U.S. Department of Labor

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

BRB No. 22-0115 BLA

DALE E. JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE OHIO COUNTY COAL COMPANY	)	
	)	
and	)	
	)	
MURRAY ENERGY CORPORATION TRUST	)	DATE ISSUED: 12/14/2022
	)	
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 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.

Aimee M. Stern (Dinsmore & Shohl, LLP), Wheeling, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2020-BLA-05884) rendered on a subsequent claim filed on July 30, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had twenty-five years of coal mine employment and found at least fifteen years entailed underground coal mine employment. He further found Claimant established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

[1] Claimant filed four previous claims. The district director denied the first two. Director's Exhibits 1, 2. Claimant withdrew his two later claims. Director's Exhibits 3, 4. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b). The district director denied Claimant's second claim because the evidence did not establish that Claimant had pneumoconiosis or a total respiratory or pulmonary disability. Director's Exhibit 2.

[2] 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); 20 C.F.R. §718.305.

[3] 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 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(c); *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(c)(3). Because Claimant's prior claim was denied for failure to establish pneumoconiosis or total disability, Claimant had to establish either element of entitlement to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309; Director's Exhibit 2.

On appeal, Employer argues the ALJ erred in finding Claimant totally disabled and therefore erred in invoking the Section 411(c)(4) presumption. It further argues the ALJ erred in concluding it failed to rebut the presumption.[4] Claimant responds, urging affirmance 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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assoc., 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 that 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 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 opinion evidence, and the evidence as a whole.[6] Decision and Order at 16–21.

[4] We affirm, as unchallenged on appeal, the ALJ's finding of at least 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 5, 7.

[5] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7; Hearing Transcript at 16.

[6] We affirm, as unchallenged, the ALJ's determination that the pulmonary function studies establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack*, 6 BLR at 1-711; Decision and Order at 17–18.

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Feicht, Posin, Fino, and Ranavaya. Decision and Order at 20–21. Drs. Feicht and Posin opined that Claimant is totally disabled from his usual coal mine employment while Drs. Fino and Ranavaya opined he can perform his last coal mining work. The ALJ credited Dr. Feicht's opinion as well-documented and well-reasoned. Decision and Order at 21. He accorded little weight to Dr. Posin's opinion because the doctor failed to identify the exertional requirements of Claimant's coal mine work. *Id*. Furthermore, he accorded little weight to the contrary opinions of Drs. Fino and Ranavaya, finding that in light of Claimant's qualifying pulmonary function studies,[7] their opinions were not well reasoned. *Id*. Consequently, the ALJ found the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Employer argues the ALJ erred in crediting Dr. Feicht's opinion.[8] Employer's Brief at 8. We disagree.

Dr. Feicht opined that Claimant would not be able to perform his last coal mine employment based on Claimant's moderate chronic obstructive pulmonary disease (COPD), as demonstrated by his abnormal pulmonary function study. Director's Exhibits 14, 18. The ALJ found Dr. Feicht's opinion entitled to great weight, as the doctor had an accurate understanding of the exertional requirements of Claimant's usual coal mine work and based his opinion on the abnormal pulmonary function study evidence. Decision and Order at 21.

Employer's sole contention is that Dr. Feicht's opinion is not credible because he stated in his initial report that Claimant's shortness of breath is mild. Employer's Brief at 8. It is the ALJ's duty to make findings of fact and weigh the evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998). Employer's argument amounts to a request to reweigh the evidence, which the Board may not do.[9] *Anderson v. Valley*

[7] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[8] We affirm, as unchallenged on appeal, the ALJ's discrediting of Drs. Fino's and Ranavaya's opinions that Claimant is not totally disabled. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17–18.

[9] Moreover, to the extent Employer suggests Dr. Feicht meant to indicate that Claimant's impairment is mild, even a mild impairment may be totally disabling depending on the exertional requirements of the miner's usual coal mine work. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). In any event, Dr. Feicht diagnosed Claimant

Camp of Utah, Inc., 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the ALJ's findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and that, when weighed together, the evidence as a whole establishes total disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order at 21.

We thus 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); 20 C.F.R. §725.309; Decision and Order at 18.

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,[10] or "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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ found Employer failed to establish rebuttal by either method.[11] Decision and Order at 9–15.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated

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with a moderately severe and disabling obstructive impairment, and the ALJ rationally found his opinion supported by Claimant's qualifying pulmonary function study. Decision and Order at 21; Director's Exhibits 14, 18.

[10] "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 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).

[11] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 11.

by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A).

Employer relied on the medical opinions of Drs. Fino and Ranavaya[12] who opined that Claimant does not have legal pneumoconiosis, but instead suffers from asthma unrelated to his coal mine dust exposure. Director's Exhibit 17, Employer's Exhibit 1. The ALJ found neither opinion sufficiently reasoned to rebut legal pneumoconiosis in light of the medical science regarding coal mine dust exposure and obstructive lung disease discussed by the Department of Labor in the preamble to the 2001 revised regulations. Decision and Order at 14-15.

Employer argues Dr. Fino provided a well-reasoned medical opinion that is supported by Dr. Ranavaya's opinion. Employer's Brief at 8. Employer, however, has not set forth any specific allegation of error by the ALJ. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446–47 (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); 20 C.F.R. §802.211(b). At best, Employer's argument amounts to a request to reweigh the evidence, which the Board may not do. *Anderson*, 12 BLR at 1-113. Therefore, we affirm the ALJ's finding that the opinions of Drs. Fino and Ranavaya are insufficiently reasoned to rebut the presumption that Claimant has legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 12–15.

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant'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); Decision and Order at 22. The ALJ discounted the opinions of Drs. Fino and Ranavaya on the cause of Claimant's pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015). Employer has not challenged the ALJ's finding that it failed to rebut disability causation. Decision and Order at 22–24. Thus, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption and affirm the award of benefits.

[12] The ALJ also considered the opinions of Drs. Feicht and Posin diagnosing Claimant with legal pneumoconiosis in the form of COPD due to coal mine dust exposure. Decision and Order at 13 Director's Exhibits 14, 18; Claimant's Exhibit 1.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge