U.S. Department of Labor

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

BRB No. 23-0117 BLA

KENNETH D. ROBINETTE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STONEY GAP COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 02/07/2024
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU, c/o LIBERTY MUTUAL MIDDLE MARK	)	
	)	
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 Granting Benefits of Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices PLLC), Lexington, Kentucky, for Employer and its Carrier.

Sarah M. Hurley (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: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Granting Benefits (2013-BLA-05562) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on October 29, 2010, and is before the Benefits Review Board for the second time.

In a Decision and Order – Denying Benefits dated July 20, 2017, ALJ Alan L. Bergstrom credited Claimant with twenty-three years of underground coal mine employment, as stipulated by the parties, but found the evidence did not establish total disability. Therefore, ALJ Bergstrom found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[1] or establish entitlement to benefits under 20 C.F.R. Part 718.

Upon consideration of Claimant's pro se appeal, the Board affirmed ALJ Bergstrom's findings that the two pulmonary function studies and one blood gas study Dr. Habre obtained as part of the Department of Labor (DOL)-sponsored pulmonary evaluation of Claimant were invalid, that Dr. Habre did not adequately address whether Claimant is totally disabled, and his overall determination that Claimant did not establish total disability based on the record before him. *Robinette v. Stoney Gap Coal Co.*, BRB No. 17-0607 BLA, slip op. at 3-6 (Sept. 18, 2018) (unpub.). Having affirmed ALJ Bergstrom's finding that Dr. Habre administered an invalid blood gas study and did not adequately address whether Claimant is totally disabled, the Board vacated the denial of benefits and remanded the case to the district director to provide Claimant with a complete pulmonary evaluation as the Act requires. *Id.* at 7.

On remand, the district director sent Claimant for a new complete pulmonary evaluation with Dr. Harris on June 20, 2019, and then returned the case to the Office of

[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.

Administrative Law Judges, where it was reassigned to ALJ Leslie (the ALJ). In her Decision and Order, the ALJ found Claimant established twenty-three years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment. Thus, she concluded Claimant invoked the Section 411(c)(4) presumption. She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the ALJ's finding that Claimant established total disability and invoked the Section 411(c)(4) presumption. Specifically, Employer argues the ALJ erred in determining the validity of the pulmonary function study evidence and in considering Dr. Habre's opinion from the initial DOL-sponsored pulmonary evaluation. Employer also argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response arguing the ALJ's consideration of Dr. Habre's opinion is harmless error.[2]

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.[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).

Evidentiary Issue

Employer argues the ALJ erred in considering the reports of both Dr. Habre and Dr. Harris. It maintains that Claimant is entitled to only one complete pulmonary evaluation and thus the ALJ should have excluded Dr. Habre's report from the record.[4] Employer's

[2] We affirm, as unchallenged on appeal, the ALJ's crediting of Claimant with twenty-three years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 2; Director's Exhibit 2 at 237.

[4] The Act requires the DOL provide each miner who applies for benefits the opportunity to undergo a complete pulmonary evaluation, including a report of a physical examination, a pulmonary function study, a chest radiograph, and, unless medically

Brief at 4-5. The Director contends that once Dr. Harris's opinion was admitted into the record as the DOL's complete pulmonary evaluation, the ALJ should have excluded Dr. Habre's opinion from consideration. However, the Director asserts the ALJ's error in weighing Dr. Habre's opinion at 20 C.F.R. §718.204(b)(2)(iv) is harmless as it did not influence her findings that Claimant established total disability and invoked the Section 411(c)(4) presumption. Director's Brief at 2-3. We agree with the Director that error, if any, in considering Dr. Habre's opinion was harmless.

The ALJ found Dr. Habre's opinion "inconclusive" and therefore did not aid Claimant in satisfying his burden of proof on total disability. Decision and Order on Remand at 10-11, 14. Moreover, the ALJ did not rely on Dr. Habre's opinion in finding the Section 411(c)(4) presumption unrebutted as she determined that Employer's evidence was insufficient to establish either that Claimant did not have pneumoconiosis or that his total disability was unrelated to pneumoconiosis. *Id*. at 29. Consequently, Employer has not shown why the ALJ's error in considering Dr. Habre's opinion requires vacating the award of benefits. *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).

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

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 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 he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work.[5] *See* 20 C.F.R. §718.204(b)(1). A miner 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).

contraindicated, a blood gas study, at no expense to the miner. 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406.

[5] The ALJ found Claimant established his usual coal mine work required "a heavy level of exertion." Decision and Order on Remand at 5.

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinion evidence, and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order on Remand at 15.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies conducted on November 1, 2016, August 15, 2017, June 20, 2019, and June 24, 2020. Decision and Order on Remand at 9-12; Director's Exhibit 7; Claimant's Exhibits 1, 2; Employer's Exhibit 2. She found the June 24, 2020 study is unreliable; the pre-bronchodilator studies conducted on November 1, 2016, August 15, 2017, and June 20, 2019, are reliable; and there are no reliable post-bronchodilator results in the record. Decision and Order on Remand at 12; *see* Director's Exhibit 7; Claimant's Exhibits 1, 2. In regard to the three reliable and valid studies, she found the two conducted on November 1, 2016, and June 20, 2019, are qualifying.[7] Decision and Order on Remand at 12. Relying on these two studies, she determined the pulmonary function studies support a finding that Claimant has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(i). *Id*.

Employer argues the ALJ erred in finding the 2016, 2017, and 2019 pulmonary function studies are valid. Employer's Brief at 3-4. Regarding the June 20, 2019 study, we see no error in the ALJ's conclusion that it is a reliable study. Employer's Brief at 3-4. Dr. Harris reported Claimant gave good effort but had difficulty exhaling forcefully due to complications from a stroke. Director's Exhibit 7 at 12. The technician reported good effort and excellent cooperation, but that Claimant needed to "blast out faster" in two of the three pre-bronchodilator studies. *Id*. at 14. Dr. Michos invalidated the study due to less than optimal effort, cooperation, and comprehension because there was excessive variation in the peak flows pre-bronchodilator and suboptimal MVV performances on the pre-bronchodilator studies. *Id*. at 27. Dr. Rosenberg agreed with Dr. Michos that these pulmonary function studies were invalid. Employer's Exhibit 6 at 4. Dr. Harris agreed with Dr. Michos that the pre-bronchodilator MVV results were not acceptable but opined the remaining pre-bronchodilator maneuvers were reliable. Director's Exhibit 7 at 1.

[6] The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order on Remand at 13.

[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).

Employer asserts the ALJ erred in relying on the June 20, 2019 pulmonary function study because Dr. Michos found it invalid due to "excessive variation in peak flows." Employer's Brief at 6; Director's Exhibit 7 at 27. We disagree.

Under the regulatory quality standards, a pulmonary function study may be deemed "unacceptable" if it has "excessive variability between the three acceptable curves," defined as "variation between the two largest FEV1's of the three acceptable tracings [that] exceed[s] 5 percent of the largest FEV1 or 100 ml, whichever is greater." 20 C.F.R. Part 718, Appendix B 2(ii)(G). Given Dr. Michos's reference to "peak flow," it is not clear he was referring to the quality standard at Appendix B, paragraph (2)(ii)(G), which addresses variability in the FEV1 tracings but does not mention peak flow. A separate quality standard at Appendix B, paragraph (2)(ii)(F), refers to "peak flow" but addresses "excessive hesitation," not variability which was the subject of Dr. Michos's invalidation.

Further, as the ALJ observed, Dr. Harris specifically disputed Dr. Michos's invalidation, stating that "peak flow variability is not listed in the standards for considering repeatability" and Claimant's "pre-bronchodilator maneuvers meet the [American Thoracic Society] standards for acceptability and repeatability." Director's Exhibit 7 at 1. Faced with the conflicting medical opinions, the ALJ permissibly credited the opinions of Dr. Harris and the technician who conducted the June 20, 2019 study over the opinions of Drs. Michos and Rosenberg regarding Claimant's effort and cooperation in performing the test. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (an ALJ may make a "reasoned decision to give greater deference to the opinions of the physicians who actually administered the ventilatory studies, as opposed to those of physicians who merely reviewed the results"); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231 (6th Cir. 1994) (same); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-149 (1990) (the ALJ must provide a rationale to credit a consultant's opinion over the opinion of a physician or technician who observed the test); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997) (deferring to the ALJ's evaluation of the proper weight to accord conflicting medical opinions in determining the validity of a blood gas study); Decision and Order on Remand at 12.

Employer's arguments to the contrary are 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, even assuming Dr. Michos's opinion could be construed as suggesting Claimant's pulmonary function study does not meet the FEV1 excessive variability requirement, that fact by itself does not require the ALJ to find the study invalid. The regulations specifically provide that because "individuals with obstructive disease or rapid decline in lung function will be less likely to achieve [the required] degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits." 20 C.F.R. Part 718, Appendix B 2(ii) (G).

Consequently, we affirm the ALJ's finding that the June 20, 2019 pulmonary function study is valid.

Although Employer correctly asserts the ALJ erred in not considering Dr. Rosenberg's opinion that the November 1, 2016 and August 15, 2017 pulmonary function studies are invalid, remand is not required.[8] Employer's Brief at 3. Even if both studies were excluded from consideration, the one remaining study is valid and qualifying. *See* 20 C.F.R. §718.103(c) (invalid pulmonary function studies do not constitute evidence of the presence or absence of an impairment). In any event, Dr. Rosenberg stated that the November 1, 2016 pulmonary function study "likely" reflected Claimant has severe obstruction. Employer's Exhibit 7 at 1. Thus, we affirm the ALJ's determination that Claimant established total disability based on the June 20, 2019 qualifying study at 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Remand at 12.

Further, to the extent Employer asserts Dr. Harris's opinion cannot be given much weight because the physician relied on an invalid pulmonary function study, we reject that argument. *See* Employer's Brief at 7. We therefore affirm the ALJ's findings that Claimant established total disability based on the medical opinion evidence and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1).

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 that "no part of

[8] In considering the November 1, 2016 and August 15, 2017 pulmonary function studies, the ALJ incorrectly stated, "No other physician provided an opinion on the validity of this test." Decision and Order on Remand at 11. However, Dr. Rosenberg opined in a supplemental report dated September 27, 2021, that these two studies are not valid because the efforts were not maximal and consistent. Employer's Exhibit 7. Therefore, as Employer correctly asserts, the ALJ did not consider Dr. Rosenberg's opinion regarding the validity of these two studies. Employer's Brief at 3; Employer's Exhibit 7; Claimant's Exhibits 1, 2.

[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

[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.[10]

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).

Before the ALJ, Employer relied on the opinions of Drs. Rosenberg, Castle, and Dahhan that Claimant does not have legal pneumoconiosis. Director's Exhibit 14; Employer's Exhibits 6, 7. The ALJ found their opinions not well-reasoned and insufficient to satisfy Employer's burden of proof. Decision and Order on Remand at 25, 30.

Employer asserts the ALJ mischaracterized Dr. Rosenberg's opinion as relying on his belief that Claimant would not have an impairment related to coal mine dust exposure because protective face masks were available to him during his coal mine employment.[11] Employer's Brief at 8; *see* Decision and Order on Remand at 24; Director's Exhibit 14 at 99. We disagree with Employer's argument. The ALJ did not discount Dr. Rosenberg's opinion because it was based on the fact that face masks were available to Claimant during his coal mine employment. Rather, the ALJ discounted it on the basis that Dr. Rosenberg failed to adequately explain his opinion.

---

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).

[10] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order on Remand at 28, 30.

[11] Employer does not assert any error in the ALJ's discrediting of the opinions of Drs. Castle and Dahhan at rebuttal. Decision and Order on Remand at 29-30; Director's Exhibit 14; Employer's Exhibits 4, 5; Employer's Brief at 5-8.

Dr. Rosenberg attributed Claimant's lung disease and respiratory symptoms to his heavy smoking history, not coal mine dust exposure.[12] Director's Exhibit 14; Employer's Exhibit 6. The ALJ permissibly found his opinion not well-reasoned because he did not adequately explain why, even if smoking had a greater impact on Claimant's pulmonary condition, Claimant's twenty-three years of coal mine dust exposure were not a significantly aggravating or contributing factor. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) ("Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking."); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (ALJ permissibly discredited two physicians' opinions because the doctors failed to adequately explain their opinions); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (ALJ may reject a medical opinion when she finds the doctor failed to adequately explain his diagnosis); Decision and Order on Remand at 24-25, 29-30; Director's Exhibit 14; Employer's Exhibits 6, 7.

Because the ALJ's credibility finding, that Dr. Rosenberg failed to adequately explain why Claimant's twenty-three years of coal mine dust exposure was not a significantly aggravating or contributing factor to his pulmonary condition, is supported by substantial evidence, we affirm her determination that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order on Remand at 30. 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 discredited Dr. Rosenberg's opinion on disability causation for the same reason she found it not credible on legal pneumoconiosis; thus she found Employer did not rebut the Section 411(c)(4) 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); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order on Remand at 30-31; Director's Exhibit 14; Employer's Exhibits 6, 7. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to rebut disability causation. *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 30-31.

[12] The ALJ found Claimant has a smoking history of "greater than [seventy-three] pack per day years." Decision and Order on Remand at 5.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge