U.S. Department of Labor

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

BRB No. 23-0011 BLA

MICHAEL J. DICKEY Claimant-Respondent v. KEYSTONE COAL MINING CORPORATION c/o CONSOL ENERGY, INCORPORATED and ROCHESTER & PITTSBURGH COAL COMPANY c/o SMART CASUALTY CLAIMS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/04/2023 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 (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Toni J. Williams (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD 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 (2022-BLA-05115) rendered on a claim filed on March 9, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-five years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 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. Alternatively, Employer argues the ALJ erred in finding it did not rebut the 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 & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

[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-five 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.

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

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 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 medical opinions and the evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20-23.

Medical Opinions

The ALJ considered the opinions of Drs. Zlupko, Gelacek, and Basheda. Decision and Order at 21-26. Drs. Zlupko and Gelacek opined Claimant is totally disabled, while Dr. Basheda opined he is not.[5] Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibit 2. The ALJ found Dr. Zlupko's opinion well-reasoned and documented, and Drs.

[4] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 18-20.

[5] We reject Employer's argument that the ALJ erred in finding Dr. Swedarsky did not render an opinion in his biopsy report regarding whether Claimant could perform his last coal mine job because the doctor "specifically stated that coal mine dust exposure was not a significant contributor to any respiratory impairment [he] may have suffered prior to the 2016 lung surgery." Employer's Brief at 18; *see* Employer's Exhibit 1; Decision and Order at 22. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary 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 pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). Even if credited, Employer's argument would concern whether Claimant's disability is caused by dust exposure in coal mine employment, not whether he suffers from a totally disabling respiratory impairment at all.

Gelacek's and Basheda's opinions not well-reasoned. Decision and Order at 21-23. He thus found the medical opinions support a finding of total disability. *Id.* at 23.

As the ALJ's finding that Dr. Gelacek's opinion is not well-reasoned is unchallenged, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We reject Employer's assertion that the ALJ erred in crediting Dr. Zlupko's opinion because the ALJ had determined the preponderance of the pulmonary function study and arterial blood gas study results are non-qualifying for total disability at 20 C.F.R. §§718.204(b)(2)(i)-(ii). Employer's Brief at 16. Contrary to Employer's argument, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460-61 (11th Cir. 1989); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Moreover, 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 usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in a doctor's report are sufficient to establish total disability); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability).

Dr. Zlupko conducted the Department of Labor's (DOL) complete pulmonary evaluation of Claimant on April 22, 2021, which included a pulmonary function study producing qualifying[6] values before and after bronchodilation and an arterial blood gas study producing non-qualifying values at rest and during exercise. Director's Exhibit 11 at 1, 4-6. Further, he noted Claimant's last coal mine job as an underground beltman "required crawling and carrying heavy loads and shoveling." *Id.* at 5. He opined Claimant has a moderate pulmonary impairment based in part on his pulmonary function study results and is unable "to perform his previous work duties as a beltman." *Id.* at 4-5.

Contrary to Employer's argument, the ALJ permissibly credited Dr. Zlupko's opinion as supporting a finding of total disability because the doctor understood the

[6] 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. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

exertional requirements of Claimant's usual coal mine work and adequately explained how Claimant's moderate impairment, based in part on his qualifying pulmonary function study, prevents him from performing the labor required of his usual coal mine work. *See 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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 23.

We also reject Employer's argument that the ALJ erred in finding Dr. Basheda's opinion contradictory. Employer's Brief at 17-18. Dr. Basheda examined Claimant on February 24, 2022, and conducted a pulmonary function study producing non-qualifying results before and after bronchodilation, an arterial blood gas study producing non-qualifying values at rest, and pulse oximetry producing "[n]o resting or exercise-induced oxygen desaturation." Employer's Exhibit 2 at 1-6. He diagnosed chronic obstructive pulmonary disease (COPD) and emphysema related to cigarette smoking, but he stated Claimant "should be treated with an aggressive respiratory medicine" to "accurately assess" his level of pulmonary impairment. *Id*. at 20-22. Thus, he concluded he was "[u]nable to accurately assess [Claimant's] impairment/disability due to the absence of respiratory therapy for tobacco induced COPD." *Id*. at 22. At his deposition, Dr. Basheda stated he "hesitate[d] to label anyone disabled or impaired when . . . he has a treatable problem" but opined that "even in the absence of respiratory therapy . . . [Claimant] could do his coal mining work." Employer's Exhibit 4 at 33, 35.

As the trier-of-fact, the ALJ has broad discretion to assess the credibility of the medical opinions and assign them appropriate weight. *See Kertesz*, 788 F.2d at 163. Here, the ALJ permissibly found Dr. Basheda didn't adequately explain the contradiction in his opinion, having initially opined he could not assess Claimant's level of impairment unless Claimant received "aggressive respiratory medicine . . . triple therapy," yet at deposition stated he could assess Claimant as not totally disabled "even in the absence of respiratory therapy." *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155; Decision and Order at 19-20; Employer's Exhibits 2 at 21; 4 at 33.

Employer's arguments on total disability amount to a request to reweigh the evidence, which the Board is 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 23. 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 23. Therefore, 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; Decision and Order at 23.

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]

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the medical opinions of Drs. Basheda and Swedarsky.[9] Decision and Order at 15-16. They opined Claimant does not have legal pneumoconiosis

[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 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).

[8] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 14.

[9] The ALJ also considered Drs. Zlupko's and Gelacek's opinions that Claimant has legal pneumoconiosis. Decision and Order at 15; Director's Exhibit 11; Claimant's Exhibit 1. He found their opinions not well-reasoned and do "nothing to rebut the presumption." *Id*. Because Dr. Zlupko's opinion does not aid Employer in rebutting the Section 411(c)(4) presumption, we need not address its contentions regarding the ALJ's weighing of his opinion on the issue of legal pneumoconiosis. *See 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); Employer's Brief at 15-16.

but COPD and emphysema due to smoking and unrelated to coal mine dust exposure. Employer's Exhibits 1 at 40; 2 at 22. The ALJ found their opinions not well-reasoned and thus insufficient to disprove legal pneumoconiosis.

We reject Employer's assertion that the ALJ provided invalid reasons for finding Drs. Basheda's and Swedarsky's opinions not credible. Employer's Brief at 19-23.

Dr. Basheda excluded coal mine dust exposure as a contributing cause of Claimant's COPD. Employer's Exhibits 2 at 20-22; 4 at 28-31. He stated coal mine dust exposure can cause COPD but "[t]his form of pulmonary obstruction is fixed and irreversible." Employer's Exhibit 2 at 20. In addition, he stated "[i]t is not partially reversible, that is, it will not demonstrate an acute bronchodilator response, due to the absence of bronchoconstriction." *Id*. The ALJ noted Dr. Basheda did not reference "a medical text, study, or treatise to support his assertion." Decision and Order at 15. He also noted Dr. Basheda referred to "Claimant's first spirometry test results as demonstrating 'borderline acute bronchodilator response," and Claimant's medical records that Employer submitted in the record as demonstrating "a variety of bronchodilator responses." *Id*. Contrary to Employer's assertion, the ALJ permissibly found Dr. Basheda's opinion not well-reasoned because it is not supported by the diagnostic testing results. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155; Decision and Order at 15.

Further, Dr. Swedarsky used epidemiological studies to support his opinion that Claimant's emphysema is unrelated to coal mine dust exposure. Employer's Exhibit 1 at 27-33. The ALJ permissibly found Dr. Swedarsky's opinion not well-reasoned because it is based on statistical generalities and studies that do not explain "*what happened in this particular case*." Decision and Order at 15 (emphasis in original); *see U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Employer's general assertion that the opinions of Drs. Basheda and Swedarsky are well-reasoned and well-documented amounts to a request to reweigh the evidence, which again we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because the ALJ permissibly discredited Drs. Basheda's and Swedarsky's opinions, the only medical opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 16. 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). Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 16.

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 23-26. 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. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26. We therefore affirm his finding that Employer did not rebut the Section 411(c)(4) presumption 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

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge