U.S. Department of Labor

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

BRB No. 20-0578 BLA

BARBARA BARNHART (o/b/o JOHN C. BARNHART)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 12/21/2021
Employer-Petitioner	)	
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2017-BLA-05831) rendered on a miner's claim[1] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with at least fifteen years of qualifying coal mine employment based on the parties' stipulation and found Claimant[2] established a totally disabling respiratory 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,[3] 30 U.S.C. §921(c)(4), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).[4] The ALJ further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Employer further asserts the

[1] The Miner filed two prior claims. Director's Exhibits 1, 2. The district director denied the first claim because the Miner did not establish any element of entitlement. Director's Exhibit 1. The second claim was denied as abandoned. Director's Exhibit 2. A denial for abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409.

[2] Claimant is the widow of the Miner, who died on April 4, 2018, while his case was pending before the Office of Administrative Law Judges. Claimant is pursuing this claim on the Miner's behalf. Claimant's May 10, 2018 Closing Brief at 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar 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.

[4] Where 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 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(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 the Miner's most recent prior claim was denied for failure to establish any element of entitlement, Claimant had to establish at least one element of entitlement in order to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.409; Director's Exhibit 2.

ALJ erred in finding it failed to rebut the presumption.[5] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Benefit 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, 361-62 (1965).

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

A miner was totally disabled if he had a pulmonary or respiratory impairment which, standing alone, prevented 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 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 pulmonary function studies, medical opinions, and her weighing of the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 8, 17. Employer contends the ALJ erred in finding Claimant established total disability based on the pulmonary function studies and in evaluating the medical opinion evidence. Employer's Brief at 15-19.

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

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.3; Director's Exhibits 1 at 371; 11.

[7] The ALJ determined the blood gas study evidence is non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure, and thus Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii)-(iii). Decision and Order at 9.

The ALJ considered four pulmonary function studies dated February 6, 2015, April 15, 2015, August 10, 2015, and December 15, 2015. Decision and Order at 7-8; Director's Exhibits 17, 20, 22-23. The February 6, 2015 study produced qualifying[8] values before the administration of a bronchodilator.[9] The April 15, 2015 and August 10, 2015 studies produced qualifying values both pre- and post-bronchodilator. Director's Exhibits 17, 20. The December 15, 2015 study produced non-qualifying values pre- and post-bronchodilator. Director's Exhibit 23.

Employer contends the ALJ did not explain the rationale for her conclusion that the pulmonary function studies establish total disability. Employer's Brief at 3-5. We disagree. The ALJ credited Dr. Michos's opinion that the qualifying February 6, 2015 pulmonary function study is invalid and therefore gave it "less weight." Decision and Order at 8; Director's Exhibit 19. Because the Miner performed the remaining studies within a ten-month period, she determined the studies "are essentially contemporaneous."[10] Decision and Order at 8. Thus, weighing the two qualifying studies against the one non-qualifying study, she found the preponderance of the pulmonary function study evidence established total disability. *Id.* Consequently, we affirm the ALJ's finding that the pulmonary function studies establish total disability.

The ALJ next considered the medical opinions of Drs. Ajjarapu, Sargent, and McSharry. Decision and Order at 10-17. Dr. Ajjarapu opined the Miner had a totally disabling respiratory or pulmonary impairment, whereas Drs. Sargent and McSharry opined he did not. *Id.*; Director's Exhibits 17, 24-25, 27; Employer's Exhibit 32. Giving

[8] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[9] The miner did not perform post-bronchodilator testing as part of the February 6, 2015 pulmonary function study. *See* Director's Exhibit 22.

[10] Employer notes the December 15, 2015 pulmonary function study is the most recent and thus suggests it is "more probative." The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held it is rational to credit more recent evidence, solely on the basis of recency, only if the more recent evidence shows that a miner's condition has progressed or worsened. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993).

diminished weight to the opinions of Drs. Sargent and McSharry,[11] the ALJ found Dr. Ajjarapu's opinion established the Miner was totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16-17.

Employer contends the ALJ erred in crediting Dr. Ajjarapu's opinion as well-documented and well-reasoned.[12] Employer's Brief at 5-8. We disagree. Dr. Ajjarapu examined the Miner, considered his employment and exposure histories, and conducted objective testing, including pulmonary function and arterial blood gas studies. Decision and Order at 10-11; Director's Exhibits 17, 27. As the ALJ observed, Dr. Ajjarapu noted the blood gas studies showed mild resting hypoxemia, while the pulmonary function testing revealed severe pulmonary impairment. Decision and Order at 10; Director's Exhibit 17 at 5. Based on her overall evaluation, taking into account the objective test results and the Miner's symptoms of shortness of breath, sputum and coughing, Dr. Ajjarapu concluded the Miner was "totally and completely disabled and he doesn't have the pulmonary capacity to do his previous coal mine employment." Director's Exhibit 17 at 10. She reiterated in her supplemental opinion that the Miner was "totally and completely disabled" and did not "have the pulmonary capacity to do his previous coal mine employment." Director's Exhibit 27. The ALJ permissibly credited Dr. Ajjarapu's opinion because it is based on her examination, including a review of the Miner's employment and medical histories, and is consistent with the preponderance of the qualifying pulmonary function study evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 17.

As the trier-of-fact, the ALJ has the discretion to assess the credibility of the medical opinions and assign those opinions appropriate weight; the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Underwood v. Elkay Mining, Inc.*, 105 F.3d

[11] We affirm, as unchallenged on appeal, the ALJ's discrediting of the opinions of Drs. Sargent and McSharry. *See Skrack*, 6 BLR at 1-711.

[12] Employer also asserts the ALJ erroneously credited Dr. Ajjarapu as being a Board-certified pulmonary specialist. Employer's Brief at 5-6; *see* Decision and Order at 17. Elsewhere in her decision, however, the ALJ correctly noted Dr. Ajjarapu is Board-certified in family medicine. Decision and Order at 10. Moreover, the ALJ permissibly credited Dr. Ajjarapu's total disability opinion as based on the results of her examination and testing, and supported by the preponderantly qualifying pulmonary function studies; therefore, any error in stating Dr. Ajjarapu is a pulmonologist was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

946, 949 (4th Cir. 1997). Employer's arguments that the opinion of Dr. Ajjarapu is not well-reasoned and well-documented amount to a request to reweigh the evidence, which the Board cannot do.[13] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because substantial evidence supports the ALJ's credibility determinations, we affirm her finding that the opinion of Dr. Ajjarapu establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). We further affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. *See Shedlock*, 9 BLR at 1-198; Decision and Order at 17. The ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption is thus affirmed.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[14] or that "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.[15] Employer contends the ALJ erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 8-9.

[13] Employer further contends the ALJ erred in crediting Dr. Ajjarapu's opinion because she did not consider the Miner's obesity, cardiac condition, medical records, or the December 15, 2015 pulmonary function test. Employer's Brief at 7. Contrary to Employer's contention, Dr. Ajjarapu reviewed Dr. McSharry's opinion documenting these conditions and testing, and reaffirmed her opinion that the Miner was disabled. Director's Exhibit 27.

[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). This definition encompasses 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] The ALJ found Employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 21.

To disprove legal pneumoconiosis, Employer must establish the Miner did 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). Employer relied on the medical opinions of Drs. Sargent and McSharry. Director's Exhibits 24-25; Employer's Exhibit 32. Both doctors opined the Miner had a mild restrictive impairment due to obesity. Director's Exhibits 24-25; Employer's Exhibit 32. Dr. Sargent further opined the Miner had chronic bronchitis unrelated to coal mine dust exposure, Employer's Exhibit 32 at 24, whereas Dr. McSharry opined he had asthma unrelated to coal mine dust exposure. Director's Exhibit 25 at 5. The ALJ accorded little weight to their opinions because they were inadequately explained and unreasoned. Decision and Order at 22.

Employer contends the ALJ mischaracterized Dr. Sargent's opinion, asserting he did not opine or testify that clinical pneumoconiosis must be present in order to diagnose legal pneumoconiosis.[16] Employer's Brief at 8. We disagree.

Dr. Sargent diagnosed a mild restrictive impairment caused by the Miner's obesity and unrelated to coal mine dust exposure. Director's Exhibit 23 at 3-4. He explained the Miner did not have "legal coal workers' pneumoconiosis" or a coal dust-induced restrictive impairment because "coal workers' pneumoconiosis can result in the development of a restrictive impairment," but only "in the presence of either advanced profusion simple coal workers' pneumoconiosis or complicated pneumoconiosis, neither of which is present in this case." Director's Exhibit 23. He further explained that, when coal mine dust exposure causes a restrictive impairment, it does so by causing scarring on the lungs that can be seen on x-ray, and that low levels of profusion are "almost never associated with measurable respiratory impairment." Employer's Exhibit 32 at 25-26. Thus, contrary to Employer's argument, we see no error in the ALJ characterizing Dr. Sargent's opinion as excluding a diagnosis of legal pneumoconiosis based on the absence of clinical or complicated pneumoconiosis. Decision and Order at 21. Further, the ALJ permissibly rejected Dr. Sargent's opinion because "evidence of clinical pneumoconiosis, at any stage, is not required in order to establish legal pneumoconiosis."[17] Decision and Order at 21-22; *see*

[16] Employer does not allege error with regard to the ALJ's discrediting of Dr. McSharry's opinion. This finding is thus affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[17] The ALJ also permissibly discredited Dr. Sargent's opinion because he did not adequately explain why the Miner's restrictive impairment was not aggravated by his "[fifteen] plus years" of coal mine dust exposure. *See Milburn Colliery Co. v. Hicks*, 138

Harman Mining Co. v. Director, OWCP [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

Because the ALJ's discrediting of Dr. Sargent's opinion is supported by substantial evidence, we affirm her finding that Employer failed to establish the Miner did not have legal pneumoconiosis, thereby precluding a rebuttal finding that the Miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The ALJ next considered whether Employer rebutted the Section 411(c)(4) presumption by establishing that "no part of the miner'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). She permissibly discredited the opinions of Drs. Sargent and McSharry because they did not diagnose legal pneumoconiosis, contrary to her determination that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (physician who fails to diagnose legal pneumoconiosis, contrary to the ALJ's finding, cannot be credited on rebuttal of disability causation "absent specific and persuasive reasons"); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) (rejecting the employer's argument that the ALJ "erred by discrediting an opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found"); Decision and Order at 22-23. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

F.3d 524, 533 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 22.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge