U.S. Department of Labor

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

BRB No. 23-0022 BLA

CHARLES D. BROTHERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 01/05/2024
CONSOL ENERGY, INCORPORATED c/o SMART CASUALTY CLAIMS SERVICES	)	
	)	
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 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.

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 appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2022-BLA-05167) rendered on a claim filed on August 28, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has twenty-one years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, 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 thus awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and it failed to rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. 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-one 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, Hearing Transcript at 5.

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 5.

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

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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2). The ALJ found Claimant established total disability based on the medical opinion evidence.[4]

The ALJ considered the medical opinions of Drs. Basheda, Wertz, Zlupko, and Rosenberg. Decision and Order at 21-23; Director's Exhibits 13, 20; Employer's Exhibits 2, 4-6; Claimant's Exhibit 1. The ALJ found Drs. Basheda and Werntz credibly assessed Claimant as totally disabled because their opinions are well-reasoned and documented. In contrast, he gave Dr. Zlupko's total disability opinion no weight for failing to discuss the exertional requirements of Claimant's coal mine work, and he found Dr. Rosenberg's opinion on the issue "equivocal" and entitled to only "some weight." Decision and Order at 23. Weighing the evidence together, the ALJ found the medical opinion evidence supports a finding of total disability. *Id.*; *see* 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the ALJ erred in discrediting Dr. Rosenberg's opinion as equivocal and asserts he credibly diagnosed Claimant as not totally disabled. Employer's Brief at 15-16. We disagree. As the ALJ observed, Dr. Rosenberg opined Claimant is "potentially disabled" from a "marked elevation of his right hemidiaphragm" that is unrelated to coal dust exposure.[5] Employer's Exhibit 4 at 5-6. He opined Claimant "does not have restriction," but "his gas exchange abnormalities relate to ventilation-perfusion mismatch

[4] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, the 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 19-20.

[5] Dr. Rosenberg's statement that Claimant's "potential disability" is not due to coal mine dust exposure addresses the cause/etiology of the impairment and not its existence, which is the relevant inquiry at 20 C.F.R. §718.204(b).

from the elevation of his diaphragm." *Id.* at 5. At his deposition, Dr. Rosenberg testified that if Claimant's oxygen desaturation, as shown on the July 7, 2021 ambulatory pulse oximetry test, is a valid measure, he would be disabled. Employer's Exhibit 6 at 41-42. Because Dr. Rosenberg's opinion is ambiguous as to whether Claimant is totally disabled, the ALJ permissibly discredited it as equivocal. *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 assertion that the ALJ mischaracterized Dr. Basheda's opinion as supportive of total disability. Employer's Brief at 16-17. Dr. Basheda opined Claimant demonstrated a disabling exercise-induced oxygen desaturation and would be unable to perform his last coal mine employment. Employer's Exhibit 2 at 19-20. The ALJ correctly found Dr. Basheda's opinion supports a finding of total disability. Decision and Order at 23. Although Dr. Basheda opined Claimant's desaturation is unrelated to coal dust exposure but is attributable to his elevated right hemidiaphragm, Employer's Exhibit 2 at 20, 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). As Employer does not otherwise challenge the ALJ's finding that Dr. Basheda's opinion is reasoned and documented, we affirm it. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Skrack*, 6 BLR at 1-711; Decision and Order at 23.

Employer further argues the ALJ erred in crediting Dr. Werntz's opinion because he did not personally examine Claimant. Employer's Brief at 17-18. We disagree. There is no requirement that a non-examining physician's opinion be given less weight than that of an examining physician. *See Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1028 (3d Cir. 1986) (a non-examining physician's opinion may "have probative worth supporting substantial evidence"); *Collins v. J & L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999) (ALJ erred in rejecting medical report solely because the physician did not examine the miner).

We also reject Employer's argument that the ALJ erred in finding Dr. Werntz's opinion well-reasoned and documented. Employer's Brief at 17-19. Dr. Werntz acknowledged Claimant's usual coal mine work as a rock duster and inspector required him to lift and carry 50 to 100 pounds. Claimant's Exhibit 1 at 3-4. He opined Claimant has "impaired gas exchange significantly contributed to by coal mine dust exposure" based on his September 9, 2020 blood gas study and July 7, 2021 pulse oximetry test. *Id.* at 3. Given his consideration of the exertional requirements of Claimant's usual coal mine work

and his reliance on objective testing, the ALJ permissibly found Dr. Werntz's total disability opinion reasoned and documented. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order at 23. Employer's 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); Employer's Brief at 17-19.

Consequently, we affirm the ALJ's determination that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23. As Employer raises no other challenges to the ALJ's weighing of the evidence, we affirm his determination that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2). We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 7, 24.

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,[6] 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.[7]

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),

[6] "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).

[7] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 15.

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Basheda and Rosenberg that Claimant does not have legal pneumoconiosis. Employer's Exhibits 2, 4-6. It argues the ALJ improperly substituted his opinion for that of the medical experts and otherwise erred in discrediting those physicians' opinions. Employer's Brief at 19-26. We disagree.

Dr. Basheda opined Claimant has restriction from being overweight and an elevated right hemidiaphragm unrelated to coal dust exposure. Employer's Exhibits 2 at 20; 5 at 26, 31-32. The ALJ permissibly discredited Dr. Basheda's opinion because he did not adequately explain why Claimant's twenty-one years of coal mine dust exposure was not a significantly contributing or substantially aggravating factor in his respiratory impairment. Decision and Order at 25; *see Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; 20 C.F.R. §718.201(a)(2), (b). Consequently, we affirm the ALJ's determination that Dr. Basheda's opinion is insufficient to rebut the presumption that Claimant suffers from legal pneumoconiosis.

Dr. Rosenberg opined Claimant's elevated hemidiaphragm is "more likely than not" and "probably" causing his pulmonary impairment and that, although Claimant has restriction, legal pneumoconiosis cannot cause restriction. Employer's Exhibits 4 at 5-6, 6 at 34-36. The ALJ permissibly found Dr. Rosenberg's rationale contrary to the regulations, which recognize that legal pneumoconiosis may include a restrictive or obstructive impairment, or a combination of both. 20 C.F.R. §718.201; Decision and Order at 15-16. We therefore affirm the ALJ's finding that Dr. Rosenberg's opinion is not adequately reasoned. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163. Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson*, 12 BLR at 1-113; Employer's Brief at 20-26. Because the ALJ acted within his discretion in rejecting the opinions of Drs. Basheda and Rosenberg, we affirm his finding that Employer did not disprove legal pneumoconiosis. We therefore 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 next considered whether Employer established "no part of the [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). He permissibly discredited the opinions of Drs. Basheda and Rosenberg regarding the cause of the Claimant's total respiratory

disability because both failed to diagnose legal pneumoconiosis, contrary to his finding Employer did not rebut the presumption of the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Therefore, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's total respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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