U.S. Department of Labor

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

BRB No. 22-0517 BLA

HARVEY H. JOHNSON, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE MONONGALIA COUNTY COAL COMPANY	)	
	)	
and	)	
	)	
MURRAY ENERGY CORPORATION TRUST c/o SMART CASUALTY CLAIMS	)	DATE ISSUED: 12/05/2023
	)	
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 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.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05461) rendered on a subsequent claim[1] filed on January 23, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of seventeen years of underground coal mine employment, and found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c)[2] and 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] The ALJ further found Employer failed to rebut the presumption and awarded benefits.

[1] Claimant filed five prior claims but withdrew the two most recent claims. Director's Exhibits 1-5, 59. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b). The Benefits Review Board affirmed ALJ Stephen L. Purcell's denial of Claimant's third claim on June 28, 2007, for failing to establish any element of entitlement, and subsequently denied Claimant's Motion for Reconsideration on August 29, 2007. *Johnson v. Chance Coal Corp.*, BRB No. 06-0790 BLA (June 28, 2007) (unpub); *Johnson v. Chance Coal Corp.*, BRB No. 06-0790 BLA (Aug. 29, 2007) (unpub. Order).

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must 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); *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 failed to establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element to obtain review of the merits of this claim. *Id*.

[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); 20 C.F.R. §718.305.

On appeal, Employer argues the ALJ erred in finding Claimant totally disabled and thus erred in finding he invoked the presumption. Alternatively, it argues the ALJ erred in finding it failed to rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to respond unless requested.

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 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 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. §§718.204(b)(2), 718.305(b)(1)(i). 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). 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 medical opinions and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20-23.

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[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established seventeen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 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 11; Hearing Tr. at 13.

[6] The ALJ found Claimant failed to establish total disability based on either the pulmonary function studies or arterial blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 18-19.

The ALJ considered the medical opinions of Drs. Posin, Allen, and Fino. Decision and Order at 20-23. Dr. Posin opined Claimant is totally disabled due to the moderate obstructive lung defect seen on his pulmonary function tests. Claimant's Exhibit 1. Dr. Allen opined Claimant has mild chronic obstructive pulmonary disease (COPD) with severe air trapping that totally disables him from performing the light to heavy labor required by his usual coal mine employment. Director's Exhibits 16; 19. Dr. Fino opined Claimant's arterial blood gas studies are normal and his pulmonary function studies reveal only a mild respiratory impairment that is not sufficient to prevent him from performing his usual coal mine employment. Employer's Exhibits 1 at 9-10; 7 at 4.

The ALJ found Dr. Posin's opinion that Claimant has a moderate impairment is inconsistent with the objective testing and Claimant's treatment records, and thus gave it no weight.[7] Decision and Order at 22. He credited the opinions of Drs. Allen and Fino because they are in agreement that Claimant has a mild impairment. *Id.* He then found Dr. Allen is better qualified than Dr. Fino to offer an opinion on Claimant's ability to perform his usual coal mine employment because she is Board-Certified in Occupational Medicine.[8] *Id.* He thus credited Dr. Allen's opinion over Dr. Fino's opinion and found the medical opinion evidence establishes total disability. *Id.*

Employer argues the ALJ erred in crediting Dr. Allen's opinion because she stated Claimant's obstructive lung disease is only mild, "which is inconsistent with total pulmonary disability." Employer's Brief at 10. We disagree.

Total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing,[9] as a non-qualifying impairment may still render a miner incapable of performing his usual coal mine work. 20

[7] Because the ALJ gave Dr. Posin's opinion no weight, we need not address Employer's argument that Dr. Posin's opinion is not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10.

[8] The ALJ further observed that Dr. Fino is better qualified to opine on the nature and severity of Claimant's pulmonary impairment because he is a Board-certified pulmonologist, but that it was not relevant here because Drs. Fino and Allen agreed Claimant has a mild pulmonary impairment and the question on total disability is the "occupational impact" of that impairment. Decision and Order at 22.

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

C.F.R. §718.204(b)(2)(iv). Even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (explaining physical limitations described in doctor's report sufficient to establish total disability); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (miner is totally disabled if he cannot perform the exertional requirements of his previous job).

Dr. Allen stated that Claimant's usual coal mine employment required light to heavy labor and physically demanding activities such as "crawling multiple miles of tunnel and filling in as needed at light to heavy job activities." Director's Exhibits 16 at 4; 19 at 3. She explained that Claimant has mild COPD with severe air trapping, "which progressively increases the work of breathing" as air is essentially forced into his lungs "until they are so full that good air (oxygenated) cannot get to the alveoli and bad air cannot get out (carbon dioxide)." *Id.* So even though Claimant's impairment is mild, she opined that the effects of air trapping are increased with exertion, rendering him unable to perform the heavy labor required by his usual coal mine employment. *Id.*

Employer concedes that "Dr. Allen explained in some detail the basis for her conclusion that [Claimant] is totally disabled from a pulmonary standpoint in spite of his non-qualifying test results," and we reject its contention that a mild impairment cannot be totally disabling. *See Scott*, 60 F.3d at 1141; *Eagle*, 943 F.2d at 512; Employer's Brief at 10. Thus we affirm the ALJ's permissible crediting of Dr. Allen's explanation of how Claimant's mild impairment prevents him from performing his usual coal mine employment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 20-22.

Employer also generally argues the ALJ should have found Dr. Fino's opinion is the most credible. Employer's Brief at 10-11. Its argument amounts 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). Moreover, we affirm as unchallenged on appeal the ALJ's finding that Dr. Allen is better qualified than Dr. Fino to opine on Claimant's ability to perform his usual coal mine employment with a mild impairment because of her Board certification in Occupational Medicine.[10] *See Hicks*, 138 F.3d at 536; *Akers*, 131 F.3d at

[10] As discussed infra, Employer very generally alleges Dr. Fino's diagnosis of no pneumoconiosis is entitled to greater weight in part because he has "superior qualifications as a pulmonologist." Employer's Brief at 11. However, it does not challenge the ALJ's finding that Dr. Allen's Board certification in Occupational Medicine renders her more

440-41; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22.

Because it is supported by substantial evidence, we affirm the ALJ's determination that the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22. We further affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 22-23. Thus, we affirm his 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) (2018); 20 C.F.R. §§718.305, 725.309; Decision and Order at 7, 15.

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 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 rebut the presumption by either method.[12]

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).

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qualified to offer an opinion on the separate issue of whether Claimant's mild impairment disables him from performing the duties of his previous coal mine job.

[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 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).

[12] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 14.

The ALJ considered Dr. Fino's medical opinion that Claimant does not have legal pneumoconiosis but has a mild respiratory impairment unrelated to coal mine dust exposure.[13] Decision and Order at 13-15; Employer's Exhibits 1 at 9-10; 7 at 4. He found Dr. Fino's opinion not well-reasoned and insufficient to satisfy Employer's burden of proof. Decision and Order at 15.

Employer generally argues the ALJ should have credited Dr. Fino's opinion on legal pneumoconiosis because it is consistent with the objective testing and he has superior qualifications as a pulmonologist. Employer's Brief at 11. We disagree.

Dr. Fino opined Claimant has a respiratory impairment that improves, or is reversible, with bronchodilators. Employer's Exhibits 1 at 9-10; 7 at 4. He opined that such "reversible changes" are inconsistent with pneumoconiosis and that he does not believe Claimant has legal pneumoconiosis. *Id.* The ALJ permissibly discredited Dr. Fino's opinion as not well-reasoned because he failed "to identify the cause of Claimant's pulmonary impairment – other than stating it is not legal coal workers' pneumoconiosis," or explain why Claimant's coal mine dust exposure did not contribute to or aggravate his respiratory impairment. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 15.

Employer's argument amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; Employer's Brief at 11. Because the ALJ permissibly discredited Dr. Fino's opinion, the only opinion supportive of Employer's burden on rebuttal, we affirm his determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 15. 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).

As Employer raises no specific arguments regarding the ALJ's finding it failed to rebut disability causation, we affirm this finding. *See Skrack*, 6 BLR at 1-711; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Toler v. E. Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 25. Consequently, we affirm the ALJ's determination that Employer failed to establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 25.

[13] The ALJ also considered the opinions of Drs. Allen and Posin that Claimant has legal pneumoconiosis and correctly found they do not aid Employer in rebutting the presumption. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 15. We therefore need not address Employer's arguments regarding their opinions. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 11.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge