U.S. Department of Labor

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

BRB No. 21-0458 BLA

ROBERT R. BENAMATI, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY	)	
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	DATE ISSUED: 12/19/2022
	)	
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order on Remand Awarding Benefits (2017-BLA-06106) rendered on a claim filed on November 4, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case is before the Board for the second time.[2]

In consideration of Employer's previous appeal, the Board affirmed the ALJ's finding that Claimant established thirty years of coal mine employment but vacated his determinations that Claimant established total disability and thereby 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).[3] Specifically, the Board held the ALJ erred in weighing the pulmonary function studies, which also influenced his weighing of the medical opinions, 20 C.F.R. §718.204(b)(2)(i), (iv). *Benamati v. Helvetia Coal Co.*, BRB No. 19-0016 BLA, slip op. at 4 (Nov. 14, 2019) (unpub.). Thus, the Board vacated the award of benefits and remanded the case for further consideration. *Id*., slip op. at 4 n.8.

On remand, the ALJ again found Claimant established total disability and that he invoked the Section 411(c)(4) presumption. The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.

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

[1] Claimant filed a prior claim but withdrew it. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] We incorporate the procedural history of the case as set forth in the Board's prior decision. *Benamati v. Helvetia Coal Co.*, BRB No. 19-0016 BLA (Nov. 14, 2019) (unpub.).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled 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); 20 C.F.R. §718.305.

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 Assocs., Inc.*, 380 U.S. 359 (1965).

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

To invoke the Section 411(c)(4) presumption, a claimant must establish the miner has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on qualifying[5] pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[6] 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.*, 9 BLR 1-27, 1-28-29 (1988); *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 medical opinions and in consideration of the evidence as a whole. Employer generally asserts the ALJ erred in finding Claimant totally disabled because there are no qualifying pulmonary function or blood gas studies. *Id*. The regulations specifically provide total disability may be established based on a physician's reasoned opinion that a miner cannot perform his or her usual coal mine employment, however, even when the pulmonary function and arterial

[4] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The ALJ reconsidered the pulmonary function study evidence and, after determining Claimant's average height, found the studies non-qualifying for total disability. 20 C.F.R §718.204(b)(2)(i); Decision and Order on Remand at 5-6. He also found the record contained no evidence of cor pulmonale with right-sided congestive heart failure or evidence Claimant has complicated pneumoconiosis. 20 C.F.R. §§718.204(b)(2)(iii), 718.304; Decision and Order on Remand at 7; 2018 Decision and Order at 8.

blood gas studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal Co.*, 227 F.3d 569, 577 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997).

The ALJ determined Claimant's last coal mine job as a section foreman required heavy labor since it entailed "lifting and carrying of 50-100 pounds on a regular basis."[7] Decision and Order on Remand at 7. He then considered five medical opinions. Specifically, he credited the opinions of Drs. Cohen and Kanouff that Claimant is totally disabled over the contrary opinions of Drs. Rosenberg and Basheda. *Id*. at 13-16. Although the ALJ found Dr. Zlupko's opinion not fully explained, he gave some weight to it in finding Claimant totally disabled because it was consistent with the reasoned opinions of Drs. Cohen and Kanouff. *Id*. at 15.

Employer argues the ALJ failed to adequately explain his credibility determinations. Employer's Brief at 11-19. We disagree

Dr. Cohen

Dr. Cohen examined Claimant and reviewed his employment history and the exertional requirements of his last coal mining job, which he considered to be "heavy manual labor." Director's Exhibit 15 at 4-5, 8. He observed the pulmonary function testing showed a restrictive lung disease with a diffusion impairment. *Id.* at 8. Additionally, he noted Claimant's cardiopulmonary exercise testing showed "abnormal ventilatory limitation to exercise." *Id.* Ultimately, Dr. Cohen concluded Claimant has restrictive lung disease causing a diffusion impairment and ventilatory limitation to exercise which precludes him from performing his last coal mine job as a section foreman.[8] *Id.*

The ALJ credited Dr. Cohen's opinion as "well[-] reasoned and supported by his thorough discussion of the medical record including Claimant's treatment records." Decision and Order on Remand at 15. Specifically, the ALJ further noted Dr. Cohen gave

[7] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's last coal mine job as a section foreman required heavy manual labor. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7.

[8] Dr. Cohen opined Claimant's "degree of impairment is totally disabling for [Claimant's] last job as an underground mine foreman and superintendent where he was required to crawl long distances through the intakes and escape ways, lift bundles of roof bolts and plates as well as [fifty pound] bags of rock dust, and shovel up to an hour a day." Director's Exhibit 15 at 8.

a detailed description of the exertional requirements of Claimant's last coal mine job. *Id.* at 14. Additionally, the ALJ gave weight to Dr. Cohen's opinion because of his "impressive" credentials, "especially in regard to his experience and expertise shown in the area of coal worker[s'] pneumoconiosis," observing Dr. Cohen co-authored several articles in peer-reviewed medical journals regarding coal miners' diseases. *Id.* at 15.

Although Employer is correct that Dr. Cohen considered a May 28, 2014 pulmonary function study which is not part of record, the ALJ's failure to address this issue is harmless error, as Dr. Cohen's opinion is supported by his physical examination of Claimant, his review of Dr. Kanouff's treatment records and the results of Claimant's September 15, 2015 cardiopulmonary test, which he explained would prevent Claimant from performing specific job duties such as crawling and lifting. *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); Director's Exhibit 15 at 8; Claimant's Exhibit 2.[9] Moreover, although Dr. Cohen did not review the most recent pulmonary function studies, the ALJ was not required to discredit his opinion on that basis since he found it otherwise well-documented. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion); Decision and Order on Remand at 14-15; Director's Exhibit 15; Claimant's Exhibit 2. Because the ALJ acted within his discretion in finding Dr. Cohen's opinion credible to support a finding of total disability, we affirm his finding. *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986).

Dr. Kanouff

Dr. Kanouff has treated Claimant since July 2015 for coal workers' pneumoconiosis. Director's Exhibit 16 at 2. He noted a September 2015 cardiopulmonary stress test showed a "severe pulmonary impairment as the cause for [Claimant's] shortness of breath." *Id.* Repeating the test in May 2016, he found it confirmed the same diagnosis. *Id.* He opined Claimant cannot return to work based on the significant pulmonary impairment shown by the cardiopulmonary stress tests. *Id.* In addition, he "wholeheartedly agree[ed] with Dr. Cohen's medical assessment . . . ." *Id.* at 3.

[9] Employer argues that this test is not part of the record. Employer's Brief at 15. However, it appears in the record as Claimant's Exhibit 2 as noted, having been identified by Claimant as a hospital record/treatment note on his Evidence Summary Form and admitted at the hearing. Hearing Transcript at 8-10.

The ALJ found Dr. Kanouff's opinion to be well-reasoned, supported by his treatment notes, and entitled to additional weight because he is Claimant's treating physician. Decision and Order on Remand at 13, 16. In addition, the ALJ observed Dr. Kanouff had reviewed Dr. Cohen's report and from that review, understood the exertional requirements of Claimant's last coal mining job. *Id*. at 14, 15 n. 7.

Employer argues the ALJ erred in crediting Dr. Kanouff's opinion since he did not specifically identify Claimant's job duties. Employer's Brief at 16. However, the ALJ correctly noted that Dr. Kanouff reviewed Dr. Cohen's report which described Claimant's job duties. Decision and Order on Remand at 14, 15 n.7. Given Dr. Cohen's description of Claimant's usual coal mine work, and Dr. Kanouff's specific statement that he agrees with Dr. Cohen's opinion, the ALJ permissibly inferred Dr. Kanouff understood Claimant's job duties in rendering his opinion that Claimant is totally disabled. *Kertesz*, 788 F.2d at 163 (inferences are for the ALJ to make); Decision and Order on Remand at 13-14, 15 n.7; Director's Exhibit 16 at 2-3.

Dr. Zlupko

Dr. Zlupko conducted the Department of Labor's complete pulmonary evaluation of Claimant and diagnosed a restrictive impairment based on the pulmonary function study he performed on January 5, 2016. Director's Exhibit 14 at 8. *Id.* He opined Claimant has a "moderate to severe functional impairment" based on that testing. *Id.* In a supplemental report based on a pulmonary function study he conducted on March 9, 2016,[10] he stated that while the more recent study, "might suggest that [Claimant] only has a mild degree of restrictive ventilatory impairment, his chest [x]-ray findings [of clinical coal workers' pneumoconiosis] would suggest to me that [Claimant] not be returned to his previous work environment." Director's Exhibit 14 at 1.

Employer argues the ALJ erred in crediting Dr. Zlupko's opinion because the physician did not know the exertional requirements of Claimant's usual coal mine employment working as a section foreman and improperly relied on a chest x-ray and no objective testing to support his opinion of total disability. Employer's Brief at 14. We disagree. Contrary to Employer's contention, the ALJ gave "somewhat less weight to Dr. Zlupko's opinion because he did not state the requirements of [Claimant's last] coal mine employment, nor specify the level of difficulty he assumed in reaching his determination

[10] Dr. Michos reviewed the January 5, 2016 pulmonary function study on behalf of the Department of Labor and deemed the study technically unacceptable due to a greater than a five percent variation between the two best FVC and FEV1 maneuvers, and due to suboptimal MVV performance. Director's Exhibit 14 at 35. Thus, another pulmonary function study was performed on March 9, 2016. *Id*. at 27.

that [Claimant] would be unable to return to his coal mine duties." Decision and Order on Remand at 15. But the ALJ permissibly found his opinion otherwise consistent with the opinions of Drs. Cohen and Kanouff that Claimant is totally disabled. *Id.* Further, even if we were to agree the ALJ erred in giving any weight to Dr. Zlupko's opinion, Employer fails to explain why the ALJ's error requires remand since substantial evidence still supports his conclusion that Claimant is totally disabled. *Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

Dr. Rosenberg

Dr. Rosenberg reviewed the medical records and opined that Claimant "could perform his last coal mining job" from a pulmonary perspective. Employer's Exhibit 5 at 9. He observed that based upon his pulmonary function testing and arterial blood gas studies, Claimant "does not meet disability criteria set by [the Department of Labor]." *Id.* While conceding Claimant's "exercise tests do demonstrate a ventilatory limitation," he nevertheless opined "[Claimant's] limitation from restriction relates to his obesity and associated diminishment of ventilatory capacity." *Id.* The ALJ found Dr. Rosenberg failed to address whether Claimant's "'diminishment of ventilatory capacity' would impair his ability to perform his coal mine duties requiring heavy labor" regardless of cause. Decision and Order on Remand at 13.

Employer argues the ALJ erred in characterizing Dr. Rosenberg's opinion as one which did not address whether Claimant's respiratory impairment would preclude him from performing his usual coal mine work. Employer's Brief at 17-18. We disagree. The ALJ reasonably found Dr. Rosenberg's opinion attributing Claimant's restrictive ventilatory limitation to obesity focused on the cause of Claimant's impairment but did not specifically explain whether Claimant was totally disabled from performing his usual coal mine work without regard to the etiology of his impairment. *See* 20 C.F.R. §718.204(b)(2); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989) (relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption at 20 C.F.R. §718.305).

Dr. Basheda

Dr. Basheda indicated Claimant's October 30, 2017 pulmonary function study showed a reversible obstruction and no evidence of a restrictive impairment. Employer's Exhibit 3 at 5-6. Specifically, he noted Claimant had a reduced FEV1, FVC, and diffusion impairment, but observed the diffusion capacity measurements increased when corrected for alveolar volume. *Id.* He classified Claimant as having a Class III impairment. *Id.* at 22. Further, he noted Claimant's October 30, 2017 blood gas study reflected mild

hypoxemia at rest. *Id*. at 5. In addition, he observed that the cardiopulmonary exercise tests of September 15, 2015, and May 3, 2016, "demonstrated no evidence of ventilatory impairment." *Id.* at 23. Ultimately, he concluded Claimant had no evidence of a restrictive or obstructive disease, no oxygenation impairment, and could return to his last coal mining work based on the objective data. *Id.* In a supplemental report and during his deposition, Dr. Basheda maintained his opinion. Employer's Exhibits 4 at 8; 6 at 17, 30.

Contrary to Employer's contention, we see no error in the ALJ's permissible finding that Dr. Basheda did not adequately address the abnormalities seen on Claimant's pulmonary function testing, the impact of Claimant's progressively worsening respiratory symptoms, or the effect of the diffusion capacity impairment he initially reported. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 16. The ALJ also found Dr. Basheda's opinion failed to explain what he meant by a Class III impairment. *Id*.

Conclusion on Total Disability

The ALJ considered all the relevant evidence and permissibly found Claimant totally disabled based on the weight of the opinions of Drs. Cohen, Kanouff, and Zlupko. Employer's arguments on total disability are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). As substantial evidence supports the ALJ's credibility determinations, we affirm his finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. Decision and Order on Remand at 16-17. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption.

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,[11] or that "no part

[11] "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

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 failed to establish rebuttal by either method. Decision and Order on Remand at 17-22.

Employer generally asserts, without any explanation, that "the ALJ erred in finding it did not rebut the presumption." Employer's Brief at 20. Because Employer has not explained how the ALJ erred in weighing the evidence or reaching his rebuttal findings, we affirm them. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (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).

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).

Accordingly, we affirm the ALJ's Decision and Order on Remand Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge