338 BLA, slip op. at 5 n.9. The Board rejected the employer's contention that the ALJ improperly substituted her opinion for that of medical experts by crediting the tests where the miner was exercised seven-minutes as more probative than the exercise studies of shorter duration. *Id.* at 4. Specifically, the Board noted the ALJ relied on Dr. Rasmussen's opinion that exercise tests should last "at least" four minutes and Dr. Castle's acknowledgment that the miner's test values fell with more exercise. *Id*. at 4, 5 n.10. Further, as Mr. Wolfe's usual work as a fire boss required him to walk four-to-five miles per night, the Board held the ALJ permissibly accorded determinative weight to the seven-minute exercise studies. *Id*. at 5.

Similar to the facts presented in *Wolfe*, the ALJ, here, permissibly attached significance to the duration of Claimant's exercise in giving less weight to the February 2019 non-qualifying study.[11] *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Although the ALJ did not specifically cite to Dr. Castle's opinion to support her conclusion, it does. Dr. Castle, the only expert to address the significance of the duration of Claimant's February 2019 non-qualifying exercise study,[12] specifically testified that 3.25 minutes of walking is not "long enough to cause a fall in the pO2

[11] As the ALJ noted, Claimant testified that for the last seven or eight years of her coal mine employment she operated a shuttle car underneath the miner, which threw coal into the buggies. Decision and Order at 3. She took the shuttle car to the feeder and unloaded it; if the shuttle car or the miner was down, she performed mason work, ran a scoop, or ran an out-by. *Id*. When running the out-by, she would get supplies and help the roof bolters, which required "heavy lifting." *Id*. The ALJ found Claimant's usual coal mine work required heavy exertion. *Id*. at 8. We affirm this finding as it is unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[12] Drs. Nader, Zaldivar, and Raj did not discuss the significance of exercise duration on blood gas studies.

[values]." Employer's Exhibit 12 at 26. He indicated that Claimant's oxygenation levels would have fallen with more exercise, and Claimant's pO2 values fell with an additional minute of exercise on the November 2017 exercise study. Director's Exhibit 14 at 17. Remand would serve no useful purpose, as Employer requests only to have the ALJ specify that Dr. Castle's opinion corroborates her conclusions. Thus, we reject Employer's contention that the ALJ improperly acted as a medical expert, because her finding regarding the reliability of the 2017 exercise study is supported by substantial evidence.

Employer also states that while the ALJ gave significant weight to the qualifying April 2019 resting blood gas studies, "the nearly contemporaneous (two months apart) February 2019 exercise study was not qualifying" and is more probative of Claimant's ability to perform her usual coal mine work. Because we have affirmed the ALJ's determination that the February 2019 exercise study is not a valid measure of whether Claimant has an exercise oxygenation impairment, Employer's argument is moot.

As Employer raises no other specific allegations of error, we affirm the ALJ's determination that a preponderance of the blood gas study evidence, which includes the qualifying 2017 exercise study and the two most recent qualifying resting studies obtained in April 2019, supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 12; Employer's Exhibit 12 at 26; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012).

Medical Opinions

The ALJ credited the opinions of Drs. Nader and Raj that Claimant is totally disabled over the contrary opinions of Drs. Zaldivar and Castle. Director's Exhibits 14, 21; Claimant's Exhibit 1; Employer's Exhibits 8, 12, 13, 24. The ALJ found Dr. Nader's and Dr. Raj's opinions better supported by the qualifying blood gas studies and concluded Claimant has an oxygenation impairment that precludes the performance of her usual coal mine work. Director's Exhibits 14, 24; Claimant's Exhibit 1. Having affirmed the ALJ's findings at 20 C.F.R. §718.204(b)(2)(ii), we see no error in her determination that the opinions of Drs. Nader and Raj are reasoned and documented. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Underwood*, 105 F.3d at 949; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993).

We also reject Employer's contention the ALJ erred in rejecting Drs. Zaldivar's and Castle's opinions on total disability. Dr. Zalidvar opined Claimant is not totally disabled, based on Claimant's non-qualifying pulmonary functions studies, the non-qualifying resting blood gas study he obtained during his examination, and the non-qualifying 2017 exercise blood gas study. Director's Exhibit 21 at 5. Dr. Castle conceded that Claimant's 2017 exercise test showed disabling hypoxemia, but he attributed the impairment to heart disease. He explained that Claimant does not have a respiratory or pulmonary impairment

since her pulmonary function studies are normal. Employer's Exhibits 8 at 29-30, 12 at 28.

The ALJ permissibly found Dr. Zaldivar's opinion less credible because, as explained above, he based his opinion on speculation that the blood gas testing was unreliable. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 25-26. Additionally, while Drs. Zaldivar and Castle believe Claimant's primary impairment is heart-related, the relevant issue at 20 C.F.R. §718.204(b)(2) is the presence of a disabling respiratory or pulmonary impairment – the cause of the impairment is addressed at 20 C.F.R. §718.204(c) or, in this case, in consideration of rebuttal of the Section 411(c)(4) presumption. Further, although they conclude Claimant has no respiratory impairment based on the pulmonary function tests, the ALJ accurately found it does not preclude a finding of total disability as pulmonary function tests 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).

Employer's arguments on total disability are a request that we reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's permissible determination that the preponderance of credible medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).[13] *Compton*, 211 F.3d at 211; *Akers*, 131 F.3d at 441; Decision and Order at 27. We further affirm, as supported by substantial evidence, the ALJ's findings that Claimant established total respiratory disability when considering the record 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 27-28. Consequently, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b); Decision and Order at 28.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal

[13] We agree the ALJ erred in discussing Claimant's smoking history when weighing the medical opinions on total disability as the cause of Claimant's impairment is relevant to the issues of legal pneumoconiosis and disability causation, not whether Claimant is totally disabled. Employer's Brief at 14-15; Decision and Order at 26. However, the ALJ's error is harmless since she provided valid reasons for crediting Dr. Nader's and Dr. Raj's opinions over the opinions of Employer's experts. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

nor clinical pneumoconiosis,[14] or that "no part of [her] 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, 1-150 (2015). The ALJ found Employer failed to establish rebuttal by either method.

Although Employer asserts the ALJ erred in finding the opinions of Drs. Zaldivar and Castle insufficient to disprove legal pneumoconiosis, it does not challenge the ALJ's finding that it failed to disprove clinical pneumoconiosis. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). We therefore affirm the ALJ's determination that Employer is unable to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis.

Disability Causation

In order to disprove disability causation, Employer must establish "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). Employer raises no specific challenge to the ALJ's findings that neither Dr. Zaldivar nor Dr. Castle adequately explained why Claimant's disabling blood gas abnormality is unrelated to clinical pneumoconiosis.[15] *Skrack*, 6 BLR at 1-711; Decision and Order at 37-38. We therefore affirm the ALJ's finding that Employer failed to establish that no part of Claimant's respiratory disability is due to clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 37-38. Thus, we affirm the ALJ's determination that Employer

[14] "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).

[15] Employer does not specifically challenge the ALJ's findings on disability causation, separate and apart from its contentions that the ALJ erred in finding Claimant established total disability and in finding Employer did not disprove legal pneumoconiosis.

failed to rebut the Section 411(c)(4) presumption.[16] *See* 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 37-38.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[16] Because Employer has failed to rebut the presumption that Claimant is totally disabled due to clinical pneumoconiosis, we need not reach Employer's challenges to the ALJ's findings concerning legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).