U.S. Department of Labor

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

BRB No. 23-0304 BLA

DAVID F. KLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TANOMA MINING COMPANY	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 01/09/2024
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Sean B. Epstein (Thomas, Thomas & Hafer, LLP), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2022-BLA-05612) rendered on a claim filed on August 17, 2021, 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 25.44 years of underground coal mining employment. She found Claimant has a totally disabling respiratory or pulmonary impairment 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).[1] Further, she found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled, and thus erred in finding he invoked the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to respond unless requested.

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.[2] 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, 361-62 (1965).

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 their pulmonary or respiratory impairment, standing alone, prevents them from performing their usual coal mine work or comparable gainful work.

[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); 20 C.F.R. §718.305.

[2] 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 20; Hearing Transcript at 14, 21.

See 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[3] pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure,[4] 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 pulmonary function studies, arterial blood gas studies, medical opinions, and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 10-11, 19.

Employer does not challenge the ALJ's finding that Claimant established total disability based on the pulmonary function study and blood gas study evidence; thus, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order 10-11. Employer challenges the ALJ's weighing of the medical opinion evidence. Employer's Brief at 4-5.

The ALJ considered the opinions of Drs. Zlupko, Fino, and Basheda. Decision and Order at 11-19. Drs. Zlupko and Fino opined Claimant is totally disabled due to an obstructive ventilatory impairment seen on his pulmonary function studies and based on his qualifying blood gas studies. Director's Exhibits 32, 41; Employer's Exhibit 2. Dr. Basheda opined Claimant is not totally disabled because his October 5, 2022 pulmonary function and blood gas study results are normal. Employer's Exhibit 3. The ALJ gave little weight to Dr. Basheda's opinion because she found it is inadequately documented and found the opinions of Drs. Zlupko and Fino are entitled to full weight because they are

[3] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] The ALJ found there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 11.

reasoned and documented.[5] *Id*. at 18-19. Thus she found the medical opinions support a finding of total disability. *Id*.

Employer argues the ALJ erred in discrediting Dr. Basheda's opinion. Employer's Brief at 4-5. We disagree.

Dr. Basheda opined Claimant is not totally disabled because, even though his earlier pulmonary function and blood gas studies were qualifying, the most recent October 5, 2022 studies are not qualifying. Employer's Exhibit 3 at 19-23. He further opined that Claimant's studies were non-qualifying on October 5, 2022, because he started using an Advair inhaler in 2021 that resolved his impairment. *Id*. The ALJ found Dr. Basheda's opinion "flawed" and poorly documented because the October 5, 2022 pulmonary function study from his examination of Claimant was actually qualifying pre-bronchodilator and consistent with the ALJ's findings that the pulmonary function studies establish total disability. Decision and Order at 18. Further, the doctor's opinion that the blood gas studies do not show disability because the October 5, 2022 study is non-qualifying is contrary to her finding the blood gas studies establish total disability. *Id.* Thus, the ALJ permissibly found Dr. Basheda's opinion is not documented and is unpersuasive.[6] *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2 158, 163 (3d Cir. 1986); Decision and Order at 18.

Consequently we affirm, as supported by substantial evidence, the ALJ's finding the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19. Further, we affirm the ALJ's finding Claimant established total disability in consideration of the evidence as a whole, 20 C.F.R. §718.204(b)(2), and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 19.

Rebuttal of the Section 411(c)(4) Presumption

[5] We affirm, as unchallenged on appeal, the ALJ's crediting of Drs. Zlupko's and Fino's opinions. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-19.

[6] Employer argues the ALJ substituted her opinion for Dr. Basheda's opinion with regard to the pulmonary function studies. Employer's Brief at 4-5. Because the ALJ provided valid reasons for discrediting Dr. Basheda's opinion we need not address this argument. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant 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 did not 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." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ weighed the medical opinions of Drs. Fino and Basheda.[9] Decision and Order at 23-24. Both physicians opined Claimant does not have legal pneumoconiosis but instead has chronic obstructive pulmonary disease (COPD) due to smoking and unrelated to coal mine dust exposure. Employer's Exhibits 2, 3. The ALJ found their opinions not well-reasoned and thus insufficient to disprove legal pneumoconiosis. Decision and Order at 23-24.

[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 22.

[9] The ALJ also considered Dr. Zlupko's opinion that Claimant has legal pneumoconiosis and correctly found it does not aid Employer in rebutting the presumption. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 22. We therefore need not address Employer's argument regarding his opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 6-8.

Employer argues the ALJ erred in discrediting the opinions of Drs. Fino and Basheda. Employer's Brief at 5-6. We disagree.

Dr. Fino diagnosed Claimant with COPD in the form of emphysema and opined he has a "disabling obstructive and oxygen transfer impairment." Employer's Exhibit 2 at 9. After discussing several medical studies at length, he acknowledged that coal dust exposure can cause COPD but opined cigarette smoking has a far greater impact on development of the disease, and concluded Claimant does not have legal pneumoconiosis. *Id*. at 15.

Dr. Basheda opined Claimant's coal mine employment history put him "at risk for coal dust induced pulmonary disease," but that his "COPD/asthma" was caused by his cigarette smoking. Employer's Exhibit 3 at 18. Noting the improvement seen on Claimant's October 5, 2022 pulmonary function study demonstrated his treatment with an Advair inhaler was effective, Dr. Basheda explained that Advair is used to treat "abnormalities" associated with smoking. *Id*. at 19-20. He further opined that as "[c]oal dust obstruction is a fixed disorder" that would not be improved with Advair, or with bronchodilators as seen on his pulmonary function study, Claimant therefore does not have legal pneumoconiosis. *Id.*

Contrary to Employer's contention, the ALJ permissibly discredited the opinions of Drs. Fino and Basheda because they failed to explain why Claimant's significant history of coal mine dust exposure was not also a contributing or aggravating factor to Claimant's condition, even if smoking has a greater relative impact or is a more likely underlying cause. *See Balsavage*, 295 F.3d at 396-97; *Kertesz*, 788 F.2d at 163; *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); Decision and Order at 23-24. The ALJ further permissibly found both physicians' opinions unpersuasive as they did not account for the "additive properties of coal mine dust and tobacco smoke" in discussing the cause of Claimant's COPD.[10] Decision and Order at 23-24; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Balsavage*, 294 F.3d at 396-97; *Kertesz*, 788 F.2d at 163.

Because the ALJ permissibly discredited the only opinions supportive of Employer's burden on rebuttal, we affirm her finding Employer did not disprove legal pneumoconiosis. Decision and Order at 25. Employer's failure to disprove legal

[10] Because the ALJ provided a valid reason for discrediting Dr. Basheda's opinion, we need not address Employer's remaining contentions regarding her weighing of his opinion. *See Kozele*, 6 BLR at 1-382 n.4; Employer's Brief at 5-6.

pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Next, the ALJ considered whether Employer established "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 Order at 25-27. The ALJ rationally discredited the disability causation opinions of Drs. Fino and Basheda because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove 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 Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 26. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's total disability is due to pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii), 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

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge