U.S. Department of Labor

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

BRB No. 21-0020 BLA

MICHAEL H. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRESEE TRUCKING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
ENCOVA INSURANCE	)	DATE ISSUED: 12/29/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

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

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

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits (2018-BLA-05599) rendered on a claim filed on August 19, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined Claimant established complicated pneumoconiosis arising out of coal mine employment and is thereby entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §§718.203(b), 718.304. He also found 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).[2] He further found Employer did not rebut the presumption. Thus he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and invoked the Section 411(c)(3) irrebuttable presumption. It further contends he erred in finding Claimant is totally disabled and invoked the Section

[1] Claimant filed two prior claims that he later withdrew. Director's Exhibits 1, 2. As a withdrawn claim is considered not to have been filed, the ALJ treated the current claim as an initial claim. 20 C.F.R. §725.306(b); Director's Exhibit 4.

[2] Section 411(c)(4) provides a rebuttable presumption that 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.

411(c)(4) presumption;[3] alternatively, it challenges the constitutionality of the presumption. Both Claimant and the Director, Office of Workers' Compensation Programs, have filed response briefs in support of the award of benefits.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, 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 25-28. Employer cites the district court's 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 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

[3] 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 28.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 65.

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 pulmonary function studies and medical opinions.[5] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 26, 28. As an initial matter, we affirm as unchallenged on appeal the ALJ's determination that the pulmonary function study evidence establishes total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 26. As discussed below, because we also find Employer did not establish any error in the ALJ's weighing of the medical opinions that could affect his determination that the pulmonary function studies establish total disability, we further affirm his finding Claimant is disabled based on the evidence as a whole.

Turning to the medical opinion evidence, Employer argues the ALJ erred in assessing the exertional requirements of Claimant's usual coal mine employment. Employer's Brief at 19-25. We disagree.

The ALJ addressed the exertional requirements of Claimant's usual coal mine employment as a truck driver. Decision and Order at 5-7. The ALJ highlighted Claimant's testimony that he was required to climb into his truck six to eight times per day *Id., citing* Hearing Tr. at 50-52. The ALJ further noted Claimant testified that, although he could get in the truck, it would not "be easy." *Id., citing* Hearing Tr. at 70. Contrary to Employer's argument, the ALJ reasonably concluded Claimant's usual coal mine employment required "a significant degree of exertion" based on Claimant's credible testimony he was required to climb in and out of the trucks several times a day. Decision and Order at 7; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (the ALJ has discretion to assess witness credibility and the Board will not disturb his or her findings unless they are inherently unreasonable).

Employer's suggested interpretation of Claimant's testimony amounts to a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Further, it is the ALJ's function to weigh the evidence, draw appropriate inferences and determine credibility. *See Underwood v. Elkay Mining,*

[5] The ALJ found Claimant did not establish total disability based on the blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 11, 14.

Inc., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Even if the Board would weigh the evidence differently if considered *de novo*, it must affirm the ALJ's finding if it is supported by substantial evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis.").

With respect to the medical opinion evidence, the ALJ discredited as inadequately reasoned Dr. Basheda's opinion that Claimant's respiratory or pulmonary impairment does not preclude him from performing his usual coal mine work. Decision and Order at 26-28. He found Dr. Raj's opinion that Claimant is totally disabled credible and sufficient to establish total disability.[6] *Id.*

We find no merit in Employer's assertion the ALJ erred in discrediting Dr. Basheda's contrary opinion. Employer's Brief at 28-30. The ALJ correctly noted Dr. Basheda based his conclusion on his understanding that Claimant's usual coal mine employment was "not exertional" and Claimant "just drove the truck." Decision and Order at 27. He further noted Dr. Basheda failed to discuss the requirement that Claimant had to climb in and out of his truck five to six times a day, or any of the other specific tasks related to his usual coal mine employment.[7] *Id.* Contrary to Employer's argument, the ALJ permissibly discredited Dr. Basheda's opinion because he underestimated the exertional requirements of Claimant's truck driver job that required "significant exertion," and further failed to discuss the specific demands of this job when opining Claimant is not totally disabled. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (a physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir.

[6] The ALJ noted Dr. Marantz concluded Claimant is totally disabled because he has complicated pneumoconiosis, but he declined to credit the opinion as establishing total disability independent of the finding that Claimant has complicated pneumoconiosis. Decision and Order at 27; Director's Exhibit 18.

[7] Claimant testified that in addition to climbing in and out of his truck, he also had to run the loader to fill his truck, which required that he climb in and out of the loader several times a day. Hearing Tr. at 53-54. Further, he testified he had to change a truck tire on occasion. *Id.* at 53.

2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); Decision and Order at 27.

Because Dr. Basheda is the only physician to opine Claimant is not totally disabled, his discredited opinion cannot undermine the ALJ's finding that Claimant established total disability based on the pulmonary function studies. We therefore need not address Employer's argument that the ALJ erred in crediting Dr. Raj's opinion and in finding the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 19-25. As Dr. Raj diagnosed total disability, his opinion is not contrary to the qualifying pulmonary function study evidence. Thus, even if Dr. Raj's opinion was accorded no weight, the medical opinion evidence would be in equipoise and could not weigh against a finding of total disability. *See Rafferty*, 9 BLR at 1-232. In this context, Employer cannot explain how the "error to which [it] points could [make] any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As Dr. Basheda's opinion is the only contrary evidence of record, substantial evidence supports the ALJ's determination that the medical opinion evidence does not undermine the totally disabling results of the pulmonary function studies. Decision and Order at 27-28. Because there is no evidence undermining the qualifying pulmonary function studies, we affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; 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.[8] *Skrack*, 6 BLR at 1-711; Decision and Order at 29-31.

[8] Because we affirm the ALJ's alternative finding that Claimant established entitlement to benefits based on the Section 411(c)(4) presumption, we need not address Employer's argument that the ALJ erred in finding Claimant invoked the irrebuttable presumption at Section 411(c)(3) of the Act by establishing complicated pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 6-18.

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

JONATHAN ROLFE
Administrative Appeals Judge