U.S. Department of Labor

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

BRB No. 22-0171 BLA

GOEBEL R. BURKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KIAH CREEK MINING COMPANY	)	
	)	DATE ISSUED: 7/21/2023
Employer-Respondent	)	
	)	
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 After Remand of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (AppalReD Legal Aid), Prestonsburg, Kentucky, for Claimant.

Paul Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order Awarding Benefits After Remand (2018-BLA-05668) rendered on a claim filed

pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim[1] filed on July 12, 2016, and is before the Benefits Review Board for the second time.

In his initial Decision and Order Awarding Benefits, the ALJ found Employer is the properly designated responsible operator and credited Claimant with eighteen years of underground coal mine employment. He also found Claimant established the existence of complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Alternatively, he found Claimant established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore 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); *see* 20 C.F.R. §718.305. He further found Employer did not rebut the presumption and awarded benefits.

Pursuant to Employer's appeal, the Board affirmed the ALJ's findings that Employer is the properly designated responsible operator and Claimant established eighteen years of underground coal mine employment. *Burke v. Kiah Creek Mining Co.*, BRB No. 20-0218 BLA, slip op. at 2 n.2, 3-6 (Mar. 30, 2021) (unpub.). However, the Board vacated the ALJ's findings that Claimant established the existence of complicated pneumoconiosis and thus invoked the irrebuttable presumption at Section 411(c)(3) and remanded the case for further consideration. *Id.* at 7-8. The Board also vacated the ALJ's findings that Claimant established a totally disabling respiratory or pulmonary impairment and thus invoked the rebuttable presumption at Section 411(c)(4) and remanded the case for further consideration of these issues if necessary. *Id.* at 11-12. Therefore, the Board vacated the award of benefits and remanded the case for additional consideration. *Id.* at 13. Further, the Board affirmed the ALJ's finding that Employer failed to establish rebuttal of the Section 411(c)(4) presumption. *Id.* at 13. Consequently, the Board instructed the ALJ that if he finds on remand that Claimant has not established complicated pneumoconiosis but has proven total disability, he may reinstate his finding that Claimant invoked the Section 411(c)(4) presumption and therefore the award of benefits. *Id.*

[1] Claimant filed a prior claim but withdrew it. Director's Exhibits 1, 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[2] 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.

On remand, the ALJ again found Claimant established the existence of complicated pneumoconiosis and thus invoked the irrebuttable presumption at Section 411(c)(3). He also found Claimant established that his complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. Alternatively, he again found Claimant established a totally disabling respiratory or pulmonary impairment and thus invoked the rebuttable presumption at Section 411(c)(4). 20 C.F.R. §718.204(b)(2). He further found Employer did not rebut the presumption. Thus, he reinstated the award of benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established the existence of complicated pneumoconiosis and thus invoked the irrebuttable presumption at Section 411(c)(3). It also argues the ALJ erred in finding Claimant established a totally disabling respiratory or pulmonary impairment and therefore invoked the rebuttable presumption at Section 411(c)(4). Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

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)(i). 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 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).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. 15-16.

The ALJ found Claimant established total disability based on the medical opinions, and in consideration of the evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order After Remand at 9-11.

Medical Opinions

Before weighing the medical opinions, the ALJ followed the Board's instruction to determine the exertional requirements of Claimant's usual coal mine employment. Decision and Order After Remand at 7. A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time, *Shortridge v. Beatrice Pocahontas Coal Co*., 4 BLR 1-534, 1-539 (1982); *Pifer v. Florence Mining* Co., 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co*., 7 BLR 1-124, 1-127 (1984).

The ALJ correctly observed Claimant testified that his last coal mine job as an underground "roof bolter" required him to "manually load his bolts, which came about 10 to a pack" and weighed "60 to 70 pounds," drill holes, and "put glue up" that "came in 60 pound boxes." Decision and Order After Remand at 6; Hearing Tr. at 15-20. He also correctly observed Claimant testified he had to carry "the box of glue plus plates" that came in stacks of ten and weighed "close to 100 pounds" for fifty or sixty yards "from the supply place" to "load his machine, and . . . back to the face [to] unload some of it." Decision and Order After Remand at 6; Hearing Tr. at 20-21. Further, he noted Claimant reported to Drs. Nader and Go that his job as a roof bolter required him to lift "50 to 60 pound loads" and carry that weight "from the scoop to the pinner." Decision and Order After Remand at 6; Director's Exhibit 14; Claimant's Exhibit 2. He additionally noted Claimant reported to Drs. Dahhan and Rosenberg that his job as a roof bolter required him to "lift bundles of bolts, boxes of glue and other supplies, and carry them to the pinner from the scoop." Decision and Order After Remand at 6; Employer's Exhibits 4, 5. Finally, he noted Claimant reported to Drs. Go, Dahhan, and Rosenberg that he carried "25 to 30 pounds," and that Drs. Dahhan and Rosenberg confirmed Claimant's testimony that he also had to hang cable, shovel belts, set timbers, and crawl on his knees in underground mines where the height ranged from four to twelve feet. Decision and Order After Remand at 6; Hearing Tr. at 21-23; Claimant's Exhibit 2; Employer's Exhibits 4, 5.

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant's usual coal mine work as an underground "roof bolter" required "regular and

[4] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, 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 After Remand at 7-8.

sustained heavy to very heavy" exertional levels. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion); Decision and Order After Remand at 7.

The ALJ then weighed the medical opinions of Drs. Go, Nader, Dahhan, and Rosenberg. Decision and Order After Remand at 8-11. Drs. Go and Nader opined Claimant is totally disabled from a pulmonary or respiratory impairment, while Drs. Dahhan and Rosenberg opined he is not. Director's Exhibits 14, 22, 24; Claimant's Exhibit 2; Employer's Exhibits 1, 3-5, 10. The ALJ found the opinions of Drs. Go and Nader better reasoned and supported by the objective testing than the contrary opinions of Drs. Dahhan and Rosenberg. Decision and Order After Remand at 10-11. He thus concluded the medical opinion evidence supports a finding of total disability based on Drs. Go's and Nader's opinions. *Id*.

Employer argues the ALJ erred in crediting Dr. Nader's opinion because he did not review Dr. Rosenberg's medical report. Employer's Brief at 7. We disagree. The May 10, 2017 pulmonary function and arterial blood gas studies Dr. Rosenberg conducted produced results similar to the March 31, 2017 pulmonary function and arterial blood gas studies Dr. Dahhan conducted. Director's Exhibit 22 at 7, 9; Employer's Exhibit 1 at 6, 15, 17, 20, 24-25, 27-28. Although Dr. Nader did not consider the May 10, 2017 objective tests Dr. Rosenberg conducted, he did consider the March 31, 2017 objective tests Dr. Dahhan conducted. Director's Exhibit 24 at 4. Moreover, the ALJ credited the opinion of Dr. Go, who considered both the March 31, 2017 and May 10, 2017 objective tests. Decision and Order at 10; Claimant's Exhibit 2. Thus, any error the ALJ made in failing to specifically address Dr. Nader's failure to consider Dr. Rosenberg's medical report is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We also reject Employer's argument that the ALJ erred in crediting Dr. Go's opinion because he did not examine Claimant but "simply performed a records review." Employer's Brief at 7. Contrary to Employer's argument, there is no requirement that a non-examining physician's opinion be given less weight than an examining physician's opinion. *See Collins v. J&L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984).

We further reject Employer's argument that the ALJ erred in failing to adequately explain why he credited the opinions of Drs. Go and Nader as they are contrary to his finding that the pulmonary function study and arterial blood gas study evidence does not support a finding of total disability. Employer's Brief at 9. Contrary to Employer's argument, the fact that Claimant did not demonstrate total disability based on the pulmonary function study or blood gas study evidence does not preclude a finding of total

disability based on the medical opinion evidence. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997). Non-qualifying test results alone do not establish the absence of an impairment. *Estep v. Director, OWCP*, 7 BLR 1-904, 1-905 (1985). Rather, as noted, the relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether Claimant's respiratory or pulmonary impairment precluded the performance of his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1)(i), (ii), (b)(2)(iv).

Employer additionally argues the ALJ erred in failing to adequately explain why he found the opinions of Drs. Nader and Go more consistent with the objective testing than the opinions of Drs. Dahhan and Rosenberg. Employer's Brief at 7-9. We disagree.

Dr. Nader opined the October 24, 2016 qualifying[5] exercise arterial blood gas study he conducted as part of Claimant's examination is a better indicator of disability and his inability to perform his usual coal mine work than the March 31, 2017 non-qualifying exercise arterial blood gas study Dr. Dahhan conducted. Director's Exhibit 14 at 5; Employer's Exhibit 3 at 15-16, 33-34, 37, 46-54, 59-60. He noted Claimant exercised on a treadmill for two minutes and fourteen seconds and reached a maximum heart rate of one-hundred twenty-six beats per minute (BPM) and a workload of 4.6 metabolic equivalents (METs). Director's Exhibit 14 at 5. In addition, he indicated he drew Claimant's blood when this heart rate and METs level were reached. *Id*. He further testified the higher heart rate indicates Claimant's blood was drawn in exercise conditions that better reflect the exertional requirements of his usual coal mine work as a roof bolter, which required him to lift fifty to sixty pounds at any given time during the workday and work under a four-foot ceiling. Employer's Exhibit 3 at 46-47, 51-52. Dr. Nader contrasted the maximum heart rate of this study with the maximum heart rate of ninety-two BPM that Claimant achieved while exercising as part of the March 31, 2017 arterial blood gas study Dr. Dahhan conducted. Director's Exhibit 24; Employer's Exhibit 3 at 46-47. Because Claimant's heart rate was so much lower on the March 31, 2017 study and he was not exercised with the maximum heart rate, Dr. Nader concluded its workload was not sufficient to evaluate whether Claimant was hypoxic with exercise.[6] *Id*. at 47-48. In his

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

[6] Dr. Nader also noted the October 24, 2016 blood gas study was administered with an arterial line so that Claimant's blood was drawn at peak exercise. Director's Exhibit 14 at 5. He further stated the technician who conducted the March 31, 2017 study did not

supplemental report, Dr. Nader retracted his diagnosis of chronic obstructive pulmonary disease contained in his initial medical report because Claimant's "poor effort was noticed during his [pulmonary function] test," preventing him from meeting criteria for acceptance and reproducibility. Director's Exhibit 24 at 4. But Dr. Nader ultimately determined that it "does not change his overall evaluation" that Claimant is totally disabled due to a pulmonary or respiratory impairment that prevents him from performing the exertional requirement of his previous coal mine work. *Id*. at 4-5.

Dr. Go opined the level of exercise Claimant performed during the March 31, 2017 and May 10, 2017 non-qualifying blood gas studies that Dr. Dahhan and Dr. Rosenberg conducted, respectively, was "significantly lower" than the October 24, 2016 qualifying blood gas study Dr. Nader conducted. Claimant's Exhibit 2 at 7. Based on the recorded heart rates and METs values for the three studies, Dr. Go found Dr. Nader's testing "more closely approximated the level of work [Claimant] had to perform in his mining career – lifting [twenty-five to sixty] pound loads, [and] shoveling and moving about in low coal." *Id*. He determined the "lack of observed hypoxemia" on the March 31, 2017 and May 10, 2017 blood gas studies "cannot be interpreted to exclude [a] totally disabling pulmonary impairment." *Id*.

Dr. Dahhan acknowledged Claimant experienced exercise-induced hypoxemia as part of the October 24, 2016 blood gas study that Dr. Nader conducted, but he opined the results were not duplicated in the later studies. Director's Exhibit 22 at 2. He addressed the criticisms of the March 31, 2017 study he conducted. Employer's Exhibits 5, 10. Specifically, he noted the duration of exercise in the October 24, 2016 study (two minutes and fourteen seconds) was comparable to the duration of exercise in the March 31, 2017 study (two minutes). *Id*. He also noted the manner of the blood draw and the manner that Claimant exercised (using a bicycle as opposed to a treadmill) were also comparable for the two studies. Employer's Exhibit 5. Addressing the fact that Claimant reached a peak heart rate of only ninety-two BPM on the March 31, 2017 study compared to one hundred and twenty-six BPM on the October 24, 2016 study, Dr. Dahhan explained that Claimant's cardiac response during exercise was more blunted during the March 31, 2017 study compared to the October 24, 2016 study. *Id*. He concluded this limited cardiac response does not establish the March 31, 2017 study is less reliable on the issue of total disability. *Id*. Further, he reiterated his opinion that Claimant is not totally disabled because the

specify if Claimant was on oxygen or room air when it was done, or if he drew Claimant's blood during exercise or the recovery period. Director's Exhibit 24 at 2.

exercise-induced hypoxemia demonstrated on the October 24, 2016 study was not duplicated on the later studies.[7] Employer's Exhibit 5.

Dr. Rosenberg addressed the presence of hypoxemia demonstrated on the October 24, 2016 blood gas study but not on the March 31, 2017 and May 10, 2017 blood gas studies.[8] Employer's Exhibit 4. He explained Claimant may have had a temporary obstructive impairment that resulted in reduced gas exchange when Dr. Nader examined him, but this impairment was no longer present in the subsequent examinations.[9] Employer's Exhibit 4 at 15. Further, he opined Claimant's "target heart rate" to achieve "maximal exertional exercise" is one hundred thirty-two BPM. Employer's Exhibit 4 at 28. He explained, however, that when he conducts exercise blood gas testing, he does not have individuals reach maximum exercise. Employer's Exhibit 4 at 28. Instead, he stated an individual need only do enough exercise to reach a "steady state." *Id.* In his experience, when an individual reaches a steady state, they have done enough exercise so blood gas exchange abnormalities will occur. *Id.* He conceded, however, that Claimant did more exercise on the October 24, 2016 study than on the May 10, 2017 study. *Id.* at 33.

The ALJ noted Dr. Rosenberg did not address the fact that Claimant's heart rate was higher during the October 24, 2016 study. Decision and Order After Remand at 9. He also noted Dr. Rosenberg did not discuss whether Claimant could perform the exertional requirements of his previous coal mine employment based on the totality of the arterial blood gas study findings. *Id.* Additionally, he noted Dr. Dahhan's conclusion that while Claimant's cardiac response during exercise was more blunted during the March 31, 2017 study as compared to the October 24, 2016 study, Claimant's failure to reach the same pulse rate during his examination did not "disqualify" the amount of work done. Decision and Order After Remand at 9; Employer's Exhibit 5. The ALJ noted Dr. Dahhan's view

[7] In addition, Dr. Dahhan explained that Claimant was not on oxygen during the March 31, 2017 study. Employer's Exhibit 5.

[8] Drs. Dahhan and Rosenberg also opined Claimant's pulmonary function studies and resting arterial blood gas studies do not establish total disability. Director's Exhibit 22; Employer's Exhibits 1, 4, 5, 10.

[9] Dr. Rosenberg was not sure how long Claimant exercised during the May 10, 2017 blood gas study he conducted, but he estimated it would be two to three minutes on a stationary bicycle based on his prior examinations of miners. Employer's Exhibit 4 at 30, 38. Claimant reached a maximum heart rate of ninety-nine BPM on this study. Employer's Exhibit 1 at 27. Dr. Rosenberg did not believe the technician recorded a METs value for this study. Employer's Exhibit 4 at 33.

was inconsistent with Drs. Rosenberg's and Nader's opinion that the heart rate reached during exercise is what is important. *Id*. Further, he permissibly found Drs. Go and Nader "credibly explain[ed] why Dr. Nader's [October 24, 2016 exercise blood gas study] results are a better reflection of [Claimant's] pulmonary capacity to perform his previous coal mine work." Decision and Order After Remand at 10; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Here, the ALJ permissibly found the opinions of Drs. Nader and Go better "reasoned and supported by objective evidence," and thus outweighed the contrary opinions of Drs. Dahhan and Rosenberg.[10] *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order After Remand at 10. Employer's arguments 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).

Thus, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence and the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order After Remand at 10-11. We therefore affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we also affirm this finding and therefore the award of benefits.[11] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order After Remand at 11.

[10] Because the ALJ provided valid reasons for how he weighed Drs. Dahhan's and Rosenberg's opinions, we need not address Employer's additional arguments regarding the ALJ's consideration of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 7-10.

[11] Because we affirm the ALJ's alternative finding that Claimant established entitlement to benefits based on the Section 411(c)(4) presumption, we need not address Employer's argument that the ALJ erred in finding Claimant invoked the irrebuttable presumption at Section 411(c)(3) by establishing complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 4-6.

Accordingly, the ALJ's Decision and Order Awarding Benefits After Remand is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge