U.S. Department of Labor

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

BRB No. 22-0471 BLA

LEROY BOWMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, LLC	)	
	)	DATE ISSUED: 02/15/2024
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Leroy Bowman, Bluefield, Virginia.

Howard J. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor, Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2021-BLA-05134) rendered on a subsequent claim filed on July 5, 2019,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of at least twenty-nine 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, the ALJ found Claimant established a change in an applicable condition of entitlement[3] and 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).[4] The ALJ found that Employer rebutted the Section 411(c)(4) presumption and denied benefits.

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[1] Bradley Johnson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but he does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] This is Claimant's second claim for benefits. The existence of the prior claim file is noted in the record; however, the relevant exhibit contains only a one-page memorandum identifying the claim number, the claim's status as "closed," and the number of pages included in the file. Director's Exhibit 1. According to Employer, that claim was filed on June 26, 2001, and an ALJ denied it on November 28, 2006. Employer's Brief at 2. Neither Director's Exhibit 1 nor Employer's Brief states the basis for the prior denial. However, Employer does not dispute the ALJ's statement that the first claim was denied for failure to establish the existence of pneumoconiosis and total disability. Decision and Order at 4.

[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 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); *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). As Employer does not dispute that the prior claim was denied for failure to establish pneumoconiosis and total disability, Claimant had to establish either element to obtain review of the merits of his claim.

[4] 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, Claimant generally challenges the denial of benefits. Employer responds in support of the denial but argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[5] The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Board to vacate the ALJ's finding that Employer rebutted the presumption because she did not properly shift the burden of proof to Employer.

In an appeal a claimant files without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is considered 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 pulmonary function study evidence, the medical opinions, and the evidence overall.[7]

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[5] Employer's arguments in its response brief are in support of other methods by which the ALJ may reach the same result and deny benefits. Employer's Brief at 10-14. Therefore, these arguments are properly before the Board, and no cross-appeal was required. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc).

[6] 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); Hearing Transcript at 12.

[7] We affirm, as unchallenged by Employer on appeal, the ALJ's finding that the pulmonary function studies support a finding of total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6. The ALJ further found,

Employer contends the ALJ erred in finding the medical opinion evidence established total disability. Employer's Brief at 11-14. We disagree.

The ALJ considered the medical opinions of Drs. Ajjarapu, McSharry, and Zaldivar. Decision and Order at 7-8. Dr. Ajjarapu opined that Claimant lacks the respiratory capacity to perform his usual coal mine work, Director's Exhibits 18, 20, and Dr. Zaldivar concluded that Claimant's ventilatory capacity "may not be sufficient to allow him to perform heavy labor." Employer's Exhibit 1 at 5. Dr. McSharry concluded that although Claimant is not "formally" totally disabled from a respiratory standpoint, his obesity would make it difficult for him to perform his usual coal mine work. Director's Exhibit 20 at 5. The ALJ afforded all three opinions some weight and found that the medical opinion evidence supports a finding of total disability. Decision and Order at 8. Consequently, the ALJ found the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer contends the ALJ erred because Dr. Ajjarapu did not have the benefit of reviewing later testing and did not consider the effects of Claimant's obesity. Employer's Brief at 13. However, an ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise reasoned, documented, and based on her own examination of the miner and objective test results. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). At best, Employer's argument amounts to a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Moreover, in arguing that Dr. Ajjarapu did not adequately consider obesity as a cause of Claimant's impairment, Employer fails to recognize that a respiratory impairment caused by a non-respiratory condition must be considered in determining total disability. 20 C.F.R. §718.204(a). As a consequence, Employer conflates total disability with disability causation. Total disability concerns whether the miner has a respiratory or pulmonary impairment that prevents him from performing his usual coal mine work, 20 C.F.R. §718.204(b); the cause of that impairment is addressed at 20 C.F.R. §718.204(c) or §718.305(d)(1).

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accurately, that the blood gas studies do not establish total disability as they are all non-qualifying, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii),(iii); Decision and Order at 6-7. A "qualifying" blood gas study yields values that are equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

Employer further contends that Drs. McSharry's and Zaldivar's opinions are well-documented and reasoned and show that Claimant's restrictive impairment is due to obesity. Employer's Brief at 13-14. But again, Employer conflates the existence of total disability with the cause of disability. Employer summarizes the medical evidence and asserts it does not establish total disability, but does not otherwise specify any error in the ALJ's analysis of the medical opinions. *Id.* at 12-14. Therefore, we affirm the ALJ's finding that the medical opinions establish total disability at 20 C.F.R §718.204(b)(2)(iv). *See* 20 C.F.R. §802.211(b); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

We also affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole.[8] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 8. Thus, we affirm her determination 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,[9] 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 rebutted the presumption because Claimant failed to establish he suffers from either clinical or legal

[8] When weighing the evidence as a whole, an ALJ must consider contrary evidence, which may include later-gathered evidence a credited physician did not consider. To the extent Employer alleges the ALJ failed to consider evidence contradicting Dr. Ajjarapu's total disability opinion, any alleged error is harmless as Employer's argument regarding evidence not considered by Dr. Ajjarapu and/or the ALJ relates to the cause, not the existence, of total disability. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (alleged error is harmless unless it "could have made [a] difference"); Employer's Brief at 13.

[9] "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).

pneumoconiosis, or that pneumoconiosis is a substantially contributing cause of his total disability. Decision and Order at 10-12.

The Director argues the ALJ did not shift the burden of proof to Employer to disprove pneumoconiosis and disability causation as required by the Section 411(c)(4) presumption. Director's Brief at 1-2. Employer argues that the ALJ properly weighed the evidence regarding clinical and legal pneumoconiosis to find them both rebutted. Employer's Brief at 14-16. We agree with the Director's argument.

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*, 25 BLR at 1-155 n.8.

The ALJ considered the opinions of Drs. Ajjarapu, McSharry, and Zaldivar. Decision and Order at 7-9. Dr. Ajjarapu diagnosed Claimant with chronic bronchitis due to both smoking and coal mine dust exposure. Director's Exhibits 18, 22. Dr. McSharry stated he was "not convinced" Claimant suffers from legal pneumoconiosis because his bronchitis was not likely related to his "remote" exposure to coal mine dust. Director's Exhibit 20 at 4. Dr. McSharry further opined that Claimant has a restrictive impairment due to obesity. *Id*. Dr. Zaldivar opined that Claimant does not have legal pneumoconiosis but has pulmonary impairments due to obesity and previous heart surgery. Employer's Exbibit 1. The ALJ afforded all three opinions "some weight" and found "the overall medical opinion evidence does not establish Claimant suffers from" legal pneumoconiosis. Decision and Order at 11.

Rather than determining whether the evidence rebutted the existence of legal pneumoconiosis, the ALJ instead found it does not establish legal pneumoconiosis. Decision and Order at 11. The ALJ thus erroneously placed the burden on Claimant and failed to properly evaluate whether Employer met its burden to show that his coal mine dust exposure did not "significantly contribute to, or substantially aggravate," his respiratory impairment. 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35 (4th Cir. 2015).

Moreover, the ALJ has not explained her analysis of the medical opinions. The Administrative Procedure Act (APA) requires the ALJ to set forth her "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While the ALJ summarized the opinions of Drs. Ajjarapu, McSharry, and Zaldivar, she did not

make any findings regarding the credibility of each opinion as to the role coal mine dust played in Claimant's respiratory impairment. Decision and Order at 11. Because the ALJ provided no analysis of the physicians' opinions and failed to resolve the conflict in the evidence, her findings are not in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165. We therefore vacate the ALJ's finding that the medical opinion evidence, and the evidence overall, established Claimant does not have legal pneumoconiosis as well as her determination that Employer rebutted the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 11.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the 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. §§718.305(d)(1)(i)(B), 718.201(a)(1).

The ALJ considered eleven interpretations of five x-rays, dated April 17, 2019, August 15, 2019, February 24, 2020, March 30, 2020, and December 2, 2020. Decision and Order at 9-10. The ALJ accurately found that all the physicians who provided an x-ray interpretation were dually qualified as Board-certified radiologists and B readers. *Id.* Dr. Crum interpreted the April 17, 2019 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, while Dr. Willis interpreted it as negative for the disease. Employer's Exhibit 5. Drs. Crum and Willis interpreted the August 15, 2019 x-ray as positive for pneumoconiosis, Director's Exhibit 21, Employer's Exhibit 3, while Dr. DePonte interpreted it as negative for the disease. Director's Exhibit 18. Dr. Ramakrishnan interpreted the February 24, 2020 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, while Dr. Willis interpreted it as negative for the disease. Employer's Exhibit 4. Dr. Ramakrishnan interpreted the March 30, 2020 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, while Dr. Willis interpreted it as negative for the disease. Director's Exhibit 20. Dr. DePonte interpreted the December 2, 2020 x-ray as positive for pneumoconiosis, Claimant's Exhibit 4, while Dr. Willis interpreted it as negative for the disease. Employer's Exhibit 2.

The ALJ found the August 15, 2019 x-ray positive for pneumoconiosis as two of the three physicians read it as positive. Decision and Order at 10. She found the readings of the remaining three x-rays to be in equipoise because an equal number of physicians read the x-rays as positive and negative. *Id.* Finding "the overall interpretations . . . neither support[] nor refute[] a finding of pneumoconiosis," the ALJ concluded that "Claimant has not established that he suffers from clinical pneumoconiosis." *Id.*

In evaluating whether Employer rebutted the presumption of clinical pneumoconiosis, the ALJ erroneously placed the burden on Claimant to show he has the disease. Decision and Order at 10. Specifically, she improperly assessed whether the preponderance of the evidence establishes the existence of pneumoconiosis. *Id.* Clinical pneumoconiosis is presumed to exist because Claimant invoked the Section 411(c)(4) presumption. The ALJ was tasked with evaluating whether Employer disproved its existence by a preponderance of the evidence. *Smith*, 880 F.3d at 699; *Bender*, 782 F.3d at 134-35; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554-59 (4th Cir. 2013). Thus, we vacate her finding that the x-ray evidence rebuts the presumption of clinical pneumoconiosis.

Moreover, in finding Employer rebutted the existence of clinical pneumoconiosis, the ALJ failed to consider the medical opinion evidence relevant to clinical pneumoconiosis. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 10; Director's Exhibits 18, 20, 22, Employer's Exhibit 1. Because the ALJ failed to weigh the evidence using the proper burden of proof and failed to consider relevant evidence, we must vacate her determination that Employer rebutted the presumption of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 11.

Disability Causation

Because the ALJ found Claimant did not establish pneumoconiosis, she concluded he could not establish that pneumoconiosis is a substantially contributing cause of his total disability. Decision and Order at 12. Contrary to the ALJ's analysis, because Claimant invoked the Section 411(c)(4) presumption, it was Employer's burden to establish that "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); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015). We therefore vacate the ALJ's determination that Employer rebutted the presumed fact of disability causation.

Remand Instructions

On remand, the ALJ must reconsider whether Employer has rebutted the Section 411(c)(4) presumption. She must consider whether Employer disproved the existence of legal pneumoconiosis by establishing 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*, 25 BLR at 1-155 n.8. The ALJ also must determine whether Employer has established Claimant does not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *see Minich*, 25 BLR at 1-159.

When weighing the medical opinion evidence, the ALJ must consider the physicians' qualifications, explanations for their conclusions, the documentation underlying their medical judgments and the sophistication of, and bases for, their diagnoses and medical conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439 (4th Cir. 1997). In so doing, she must set forth her findings in detail, including the underlying rationale. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

If the ALJ finds Employer has disproved the existence of both legal and clinical pneumoconiosis, Employer will have rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. However, if the ALJ finds Employer has not rebutted the presumed fact of either legal or clinical pneumoconiosis, she must then determine whether Employer has rebutted the presumed fact of disability causation by establishing that "no part of [Claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 1-159. If Employer is unable to rebut the Section 411(c)(4) presumption pursuant to either 20 C.F.R. §718.305(d)(1)(i) or (ii), Claimant is entitled to benefits.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge