U.S. Department of Labor

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

BRB No. 22-0076 BLA

WILLIAM J. CRYTZER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	DATE ISSUED: 7/12/2023
Employer-Petitioner	)	
	)	
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.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer.

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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2020-BLA-05362) rendered on a claim filed on April 17, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ accepted the parties' stipulation that Claimant had thirty-seven years of underground coal mine employment and found Claimant has a totally disabling respiratory impairment. 20 C.F.R. §718.204(b). Therefore, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). She further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. Employer also argues the ALJ erred in finding it did not rebut the presumption of legal pneumoconiosis.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response. However, in a footnote to his letter to the Benefits Review Board, he urges rejection of Employer's contention that the ALJ erred in crediting an arterial blood gas study that did not strictly comply with regulatory requirements.

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

[1] Claimant filed a previous claim that was withdrawn. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306.

[2] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-seven years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5; Employer's Brief at 15.

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).

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 his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). 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 consider all relevant evidence and weigh the evidence supporting total disability against all 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 arterial blood gas study and medical opinion evidence, and the evidence as a whole.[5] Decision and Order at 26, 29.

Arterial Blood Gas Study

The ALJ considered an arterial blood gas study conducted on May 10, 2019, that produced non-qualifying[6] values at rest and qualifying results after exercise. Decision and Order at 8, 25-26; Director's Exhibit 19. Placing greater weight on the exercise study, the ALJ found the arterial blood gas studies support a finding of total disability. Decision and Order at 25-26.

[4] 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 4; Claimant's Exhibit 9.

[5] The ALJ determined the pulmonary function studies do not support total disability 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 25, 26.

[6] A "qualifying" blood gas study yields results equal to or less than the applicable table values contained in Appendix C 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)(ii).

Employer argues the ALJ erred in crediting the exercise study because the blood gas sample was obtained immediately after exercise, while Claimant was sitting down, and therefore does not comply with the regulatory requirements. Employer's Brief at 16-19. It asserts the regulations require that blood be drawn during exercise, not after; thus, the exercise blood gas study is invalid and cannot be relied upon to find total disability. Employer's Brief at 16-19 (citing 20 C.F.R. §718.105(b)). The Director responds, acknowledging the evidence demonstrates Claimant was sitting down when the exercise blood gas sample was drawn, but submits a study is not required to strictly conform to the regulations to be considered as credible evidence. Director's Response. Rather, it may be considered if in substantial compliance with the quality standards and, because the ALJ addressed the issue and provided reasoned bases for relying on the exercise study, her reliance on the study was permissible. *Id.* We agree with the Director's position.

When considering arterial blood gas studies, an ALJ must determine whether they are in substantial compliance with the quality standards. *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987); 20 C.F.R. §§718.101, 718.105; 20 C.F.R. Part 718, Appendix C; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ, as the factfinder, must determine the probative weight to assign the study. *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The ALJ addressed Employer's argument that the exercise blood gas study should be excluded, but she found the study reliable as all five physicians-- including Employer's experts-- relied on the study to find disabling hypoxemia, with none indicating the results were invalid or unreliable. Decision and Order at 25 n.5. She further noted that Dr. Ranavaya reviewed the study and determined it was technically acceptable, a finding the Employer does not address. *Id.*; Director's Exhibit 18. A physician's opinion regarding the reliability of a pulmonary function study or an arterial blood gas study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985). Thus, the ALJ permissibly found the evidence demonstrated the exercise blood gas study was reliable and in substantial compliance with the regulations. *Orek*, 10 BLR at 1-54-55; Decision and Order at 25 n.5. Consequently, we affirm the ALJ's finding that the arterial blood gas study supports a finding of total disability. Decision and Order at 25-26, 29.

Medical Opinions

The ALJ considered the medical opinions of Drs. Celko, Sood, Go, Rosenberg, and Basheda. Decision and Order at 8-23, 27-29. Drs. Celko, Sood, and Go opined Claimant is totally disabled based on his disabling hypoxemia with exercise. Director's Exhibit 19; Employer's Exhibits 4, 6-8. Drs. Rosenberg and Basheda agreed Claimant's hypoxemia with exercise was disabling, but they indicated the impairment is due to his heart disease and is thus not a pulmonary impairment. Employer's Exhibits 7, 8.

The ALJ credited the opinions of Drs. Celko, Sood, and Go because they are consistent with the objective medical evidence, well-reasoned, and well-documented. Decision and Order at 27, 29. She found Drs. Rosenberg's and Basheda's opinions that Claimant is not totally disabled from a pulmonary perspective conflated the issues of total disability and disability causation. *Id.* at 29. Further, she found their opinions actually supported total disability because they concluded Claimant was unable to perform his usual coal mine work based on his hypoxemia during exercise. *Id.* According the most weight to Drs. Go's and Sood's opinions, the ALJ found the medical opinion evidence supported a finding of total disability. *Id.*

Employer argues the ALJ erred in crediting the opinions of Drs. Celko, Sood, and Go because they relied on an invalid exercise blood gas study and failed to address the fact that Claimant's pulmonary function studies were non-qualifying. Employer's Brief at 20. We disagree.

Initially, we reject Employer's arguments that the ALJ's credibility findings are undermined by crediting the exercise blood gas study, as we have affirmed her reliance on the study. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); Employer's Brief at 16-17.

Moreover, non-qualifying pulmonary function studies do not undermine qualifying blood gas evidence because the studies measure different types of impairment. *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Also, a physician may offer a reasoned medical opinion diagnosing total disability notwithstanding non-qualifying objective studies. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000). The relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the medical opinion evidence supports a finding that Claimant's respiratory or pulmonary impairment precluded him from performing his usual coal mine work.

Dr. Celko found Claimant totally disabled based on his blood gas study demonstrating hypoxemia at rest, which worsened to disabling values with exercise. Director's Exhibit 19. He also noted a moderate obstructive pattern indicated on Claimant's pulmonary function study, as well as a mild reduction in diffusion capacity. *Id.*

Ultimately, Dr. Celko opined that Claimant "clearly does not have the pulmonary capacity to perform his last coal mine employment . . . ." *Id.* at 1. Dr. Go found abnormally low FEV1 and FVC values on pulmonary function testing, and disabling hypoxemia, which he explained precluded Claimant from performing his usual coal mine employment. Claimant's Exhibits 4 at 9-10; 4a at 1-2. Dr. Sood also concluded Claimant is totally disabled from his usual coal mine employment, requiring heavy labor, based on his disabling hypoxemia during exercise, as well as his moderately reduced diffusing capacity. Claimant's Exhibits 6 at 14; 6a at 2.

As the ALJ found, Drs. Celko, Go, and Sood understood Claimant's coal mine employment and social histories, considered the objective testing available to them, and explained in detail why Claimant was unable to perform his usual coal mine employment. Decision and Order at 26-27, 29; Director's Exhibit 19; Claimant's Exhibits 4, 4a, 6, 6a. As it is the province of the ALJ to evaluate the medical opinion evidence and to assess its credibility, we affirm the ALJ's determination that the opinions of Drs. Celko, Go, and Sood support a finding of total disability. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163; Decision and Order at 27, 29. Further, we affirm as unchallenged the ALJ's findings that Drs. Rosenberg's and Basheda's opinions warrant less weight given their conflation of the issues of total disability and disability causation.[7] *See* 20 C.F.R. §781.204(a); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28-29.

Because it is supported by substantial evidence, we also affirm the ALJ's determination that Claimant established total disability when weighing the evidence as a whole and therefore affirm her determination that Claimant invoked the Section 411(c)(4) presumption.[8] 20 C.F.R. §§718.204(b)(2), 718.305; *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 29.

[7] While Employer generally argues Drs. Rosenberg's and Basheda's opinions do not support a finding of total disability as they explained Claimant's disabling exercise hypoxemia is due to his heart disease, it does not address the ALJ's findings that these opinions confuse the issues of total disability and disability causation. Employer's Brief at 18, 20-21.

[8] Employer also contends the pulse oximetry measurement obtained in Dr. Basheda's examination is a more accurate reflection of Claimant's condition. Employer's Brief at 18. This argument is based on Employer's rejected argument that the exercise blood gas study could not be relied upon. Moreover, as the ALJ correctly found, Dr. Basheda's opinion does not support Employer's argument, as he did not make this

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 [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] Decision and Order at 40.

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 Co*., 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Basheda and Rosenberg to disprove legal pneumoconiosis. Employer's Exhibits 4, 6-8. Dr. Basheda diagnosed hypoxemia and variable, mild restriction due to cardiovascular disease and obesity, unrelated to coal mine dust exposure. Employer's Exhibits 4 at 22-25; 7 at 18, 20, 23-24. He found no evidence of an obstructive defect and, while he acknowledged symptoms consistent with chronic bronchitis, he opined any such symptoms are unrelated to coal mine dust exposure. Employer's Exhibits 4 at 22-25; 7 at 17-19, 25-26. Dr. Rosenberg determined Claimant's mild to moderate restriction and hypoxemia with exercise were due to severe and worsening cardiomyopathy and obesity. Employer's Exhibits 6 at 6-7, 9; 8 at 12-13, 20-

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assessment, but rather opined that Claimant is disabled based on the exercise arterial blood gas study. Decision and Order at 26 n.6; Employer's Exhibits 4 at 25, 7 at 24.

[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).

[10] The ALJ found that Employer established the absence of clinical pneumoconiosis. Decision and Order at 31.

22, 29-30, 35-36. He also found no evidence of obstruction and opined Claimant's chronic bronchitis was unrelated to his coal mine dust exposure. Employer's Exhibit 6 at 7; 8 at 20-21, 30-31. The ALJ found both opinions entitled to little weight as inadequately explained and inconsistent with the principles underlying the Act; thus, she found them insufficient to rebut the presumption. Decision and Order at 35, 39.

Employer contends the ALJ erred in discrediting the opinions of Drs. Basheda and Rosenberg. Employer's Brief at 11-14. We disagree.

First, Employer contends the ALJ erred in discrediting Drs. Basheda's and Rosenberg's opinions because they did not rely *solely* on the negative x-ray evidence to find the absence of legal pneumoconiosis. *Id.* at 11-12. Contrary to Employer's assertion, the ALJ permissibly discredited the opinions of Drs. Basheda and Rosenberg given their reliance in part on the negative x-ray evidence to exclude legal pneumoconiosis, as the regulations recognize that coal dust can produce a disabling chronic lung disease, in the form of either obstruction or restriction, even in the absence of clinical pneumoconiosis. 20 C.F.R. § 718.201(a)(2); *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 36. The ALJ further permissibly found that neither Dr. Basheda nor Dr. Rosenberg explained why Claimant's history of cardiovascular disease necessarily excluded coal mine dust exposure as a contributor to Claimant's blood gas exchange impairment. *Balsavage*, 295 F.3d at 396-97; *Kertesz*, 788 F.2d at 163; *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 36-37.

Employer also contends the ALJ erred in discounting Dr. Rosenberg's opinion as to the latency of Claimant's disease, arguing the ALJ's findings are moot because Dr. Rosenberg did not diagnose obstruction. Employer's Brief at 13. However, Dr. Rosenberg opined Claimant has chronic bronchitis, which he indicated would be unrelated to coal dust exposure because chronic bronchitis due to such exposure would have ended soon after he left the coal mines. Employer's Exhibits 6 at 7-8, 11; 8 at 30-31. He further indicated that the preamble to the 2001 revised regulations only supports a finding that pneumoconiosis is latent in rare cases. Employer's Exhibit 6. Thus, the ALJ permissibly found Dr. Rosenberg's opinion undermined as inconsistent with the regulations that recognize pneumoconiosis can be a latent and progressive disease, and that he did not adequately explain why Claimant could not be one of the "rare" cases. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987) ("pneumoconiosis is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure"); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10 (3d Cir. 2002); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Decision and Order at 38-39.

Further, the ALJ permissibly found Dr. Rosenberg's opinion undermined as his indication that there was no documentation of respiratory complaints when Claimant left coal mine employment is unsupported by the record, which indicates respiratory symptoms dating back to 2009.[11] *See Balsavage*, 295 F.3d at 396-97; *Kertesz*, 788 F.2d at 163; Decision and Order at 38; Employer's Exhibits 6 at 11; 8 at 11; Claimant's Exhibit 4 at 9.

We also reject Employer's assertion that the ALJ erred in discrediting Dr. Rosenberg's opinion by applying an "all-inclusive" standard and "catch-all phrases" to find every diagnosis of a respiratory condition constitutes legal pneumoconiosis. Employer's Brief at 14. Where, as here, the Section 411(c)(4) presumption was invoked, it is presumed legal pneumoconiosis is present and it is Employer's burden to affirmatively disprove the disease by a preponderance of the evidence. 20 C.F.R. §§718.201(b)(2), (c), 718.305(d)(2)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. Here, the ALJ applied the correct standard to the physicians' explanations to find Employer failed to meet its burden. *Balsavage*, 295 F.3d at 396-97; *Kertesz*, 788 F.2d at 163; Decision and Order at 32, 35-39.

Employer's arguments are a request to reweigh the medical opinion evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the ALJ's rejection of the opinions of Drs. Basheda and Rosenberg and her finding that Employer failed to disprove the existence of the disease.[12] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 39.

[11] The miner retired in 2007. Thus, the 2009 records were not contemporaneous with the end of his mining career, but not many years after.

[12] It is unnecessary to address Employer's arguments concerning the ALJ's weighing of Drs. Sood's and Go's opinions. Employer's Brief at 8-17. While, as Employer argues, the ALJ provided greater weight to their opinions regarding the presence of obstruction over those of Drs. Basheda and Rosenberg, the ALJ provided permissible bases for finding Drs. Basheda's and Rosenberg's opinions undermined independent of those findings. Decision and Order at 35-39.

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). The ALJ permissibly discredited Drs. Basheda's and Rosenberg's opinions regarding the cause of Claimant's disability, as they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that he has the disease. 20 C.F.R. §718.305(d)(1)(ii); *see Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505-06 (4th Cir. 2015); *Ogle*, 737 F.3d at 1072-73; Decision and Order at 40. As Employer raises no other arguments, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 40.

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

JONATHAN ROLFE
Administrative Appeals Judge