U.S. Department of Labor

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

BRB No. 22-0495 BLA

DAVID S. COLEMAN Claimant-Respondent v. FALCON COAL CORPORATION and AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/05/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William P. Farley, Administrative Law Judge, United States Department of Labor.

Sarah Y. M. Himmel and Joseph N. Stepp (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer and its Carrier.

Ann Marie Scarpino (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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) William P. Farley's Decision and Order Awarding Benefits (2019-BLA-06051) rendered on a claim filed on August 28, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 25.72 years of qualifying coal mine employment and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] 20 C.F.R. §718.305. Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in admitting Dr. Raj's supplemental opinion under the Department of Labor's (DOL) pilot program. It further argues the ALJ erred in concluding Claimant established a totally disabling respiratory or pulmonary impairment. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief, urging the Benefits Review Board to reject Employer's arguments regarding the pilot program. Claimant did not file a response brief. Employer filed a response to the Director's brief, reiterating its prior contentions.[3]

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

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[1] Claimant filed and withdrew two prior claims. Director's Exhibit 41. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant had 25.72 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2-3.

with applicable law.[4] 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 - Pilot Program Challenge

Employer argues the ALJ erred in admitting Dr. Raj's supplemental medical report, obtained as part of the pilot program,[5] contending the development of supplemental reports exceeds the DOL's statutory and regulatory authority to provide each miner with a complete pulmonary evaluation. Employer's Brief at 38-45; Employer's Reply Brief at 8-10. For the reasons set forth in *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 5-12 (June 27, 2023), we reject Employer's arguments.

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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[6] 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.*

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[4] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12.

[5] The DOL established the pilot program under the Act to provide for the supplementation of a miner's DOL-sponsored complete pulmonary examination in claims where the miner had fifteen or more years of coal mine employment, the DOL-sponsored pulmonary evaluation indicated the miner is entitled to benefits, and the employer submitted evidence contrary to a claims examiner's initial proposed finding of entitlement. *See* BLBA Bulletin No. 14-05 (Feb. 24, 2014). The program became standard procedure in 2019. *See* BLBA Bulletin No. 20-01 (Oct. 24, 2019).

[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).

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's usual coal mine employment required moderate to heavy work and that Claimant established total disability based on the medical opinions and the weight of the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12. Employer challenges these findings.

Claimant's Usual Coal Mine Work

A miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

At the hearing, Claimant testified he last worked as a continuous miner operator and would cut 200 feet of coal per day. Hearing Transcript at 12-13. He also testified that he "had to carry [a twenty-five to thirty-pound remote control box for the continuous miner] around with [him,]" that he would "wear [a remote control box] on a harness" while cutting coal, and that he had to do a variety of other lifting, including lifting fifty-pound bags of rock dust. *Id.* at 13-14; Director's Exhibit 24 at 18-19. On his CM-913 Description of Coal Mine Work and Other Employment Form, Claimant reported lifting twenty-five to thirty-five pounds eight times per day and lifting fifty to one hundred pounds at an unspecified interval. Director's Exhibit 4 at 2. Taking official notice of the *Dictionary of*

[7] The ALJ found Claimant did not establish total disability based on the pulmonary function or arterial blood gas studies and there was 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 5-6, 11. The ALJ also found Claimant did not establish complicated pneumoconiosis, Decision and Order at 10 n.58, and so could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018). 20 C.F.R. §718.304.

Occupational Titles (DOT),[8] the ALJ found Claimant engaged in "moderate to heavy work with at least intermittent periods of manual labor."[9] Decision and Order at 4 & n.39.

We reject Employer's assertion that the ALJ failed to adequately explain his basis for finding Claimant's mining work required moderate to heavy work, in violation of the Administrative Procedure Act (APA).[10] Employer's Brief at 11-19; *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Although Employer correctly notes Claimant initially testified at the hearing and his deposition that the "heaviest thing" he lifted was the twenty-five to thirty-pound remote control box, Employer's Brief at 16-17, *referencing* Hearing Transcript at 13; Director's Exhibit 24 at 19, Claimant subsequently clarified at the hearing that his work also involved lifting fifty-pound bags of rock dust, hanging thirty-pound curtains, and carrying thirty-five to forty-pound cables. Hearing Transcript at 13-14. The ALJ thus permissibly credited Claimant's testimony that his job involved lifting heavier items than a remote control box. Decision

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[8] The ALJ accurately noted the DOT defines heavy work as exerting fifty to one hundred pounds of force "occasionally" and/or exerting twenty-five to fifty pounds of force "frequently," and defines medium work as exerting twenty to fifty pounds of force "occasionally" and/or ten to twenty-five pounds of force "frequently[.]" Decision and Order at 4 n.39, *citing Dictionary of Occupational Titles*, Appendix C (4th Ed., Rev. 1991), *available at* https://www.dol.gov/agencies/oalj/PUBLIC/DOT/REFERENCES/DOTAPPC. The ALJ used the term "moderate work" interchangeably with the DOT's strength factor designation of "medium work." Decision and Order at 4 & n.39.

[9] While Employer generally asserts the DOT is outdated and thus not probative, it also concedes that the ALJ advised the parties that he would take official notice of the DOT in determining the exertional requirements of Claimant's usual coal mine employment. *See* Employer's Brief at 12 n.8, 14 n.9. As the ALJ provided adequate notice with no response or objection from Employer, we reject Employer's challenge to the ALJ's reliance on the DOT. 29 C.F.R. §18.84; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989); Decision and Order at 4 n.39, *citing* ALJ Stewart F. Alford's February 12, 2020 Notice of Hearing and Pre-Hearing Order at 1 ("If necessary, the court will take official notice of occupational exertion requirements described in the [DOT].").

[10] The APA provides that every adjudicatory decision must include "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).

and Order at 4; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012) (it is the duty of the ALJ to make findings of fact and to resolve conflicts in the evidence); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985) (ALJ is charged with determining the credibility of all witnesses); *Bizarri v. Consolidation Coal Co*., 7 BLR 1-343, 1-344-45 (1984) (ALJ may rely on a miner's testimony especially if the testimony is not contradicted by any documentation of record).

We also reject Employer's assertion that the ALJ failed to resolve the "conflicts" between Claimant's deposition and hearing testimony and his Form CM-913. Employer's Brief at 16-18. Claimant's testimony that he lifted fifty-pound bags of rock dust does not directly conflict with the description of his job duties on his Form CM-913, including being required to lift and carry between fifty and one hundred pounds. Hearing Transcript at 13-14; Director's Exhibit 4 at 2. At the hearing, Claimant recounted a number of things he was required to lift; he did not testify that this was the only manual work he was required to do. Hearing Transcript at 13-14. As Claimant's testimony does not exclude the possibility of his having additional work requirements, Employer has failed to establish that it was unreasonable for the ALJ to rely, in part, on Claimant's signed Form CM-913 to determine that he was required to lift and carry between fifty and one hundred pounds while also relying on his deposition and hearing testimony. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable); *see also Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why he did it); Decision and Order at 3-4.

There also is no merit to Employer's assertion that the ALJ failed to adequately discuss how often Claimant lifted certain weights. Employer's Brief at 13-16. The ALJ accurately noted Claimant testified that he would carry a twenty-five to thirty-pound remote control box on a harness while cutting coal and that he lifted fifty-pound bags of rock dust, and that he reported on his signed Form CM-913 being required to lift and carry between fifty and one hundred pounds. Decision and Order at 3-4; Hearing Transcript at 13-14; Director's Exhibits 4 at 2; 24 at 18-19. As discussed above, the DOT defines heavy work as lifting between twenty-five to fifty pounds *frequently*, fifty and one hundred pounds *occasionally*, or both.[11] *Dictionary of Occupational Titles*, Appendix C (4th Ed., Rev. 1991). As each example provides sufficient information for the ALJ to infer that the DOT weight and frequency requirements for heavy work were met, the ALJ permissibly

[11] The DOT defines "occasionally" as an activity or condition that exists up to 1/3 of the time and "frequently" as occurring 1/3 to 2/3 of the time. *Dictionary of Occupational Titles*, Appendix C (4th Ed., Rev. 1991).

determined Claimant's usual coal mine employment required "moderate to heavy work."[12] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility); Decision and Order at 4; *Dictionary of Occupational Titles*, Appendix C (4th Ed., Rev. 1991).

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ sufficiently explained his credibility determinations in accordance with the APA and his findings are supported by substantial evidence, we affirm his conclusion that Claimant's work was "moderate to heavy" in nature. *See Owens*, 724 F.3d at 557; *Looney*, 678 F.3d at 316; *Compton*, 211 F.3d at 207-08; Decision and Order at 4.

Medical Opinion Evidence

The ALJ considered three medical opinions. Decision and Order at 7-12. Dr. Raj opined Claimant is totally disabled, whereas Drs. Rosenberg and Fino opined he is not. Director's Exhibits 10, 14, 15; Employer's Exhibits 2, 3. Dr. Raj opined Claimant has a totally disabling pulmonary impairment based on the abnormal objective testing results he obtained, which showed "significant hypoxemia" and a mild obstructive defect, and Claimant's symptoms. Director's Exhibits 10 at 5; 15 at 4. He explained Claimant would be unable to meet the physical requirements of his last coal mine work, which required lifting thirty-five to fifty pounds "at any given time during the work day." Director's Exhibit 15 at 4. Dr. Rosenberg opined Claimant is not disabled from a pulmonary perspective and that his PO2 on blood gas testing would have been higher had his blood gases been performed at sea level. Employer's Exhibit 2 at 2, 4-5. Dr. Fino noted Claimant performed light to moderate labor, which included lifting thirty-five to fifty pounds, and opined Claimant is not totally disabled and could return to his last coal mining job or one of similar effort. Employer's Exhibit 3 at 2, 4.

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[12] Employer correctly points out the ALJ mischaracterized what Claimant reported on his Form CM-913 by stating he lifted twenty-five to thirty-five pounds for *eight hours per day* rather than *eight times per day* and that he lifted between fifty to one hundred pounds at *various times* rather than an unspecified amount. Employer's Brief at 12-14; Decision and Order at 4. However, for the reasons discussed above, we consider any error to be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (the 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); Decision and Order at 4.

The ALJ found Dr. Raj's opinion well-reasoned and documented and Drs. Fino's and Rosenberg's opinions to be not well-reasoned or documented. Decision and Order at 12. The ALJ thus concluded the medical opinion evidence supports a finding of total disability. *Id.*

We disagree with Employer that the ALJ erred in discrediting Dr. Fino's opinion. Employer's Brief at 19-24. The ALJ permissibly discredited Dr. Fino's opinion because he considered Claimant's work to involve lifting thirty-five to fifty pounds at any time, contrary to the ALJ's determination that Claimant's work involved moderate to heavy labor, which included lifting and carrying as much as fifty to one hundred pounds.[13] *See Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); Decision and Order at 12; Employer's Exhibit 3 at 2. Accordingly, we affirm the ALJ's finding that Dr. Fino's opinion is not well-reasoned or documented.[14]

We also disagree with Employer's contention that the ALJ did not adequately address Dr. Rosenberg's opinion. Employer's Brief at 24-27, 34. In concluding Claimant is not totally disabled, Dr. Rosenberg opined that if the February 5, 2018 blood gas study conducted by Dr. Raj in Norton, Virginia, had occurred at sea level or had been corrected

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[13] We reject Employer's contention that the ALJ did not equally scrutinize the medical opinions when he discredited Dr. Fino for underestimating the lifting requirements of Claimant's work but not Dr. Raj - both physicians believed Claimant's job required him to lift thirty-five to fifty pounds. Employer's Brief at 19, 20-21, 23-24; *see* Decision and Order at 7-12; Director's Exhibit 15 at 4; Employer's Exhibit 3 at 2. However, because Dr. Raj opined Claimant could not lift thirty-five to fifty pounds, it logically follows that his opinion is supportive of a finding that Claimant could not lift the greater lifting requirements the ALJ found Claimant's job required. In contrast, Dr. Fino's opinion that Claimant can lift thirty-five to fifty pounds does not adequately address whether Claimant could perform the heavier lifting requirements of his job. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991) (physician's opinion that a miner's impairment is not totally disabling lacks probative value if the physician does not know the miner's job requirements).

[14] Because the ALJ provided a valid reason for discrediting Dr. Fino's opinion on total disability, we need not address Employer's remaining argument regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 19-21.

for barometric pressure, Claimant's PO2 value would increase and be "well above qualifying levels." Employer's Exhibit 2 at 2, 4-5. However, the ALJ correctly noted the test was performed in compliance with the regulation, which allows tests to be performed below 2,999 feet above sea level. Decision and Order at 11-12; *see* 20 C.F.R. Part 718, Appendix C. Because the regulations already account for the effects of elevation, we see no error in the ALJ's finding that Dr. Rosenberg's opinion is unpersuasive.[15] *See Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed. App'x. 551, 560 (4th Cir. 2004) (upholding an ALJ's discrediting of an opinion that contradicts Appendix C); *Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055 (10th Cir. 1990); Decision and Order at 11-12. Accordingly, we affirm the ALJ's finding that Dr. Rosenberg's opinion is not well-reasoned or documented.

Finally, there is no merit to Employer's contention that the ALJ erred in crediting Dr. Raj's opinion.[16] Employer's Brief at 30-33, 35-38. We reject Employer's assertion that Dr. Raj's opinion is not well-documented or reasoned because he relied on a non-qualifying pulmonary function study in concluding Claimant is totally disabled. Employer's Brief at 32-33. A physician may conclude a miner is disabled even if the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). Moreover, as the ALJ accurately noted that Dr. Raj's opinion was based on his examination of Claimant, the objective testing results he obtained, Claimant's symptoms, and the requirements of Claimant's previous coal mine job, we see no error in his finding that Dr. Raj's opinion is well-reasoned and sufficient to satisfy Claimant's burden of proof. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 12.

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[15] Employer correctly points out that the ALJ mischaracterized Dr. Rosenberg's opinion as challenging the *validity* of Dr. Raj's blood gas study. Employer's Brief at 25-27. However, as the ALJ provided a sufficient explanation for discrediting Dr. Rosenberg's opinion, we consider any error to be harmless. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Decision and Order at 11-12.

[16] As we have already rejected Employer's arguments about the credibility of Dr. Rosenberg's opinion as it relates to Dr. Raj's blood gas study results and the ALJ's consideration of Drs. Fino's and Raj's understanding of the exertional requirements of Claimant's usual work, we decline to address them again here in relation to the credibility of Dr. Raj's opinion. *See supra* at 8 n.13, 9.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and on the record as a whole. 20 C.F.R. §718.204(b)(2); *see Defore*, 12 BLR at 1-28-29; *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 12-13. We therefore further affirm that Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Decision and Order at 12-13. Moreover, because Employer does not challenge the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption, we affirm that determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-17.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge