U.S. Department of Labor

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

BRB No. 20-0482 BLA

MARVIN THACKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HUSKY COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 12/29/2021
NATIONAL UNION FIRE/CHARTIS	)	
	)	
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 and Order on Employer's Request for Reconsideration of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for Claimant.

Cameron Blair (Fogle Keller Walker PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits and Order on Employer's Request for Reconsideration (2018-BLA-05789) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on March 16, 2017.[1] Director's Exhibit 4 at 1.

The ALJ accepted the parties' stipulation that Claimant has twenty-six years of coal mine employment, and found that more than fifteen years of that work was underground. The ALJ further found the new evidence established Claimant is totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). The ALJ found Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's third claim for benefits. The denials of his two previous claims are final. Director's Exhibits 1, 2. The district director denied Claimant's second claim, filed on April 5, 2011, because he failed to establish any element of entitlement. Director's Exhibit 2 at 3, 83.

[2] When a miner files a claim more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "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(d); *see 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(d)(2). Because the district director denied Claimant's most recent prior claim for failure to establish any element of entitlement, Claimant had to submit new evidence establishing at least one element to obtain review of the merits of his claim. *See White*, 23 BLR at 1-3.

[3] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has 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).

Employer moved for reconsideration, arguing that the ALJ misunderstood the exertional requirements of Claimant's usual coal mine employment when he found Claimant is totally disabled. The ALJ, however, rejected Employer's argument that Claimant's work as a mine superintendent was "largely administrative in nature," and again found the job required Claimant to perform "heavy manual labor during each shift . . . ." Order on Reconsideration at 3. Therefore, he again credited Dr. Raj's opinion that hypoxemia detected on Claimant's arterial blood gas study prevents him from meeting the exertional requirements of his usual coal mine work. *Id.* Thus, he reaffirmed his Decision and Order Awarding Benefits "as amended and supplemented by this Order."[4] *Id.* at 4.

On appeal, Employer contends the ALJ erred in finding Claimant is totally disabled.[5] 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.[6] 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).

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). 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 consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones &*

[4] The ALJ made one change to his initial findings. Whereas he had initially found that Claimant regularly had to lift up to 100 pounds, on reconsideration he found that Claimant routinely had to lift up to 80 pounds. Order on Reconsideration at 3. However, when considering all the tasks Claimant had to perform, the ALJ's determination that Claimant had to perform heavy labor remained unchanged. *Id.*

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has more than fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[6] We 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 Exhibits 1 at 61, 91; 2 at 811; 5 at 2.

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 new medical opinion evidence.[7] Decision and Order at 15; *see* 20 C.F.R. §718.204(b)(2)(iv).

Before weighing the medical opinions, the ALJ determined Claimant's usual coal mine employment and its exertional requirements. He found Claimant's most recent job "performed regularly and over a substantial period of time" was as a mine superintendent. Decision and Order at 8; *see Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). He further found that the mine superintendent job required "heavy exertion and heavy manual labor." Decision and Order at 8; Order on Reconsideration at 2-3.

In making these findings, the ALJ considered Claimant's description that his job was the "general running of the mines," which required him to help his subordinates perform all the work in the mine. Decision and Order at 7-8, *citing* Director's Exhibit 6 at 1, Hearing Transcript at 24-25. The ALJ referred to Claimant's testimony that "he would crawl the beltline[,] help shovel it out," regularly help rock dust, lift eighty-pound bags of rock dust, and run hoses. Decision and Order at 8, *citing* Hearing Transcript at 22-24; Order on Reconsideration at 3. He further considered Claimant's testimony that he worked twelve-hour shifts and helped his subordinates "do it all," in all areas of the mine wherever there was a need. Decision and Order at 8; Hearing Transcript at 24-25. The ALJ found Claimant's testimony credible.

Employer contends the ALJ relied on an inaccurate description of Claimant's usual coal mine work, alleging that his superintendent work was largely administrative in nature.[8] Employer's Brief at 17-18. We disagree.

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[7] The ALJ found the new pulmonary function studies and arterial blood gas studies do not establish total disability and the record contains 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 5-7.

[8] Employer relies on a portion of Claimant's October 5, 2017 deposition testimony in which he stated that although he lifted heavy objects, it was not on a daily basis but sometimes monthly. Employer's Brief at 11-12, *citing* Director's Exhibit 20 at 17-18. In response to a question from Employer's counsel on whether his "everyday duties" would be ordering supplies, doing computer work, and checking to make sure everything was running as it should, Claimant responded "Yes." Director's Exhibit 20 at 18. But he also testified that he had to crawl underground in thirty- or thirty-one-inch coal seams to make sure the mine was operating safely. *Id.* When asked how much time he spent underground

Contrary to Employer's assertion, the ALJ permissibly determined that Claimant's usual coal mine work as a superintendent was not solely or even "largely" an administrative job because the evidence established that Claimant helped his subordinates perform work in all areas of the mine. *See Heavilin v. Consolidation Coal Co*., 6 BLR 1-1209, 1-1213 (1984) ("It is for the [ALJ] to determine the nature of [C]laimant's usual coal mine employment."). On reconsideration, the ALJ again disagreed with Employer's argument that Claimant's work was largely administrative and cited to Claimant's "credible" testimony regarding his job duties. Order on Reconsideration at 3. The ALJ permissibly found that Claimant's hearing testimony established he had to duck walk or crawl in coal that was thirty-two or thirty-three inches high, crawl the beltline and help shovel it out, rock dust, lift eighty-pound bags, and run the rock dusting hoses.[9] *See Heavilin*, 6 BLR at 1-1213; Order on Reconsideration at 3. The ALJ permissibly weighed the relevant evidence to find Claimant's usual coal mine work routinely required him to lift up to eighty pounds. Decision and Order at 8; Order on Reconsideration at 3; *see Brown v. Cedar Coal Co*., 8 BLR 1-86, 1-87 (1985); *Shortridge*, 4 BLR at 1-539. Therefore, we affirm the ALJ's determination that Claimant performed various tasks in all areas of the mine, routinely involving heavy manual labor.

The ALJ next considered the opinions of Drs. Raj and Nader that Claimant has a totally disabling respiratory or pulmonary impairment and those of Drs. Rosenberg and Broudy that he has only mild, non-disabling hypoxemia. Director's Exhibit 40; Claimant's Exhibit 1; Employer's Exhibits 6, 13, 15. The ALJ found Dr. Raj's opinion well-documented and reasoned, and gave it additional weight based on his documented qualifications in Pulmonary Medicine.[10] Decision and Order at 15; Order on

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versus in the office, he replied "Some days I'd be under there two hours, some days four hours, some days twelve hours; it just varied." *Id*.

[9] Although Employer alleges the ALJ erred in finding that Claimant's usual coal mine work required heavy labor, it also argues that its own experts, Drs. Rosenberg and Broudy, accurately understood that Claimant's usual coal mine employment involved heavy manual labor. Employer's Brief at 16-17 ("Both . . . understood [C]laimant's usual coal mine employment to involve heavy labor, with Dr. Broudy confirming his understanding the [C]laimant would be required to lift heavy weights and perform arduous tasks such as rock dusting," and "Dr. Rosenberg noting [he] would be required to lift up to 100 pounds and perform dead work such as rock dusting, belt moves, and power moves.").

[10] The ALJ discredited Dr. Nader's opinion because it was not sufficiently independent of the physician's discredited opinion that Claimant has complicated pneumoconiosis. Decision and Order at 12.

Reconsideration at 3. Conversely, the ALJ found neither Dr. Rosenberg's nor Dr. Broudy's opinion well-reasoned, and he gave their opinions less weight because their qualifications were not contained in the record.[11] Decision and Order at 15. The ALJ therefore found Dr. Raj's opinion establishes that Claimant is totally disabled. Decision and Order at 11, 14; Order on Reconsideration at 3.

Employer argues that because the ALJ erred in determining the exertional requirements of Claimant's usual coal mine work, he necessarily erred in crediting Dr. Raj's understanding of them as being consistent with his finding that Claimant performed heavy labor.[12] Employer's Brief at 13. As discussed above, however, the ALJ permissibly found that Claimant's job as a mine superintendent involved heavy labor. We therefore reject Employer's allegation of error regarding Dr. Raj's understanding of Claimant's job duties.

Employer next contends that the ALJ erred in crediting Dr. Raj's opinion because the doctor did not explain how Claimant's non-qualifying blood gas study supported total disability. Employer's Brief at 13-14. This argument lacks merit. Total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005). As the ALJ summarized, Dr. Raj acknowledged that Claimant's June 6, 2017 blood gas study was non-qualifying, but explained the study is abnormal because it shows Claimant has exercise-induced hypoxemia.[13] Director's Exhibit 40 at 4. Dr. Raj opined that the

[11] As the ALJ summarized, Dr. Raj is Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 5; Director's Exhibit 10 at 27-28; Employer's Exhibit 15 at 32. He further noted that because Employer did not submit a curriculum vitae for either Dr. Rosenberg or Dr. Broudy, and as neither physician set forth his qualifications, the record does not indicate whether either physician is Board-certified in a particular field. Decision and Order at 5.

[12] The ALJ found Dr. Raj's description that "Claimant worked in underground mines as a scoop and buggy operator and rock dusted . . . [and] lifted 50-100 pounds at any given time," Director's Exhibit 10 at 2, was consistent with his finding that Claimant's job as a mine superintendent required "heavy exertional and heavy manual labor," including routinely lifting up to eighty pounds. Decision and Order at 10; Order on Reconsideration at 3.

[13] Dr. Raj noted that the exercise blood gas study showed a "more significant impairment than the resting [study] because [Claimant's] pO2 dropped from 69 to 64, and

hypoxemia prevents Claimant from meeting the exertional requirements of his usual coal mine work. Decision and Order at 10-11; Employer's Exhibit 15 at 6-8. Contrary to Employer's contention, substantial evidence supports the ALJ's finding that Dr. Raj provided a reasoned medical opinion that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 577.

Employer argues further that Dr. Raj's opinion is "poorly documented" because he did not review Dr. Rosenberg's later blood gas study, which showed improvement. Employer's Brief at 14. It therefore argues that the ALJ erred in crediting the opinion. We disagree. An ALJ is not required to discredit a physician who did not review all of a miner's medical records if 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).

Moreover, the ALJ acknowledged that Dr. Rosenberg's later blood gas study showed some improvement over Dr. Raj's earlier study, but also considered Dr. Rosenberg's opinion that his study reflects Claimant has a "mild decrease in gas exchange." Employer's Exhibit 12 at 20.[14] It was reasonable for the ALJ to consider that "even a mild respiratory impairment may preclude the performance of [a] miner's usual duties," depending on their exertional requirements. Decision and Order at 13, *quoting Cornett*, 227 F.3d at 578. Employer's argument regarding the documentation of Dr. Raj's opinion is a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Nor is there merit to Employer's contention that the ALJ erred in crediting Dr. Raj's opinion because it was equivocal as to whether Claimant is totally disabled. Employer's Brief at 14. Employer notes that "[a]t one point during his deposition," *Id.*, Dr. Raj stated that Claimant "might" not be able to do heavy exertion with the degree of hypoxemia detected on his blood gas study or "could" experience cardiopulmonary complications.[15]

[his] pCO2 went up. So this [study] is showing exercise-induced hypoxemia and hypercapnia." Employer's Exhibit 15 at 8.

[14] We note that the ALJ found that Dr. Rosenberg did not provide a sufficient explanation for his upward adjustment of the blood gas study results. Decision and Order at 13; *see infra* p. 8.

[15] Employer further contends that Dr. Raj retracted his opinion when he later stated that Claimant could return to his usual coal mine work. Employer's Brief at 15. However, the record reflects that Dr. Raj was responding to whether Claimant could perform his work

Employer's Exhibit 15 at 7-8. The ALJ, however, considered Dr. Raj's opinion as a whole, including his statements that because of Claimant's degree of exercise hypoxemia he cannot perform the exertional requirements of his usual coal mine work. *See Hess*, 7 BLR at 1-296 (ALJ may not engage in selective analysis); Decision and Order at 10-11; Order on Reconsideration at 3; Employer's Exhibit 15 at 8, 10. It was within the ALJ's discretion to find that Dr. Raj's overall opinion is that Claimant is totally disabled. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1073 (6th Cir. 2013).

Therefore, we conclude that the ALJ permissibly found Dr. Raj's opinion to be well-reasoned and documented. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Additionally, we affirm as unchallenged the ALJ's determination that Dr. Raj's opinion merited additional weight based on his documented qualifications in Pulmonary Medicine. *See Skrack*, 6 BLR at 1-711.

Employer next contends that the ALJ erred in discrediting the opinions of Drs. Rosenberg and Broudy when they understood that Claimant's job required heavy labor yet opined that he retains the pulmonary capacity to perform that work. Decision and Order at 16-17. We disagree. The ALJ permissibly accorded less weight to their opinions because they failed to adequately explain how Claimant could perform heavy labor, considering the mild impairment they diagnosed based on Claimant's blood gas studies. Decision and Order at 13-14; *see Cornett*, 227 F.3d at 578. Additionally, Employer does not challenge the ALJ's determination that Drs. Rosenberg's and Broudy's opinions merited less weight than Dr. Raj's opinion because he has qualifications in pulmonary medicine and their qualifications were not of record. *See Skrack*, 6 BLR at 1-711. We also affirm as unchallenged the ALJ's finding that Dr. Rosenberg did not sufficiently explain his opinion that the blood gas study values Drs. Raj and Nader obtained should be adjusted upward, and thus "seem[ed] to have based his opinion on exaggerated" blood gas study values. Decision and Order at 13; *see Skrack*, 6 BLR at 1-711. We therefore affirm the ALJ's decision to accord less weight to the opinions of Drs. Rosenberg and Broudy.

Based on the foregoing, we affirm the ALJ's finding that Dr. Raj's opinion establishes that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv). We further

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if it was administrative in nature. Employer's Exhibit 15 at 11 ("[I]f you tell me that his . . . job was administrative . . . then I will say that yes, he can return to his last job if that's true . . . ."). The ALJ, however, found that Claimant's usual coal mine work was not an administrative job.

affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 10-11.

We therefore affirm the ALJ's determinations that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). As Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it.[16] *Skrack*, 6 BLR at 1-711; Decision and Order at 24.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Order on Employer's Request for Reconsideration.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[16] At one point in its brief, Employer states the ALJ "improperly weighed the medical evidence . . . with respect to legal pneumoconiosis . . . ." Employer's Brief at 10. However, it sets forth no argument regarding this assertion, affording us no basis to review the ALJ's rebuttal findings. 20 C.F.R. §802.211(b).