U.S. Department of Labor Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0516 BLA

RAYMOND V. BURNETTE	)
	)
Claimant-Respondent	)
	)
v.	)
	)
THE MONONGALIA COUNTY COAL COMPANY	)
	)
and	)
	)
MURRAY ENERGY CORPORATION TRUST	) DATE ISSUED: 12/04/2023
	)
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: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05889) rendered on a claim filed on March 18, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-six years of underground coal mine employment and found he has 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,[1] 30 U.S.C. §921(c)(4) (2018). He 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.[2] Claimant responds in support of the award. 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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[1] 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-six years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7; *see* Hearing Tr. at 5.

[3] 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 13.

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 or 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 Defore v. Ala. 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).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 16-21.

Employer does not challenge the ALJ's finding that the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 16-18. Thus, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Medical Opinions

The ALJ considered the medical opinions of Drs. Werntz, Go, and Abrahams. Decision and Order at 19-21. Drs. Go and Werntz opined Claimant is totally disabled, while Dr. Abrahams opined he is not. Director's Exhibit 30 at 1-2; Claimant's Exhibit 1 at 5-6; Employer's Exhibit 1 at 5. The ALJ found Drs. Go's and Werntz's opinions persuasive and Dr. Abrahams's opinion unpersuasive. Decision and Order at 21. Thus he concluded the medical opinions support a finding of total disability. *Id.*

We reject Employer's assertion that the ALJ erred in crediting Dr. Wertnz's opinion because it is "contradictory." Employer's Brief at 9.

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[4] The ALJ found Claimant did not establish total disability based on either the arterial 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 18-19.

Dr. Werntz conducted the Department of Labor's (DOL) complete pulmonary evaluation of Claimant on July 20, 2020, which included a pulmonary function study producing qualifying[5] values before bronchodilation and non-qualifying values after bronchodilation. Director's Exhibit 22 at 1-5. He diagnosed a "moderately severe" obstructive lung disease but opined Claimant has "adequate pulmonary reserve to perform the duties of his last job" as a section foreman. *Id.* at 4. In a supplemental report, Dr. Werntz stated Claimant's pre-bronchodilator pulmonary function study has an FEV_1 value "below the table values" and its "FEV_1/FVC ratio is 55%." Director's Exhibit 30 at 1-2. He further stated he had "mistakenly" believed that an FEV_1/FVC ratio "was required to be below 55%, but on reviewing the requirements of the Black Lung Act, it is clear that [Claimant's] FEV_1/FVC ratio of 55% meets the disability requirement." *Id.* at 2. Thus, he opined Claimant is "disabled on the basis of his pulmonary function testing." *Id.*

Contrary to Employer's assertion, the ALJ permissibly credited Dr. Werntz's supplemental opinion as supporting a finding of total disability because he explained that Claimant's pre-bronchodilator FEV_1 value and FEV_1/FVC ratio on pulmonary function testing meets the DOL's disability criteria. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 21; Director's Exhibit 30.

We also reject Employer's assertion that the ALJ erred in crediting Dr. Go's opinion because it is "inconsistent" with Dr. Werntz's first opinion. Employer's Brief at 10. Contrary to Employer's assertion, the ALJ permissibly credited Dr. Go's opinion and, as discussed, Dr. Werntz's supplemental opinion because they are based on the qualifying pre-bronchodilator values of the July 20, 2020 pulmonary function study. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 21; Director's Exhibit 30 at 1-2; Claimant's Exhibit 1 at 5-6.

We further reject Employer's assertion that the ALJ erred in discrediting Dr. Abrahams's opinion. Employer's Brief at 10. The ALJ permissibly found Abrahams's opinion is based on non-qualifying post-bronchodilator pulmonary function study values that the DOL has recognized do not "provide an adequate assessment of a miner's

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

disability."[6] Decision and Order at 21; *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (cautioning against reliance on post-bronchodilator pulmonary function test results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis").

Employer's arguments on total disability amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the ALJ's credibility determinations, we affirm his finding that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 21. Further, we affirm his finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 21. Thus, we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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,[7] 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 failed to establish rebuttal by either method.[8]

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[6] Dr. Go also explained his disagreement with Dr. Abrahams's reliance on post-bronchodilator values to assess the degree of Claimant's impairment. Claimant's Exhibit 1 at 6-7.

[7] "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 pneumoconiosis, *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).

[8] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 13.

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 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).

The ALJ considered the medical opinions of Drs. Werntz, Go, and Abrahams. Decision and Order at 12-15. They opined Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease related to coal mine dust exposure. Director's Exhibits 22 at 4; 30 at 1; Claimant's Exhibit 1 at 4, 6; Employer's Exhibit 1 at 4-5. The ALJ found their opinions well-reasoned and do not aid Employer in rebutting the existence of legal pneumoconiosis. Decision and Order at 14.

Employer identifies no error in the ALJ's credibility findings. *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). Rather, it generally argues Drs. Werntz's, Go's, and Abrahams's opinions are sufficient to rebut the Section 411(c)(4) presumption. Employer's Brief at 10-11. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40. Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 21. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer did not rebut the presumption by establishing "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 Oder at 21-24. Because Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, we affirm his finding that Employer failed to establish no part of Claimant's respiratory or pulmonary disability was due to legal pneumoconiosis. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24. We therefore affirm his finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge