U.S. Department of Labor

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

BRB No. 22-0069 BLA

GRANVILLE SESCO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROOKS RUN MINING COMPANY, LLC	)	
c/o HEALTHSMART CASUALTY CLAIMS	)	
	)	
Self-Insured	)	DATE ISSUED: 12/13/2022
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 in a Subsequent Claim of Administrative Law Judge Theresa C. Timlin, United States Department of Labor.

Samuel B. Petsonk (Petsonk, PLLC), Oak Hill, West Virginia, for Claimant.

T. Jonathan Cook (Cipriani & Werner, PC), Charleston, West Virginia, for Employer.

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

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits in a Subsequent Claim (2020-BLA-05634) 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 July 5, 2018.[1]

The ALJ found Claimant established 30.23 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment.[2] 20 C.F.R. §718.204(b)(2). Therefore, she 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) (2018), and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's second claim for benefits. On May 26, 2016, the district director denied his first claim, filed on June 29, 2015, because he did not establish total disability. Director's Exhibit 1 at 13, 173-76.

[2] The ALJ found Claimant did not establish complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 33. Consequently, Claimant could not invoke 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).

[3] Section 411(c)(4) of the Act 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); *see* 20 C.F.R. §718.305.

[4] When 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 Claimant did not establish total disability in his prior claim, he had to submit evidence establishing that element of entitlement to obtain review of the merits of his current claim. *Id*.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability.[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'Keefe 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, Claimant must establish he 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 gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[7] 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 Defore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 30.23 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-12.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[7] A "qualifying" pulmonary function study or arterial 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).

The ALJ found Claimant established total disability based on the medical opinion evidence and in consideration of the evidence as a whole.[8] Decision and Order at 25-27.

Employer contends the ALJ erred. Employer's Brief at 15-18 (unpaginated). We disagree.

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine work as a maintenance foreman. Decision and Order at 12-13. Based on Claimant's CM-913 Description of Coal Mine Work form dated June 28, 2018, the ALJ noted the daily duties of Claimant's usual coal mine work included "building cribs for roof support out of wooden timbers," "hanging ventilation curtains," and "carrying shields to and components of heavy equipment motors." *Id*. at 12-13 (citing Director's Exhibit 5). She also noted Claimant's usual coal mine work required: "carry[ing] and pulling water pumps weighing 70-80 lbs. and some pumps weigh[ing] nearly 300 pounds; walking thousands of feet to complete examinations of electrical systems and equipment; carrying 30 pounds of tools all day; weld[ing] to make repairs on heavy equipment; [and] carr[ying] equipment [and] several 40 lbs. rock dust bags per shift." *Id*. at 13 (citing Director's Exhibit 5). Further, she determined Claimant's Form CM-913 "description is consistent with [his] testimony that he walked a considerable distance to check pumps while carrying tools and supplies." *Id*. (citing Hearing Tr. at 28-29). Consequently, she found Claimant's usual coal mine work required "heavy labor." *Id*. at 13. As no party challenges this finding, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ then considered the opinions of Drs. Allen and Go that Claimant is totally disabled by a respiratory or pulmonary impairment and Dr. Rosenberg's opinion that he is not. Director's Exhibits 14, 21, 22; Claimant's Exhibits 1, 4; Employer's Exhibit 1. Initially, she stated Drs. Allen, Go, and Rosenberg are "well qualified to offer an opinion on whether Claimant is totally disabled due to a respiratory impairment" because they "possess relevant Board certifications in occupational medicine . . . and internal and pulmonary medicine . . . [and] relevant academic experience." Decision and Order at 24. She found Drs. Allen's and Go's opinions well-reasoned, and Dr. Rosenberg's opinion unpersuasive. *Id*. at 25-26. Thus she concluded Claimant established a totally disabling respiratory or pulmonary impairment based on Drs. Allen's and Go's opinions. *Id*.

[8] We affirm, as unchallenged, the ALJ's findings that the pulmonary function and arterial blood gas studies do not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 15-16.

Employer argues the ALJ erred in crediting Drs. Allen's and Go's opinions because it contends they are contrary to the weight of the objective evidence. Employer's Brief at 16-17 (unpaginated). We disagree.

Contrary to Employer's assertion, even if total disability cannot be established at 20 C.F.R. §718.204(b)(2)(i), (ii), "total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents" him from performing his usual coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(iv). Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

Dr. Allen performed the Department of Labor-sponsored complete pulmonary evaluation of Claimant consisting of: a physical examination; work, medical and social histories; a chest x-ray; pulmonary function and arterial blood gas studies; and an EKG. Director's Exhibit 14. She recognized Claimant worked as a "maintenance foreman" from 2007 to 2018 at "moderate" and "heavy" levels of exertion based in part on his Form CM-913. *Id*. In addition, she noted Claimant reported symptoms of cough with production of gray sputum, wheezing, dyspnea and occasional paroxysmal nocturnal dyspnea, and found "persistent coughing would decrease his ability to maintain work activities." *Id*. Further, she found Claimant's "[p]ulmonary function testing . . . indicat[es] significant air trapping" and "his [arterial blood gas testing] shows increasing pCO2 from 37 to 49 mmHg and decrease in oxygenation from 80 to 76 with exercise . . . [and] there was a significant increase in CO2 indicative of respiratory problems." *Id*. She thus opined Claimant "would not be able to work a full shift at his last coal mine related job because although he did not meet table criteria for [arterial blood gas testing] he demonstrated a large change in CO2 retention with decrease in oxygen with four minutes of moderate activity." *Id*.

Moreover, Dr. Allen stated in her supplemental report that Claimant's "pulmonary testing has shown obstructive lung disease with air trapping on multiple occasions and exercise blood gas testing on March 4, 2019 showed progressive CO2 retention (49 mmHg) with decreasing oxygenation (76 mmHg)." Director's Exhibit 22. She thus opined Claimant is "unable to maintain the physical exertion required for his last coal mining job because of his obstructive lung disease/emphysema with air trapping . . . [which] contributes to his poor exercise tolerance." *Id*.

Similarly, Dr. Go stated Claimant's last coal mine work as a maintenance foreman required that he lift "50 pounds," "tires," "water pumps," a "box of tools," and "walk a

lot." Claimant's Exhibit 1. He also stated "the spirometry of [March 14, 2019] meets AMA [American Medical Association] criteria for a class 2 pulmonary impairment" that "is incompatible with the carrying and lifting of loads in excess of 100 pounds, walking thousands of feet carrying 30 pounds of tools, and the performance of other heavy manual labor." *Id*. Further, he stated Claimant's "hypoxemia requiring oxygen supplementation is incompatible with any coal mine employment requiring physical effort." *Id*. He thus opined Claimant is "totally disabled for his last coal mine employment" as a maintenance foreman. *Id*.

The ALJ noted both Drs. Allen and Go acknowledged Claimant's "pulmonary function and arterial blood gas tests did not qualify," but stated they "reasonably explained why Claimant was nevertheless unable to return to his coal mine job." Decision and Order at 24-25. Specifically, she noted Claimant's "significant air trapping" from the pulmonary function study and "significant increase in the CO2 on arterial blood gas testing," as well as his use of supplemental oxygen and evidence of coughing, wheezing, dyspnea, and hypoxemia, demonstrated a respiratory impairment. *Id*. at 25. She further stated Drs. Allen and Go "possess[ed] an adequate understanding of the exertional requirements of Claimant's usual coal mine job" and "reasonably concluded that Claimant's respiratory condition precluded further coal mine work." *Id*. 24-26. Thus she permissibly found their opinions well-reasoned. *See 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 24-25.

We also reject Employer's argument that the ALJ erred in discounting Dr. Rosenberg's opinion. Employer's Brief at 17-18. The ALJ noted Dr. Rosenberg "clearly opined in his first report that Claimant does not suffer from a pulmonary impairment," but observed the doctor "appears to focus on disability causation in his second report as he "acknowledged . . . Claimant's hypoventilation 'likely' resulted in a 'whole person' disability." Decision and Order at 25. She thus permissibly found Dr. Rosenberg's opinion unpersuasive because he conflated the issues of disability and disability causation.[9] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 25-26.

Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). It is the ALJ's function to weigh the evidence, draw appropriate inferences and determine credibility. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23

[9] Because the ALJ provided valid bases for discrediting Dr. Rosenberg's opinion, we need not address Employer's remaining arguments concerning the weight afforded his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

(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."). Because substantial evidence supports the ALJ's decision to credit Drs. Allen's and Go's opinions over Dr. Rosenberg's contrary opinion, we affirm the ALJ's permissible finding that the medical opinion evidence, considered in isolation, establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 25.

We also affirm, as supported by substantial evidence, the ALJ's finding that all of the relevant evidence, when weighed together, established total respiratory disability. 20 C.F.R. §718.204(b)(2) ; *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 26-27. Thus, we affirm her findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309; Decision and Order at 6, 33.

We further affirm, as unchallenged, her finding that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 38. We therefore affirm the award of benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge