U.S. Department of Labor

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

BRB No. 22-0014 BLA

DEWEY OSBORN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BEECH FORK PROCESSING PLANT	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 6/23/2023
	)	
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 John P. Sellers III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), Pikesville, Kentucky, for Employer and its Carrier.[1]

[1] On November 15, 2022, after filing Employer and Carrier's (Employer's) petition for review and brief and the briefing schedule closed, the Jones & Jones Law Office filed

a motion to withdraw as Employer's counsel and requested an extension of all deadlines in this appeal. *See* Motion to Withdraw as Counsel and Request an Extension of All Deadlines. Thomas L. Ferreri and Matthew J. Zanetti of Ferreri Partners, PLLC, subsequently filed an Entry of Appearance and Notice of Representation on behalf of Employer. The Benefits Review Board grants Jones & Jones's request to withdraw but denies the request to extend deadlines as moot.

Before: BOGGS, ROLFE, and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2020-BLA-05678) rendered on a claim filed on March 25, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of thirty-five years of qualifying coal mine employment. He found the evidence inconclusive for the presence of complicated pneumoconiosis and therefore found Claimant did 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); *see* 20 C.F.R. §718.304. However, he found Claimant established a totally disabling respiratory or pulmonary impairment 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); 20 C.F.R. §718.204(b)(2). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and therefore in finding Claimant invoked the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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.[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).

[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 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 established thirty-five years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[4] 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*

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 or comparable gainful work.[5] 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). The ALJ found Claimant established total disability based on the medical opinion evidence and when weighing the evidence as a whole.[6]

The ALJ considered the medical opinions of Drs. Nader, Jarboe, and Dahhan. Decision and Order at 18-21. Dr Nader opined Claimant is totally disabled from performing his usual coal mine employment due to complicated pneumoconiosis and a decrease in oxygenation with exercise.[7] Director's Exhibit 12; Claimant's Exhibits 1, 4.

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14-15.

[5] The ALJ found Claimant's usual coal mine employment was as a continuous miner operator, which constituted heavy labor. Decision and Order at 16. Employer does not challenge this finding; thus, we affirm it. *See Skrack*, 6 BLR at 1-711.

[6] 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), (ii), (iii); Decision and Order at 17-18.

[7] Dr. Nader examined Claimant on three separate occasions. Director's Exhibit 12; Claimant's Exhibits 1, 4. In his first examination report, obtained on behalf of the Department of Labor, Dr. Nader opined Claimant was totally disabled based solely on Dr. DePonte's x-ray reading of complicated pneumoconiosis. Director's Exhibit 12. In his two subsequent exams, he continued to find complicated pneumoconiosis based on x-ray readings, but also found Claimant disabled based on his desaturation of oxygenation with exercise and symptoms of shortness of breath walking sixty feet on level ground, wheezing,

Drs. Jarboe and Dahhan opined he is not total disabled, noting mild restriction and indicating that his decrease in blood gas exchange with exercise did not fall to qualifying[8] levels. Director's Exhibit 25; Employer's Exhibits 5, 8. The ALJ gave the most weight to Dr. Nader's two most recent examination reports and found they outweighed Drs. Jarboe's and Dahhan's opinions, which he found to be not well-reasoned. Decision and Order at 19-21.

Employer contends the ALJ erred in crediting Dr. Nader's opinion and in failing to consider the physician's potential bias. Employer's Brief at 5-7. It also contends the ALJ erred by selectively analyzing the evidence to discredit Dr. Jarboe and in failing to consider the entirety of Dr. Dahhan's opinion. *Id.* at 7-9. We disagree.

Initially, we decline to address Employer's argument that the ALJ failed to consider alleged bias on the part of Dr. Nader, as Employer did not raise this contention below. 20 C.F.R. §802.301(a); *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995). Moreover, even if the argument were before us, Employer's general allegation that Dr. Nader examined Claimant twice at Claimant's request falls short of a specific allegation of bias. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (en banc) (holding it is error to discredit, as biased, a medical report prepared for litigation absent a specific basis for finding the report to be unreliable).

Employer also contends that Dr. Nader failed to adequately explain why Claimant could not perform his last coal mining job and cannot be well-documented as he did not review the other medical opinions. Employer's Brief at 6-7. We disagree. As Employer acknowledges, a physician may offer a reasoned medical opinion diagnosing total disability even when the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); Employer's Brief at 7. Dr. Nader described Claimant's shortness of breath with

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and cough. Claimant's Exhibits 1, 4. Although the ALJ found complicated pneumoconiosis was not established, he found this fact did not undermine Dr. Nader's finding of total disability in his two more recent exams, as he provided additional bases. Decision and Order at 19.

[8] 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).

little exertion, wheezing, and coughing observed in multiple examinations; accurately noted Claimant's last coal mine work required heavy labor; and explained that, while not qualifying under the regulations, the significant degree of hypoxemia demonstrated on exercise during the December 2020 and February 2021 blood gas studies would preclude him from performing such heavy labor. Decision and Order at 19; Claimant's Exhibits 1, 4. Thus, the ALJ permissibly found Dr. Nader's opinion that Claimant is totally disabled to be well-reasoned. *See Cornett*, 227 F.3d at 587; *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); Decision and Order at 19. In addition, contrary to Employer's argument, the fact that Dr. Nader did not review Drs. Jarboe's or Dahhan's reports does not render his opinion undocumented. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996) (a medical opinion may be credited and sufficient to establish Claimant's burden if it is based on the doctor's own examination of the miner and objective test results).

Employer next argues the ALJ selectively analyzed the evidence, for while he did not discredit Dr. Nader for failing to consider all the evidence, he found Dr. Jarboe's opinion undermined because he did not discuss Dr. Nader's most recent exercise blood gas studies.[9] Employer's Brief at 7-8. We disagree, as the ALJ permissibly found Dr. Jarboe's opinion unpersuasive because he was unaware of the two more recent exercise blood gas studies that demonstrated lower pO2 values and which formed the basis of Dr. Nader's diagnosis of totally disabling hypoxemia with exertion. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (ALJ may assign less weight to physician's opinion which reflects an incomplete picture of miner's health); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (a later test may be more reliable than an earlier one when the miner's condition worsened given the progressive nature of pneumoconiosis); Decision and Order at 20. Moreover, the ALJ found Dr. Jarboe's opinion undermined because he failed to address the exertional requirements of Claimant's usual coal mine employment, a finding we affirm as uncontested by Employer. *Cornett*, 227 F.3d at 578; *Eagle v. Armco, Inc*, 943 F.2d 509, 513 (4th Cir. 1991); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20.

Similarly, the ALJ noted Dr. Dahhan incorrectly stated Claimant did not undergo an exercise blood gas study as part of his February 9, 2021 examination with Dr. Nader and thus permissibly discredited Dr. Dahhan's opinion because he failed to discuss the

[9] Employer also implies that the ALJ did not consider all the evidence, indicating the ALJ "only references [Dr. Jarboe's] initial report." Employer's Brief at 7. While Employer's evidence summary form indicated that it anticipated a supplemental report from Dr. Jarboe post-hearing, there is no such supplemental report in the record.

most recent exercise blood gas study of record[10] and demonstrated "carelessness" in his review of the evidence.[11] *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 20.

Employer is correct that Dr. Dahhan noted the exertional requirements of Claimant's usual coal mine employment and opined he was capable of performing his usual coal mine employment. Employer's Brief at 9; Employer's Exhibit 2, 5. However, as the ALJ found, Dr. Dahhan emphasized that, while the decrease in oxygenation with exercise was abnormal, none of the exercise blood gas values were qualifying under the regulations, incorrectly relying on whether the studies were qualifying as definitive on the issue of whether the values prevented Claimant from performing his usual coal mine work. Employer's Exhibit 5 at 7 ("[to] conclude regarding the arterial blood gas studies, they show abnormalities, however, none of the values at rest or at exercise are below disability standards set by the Department of Labor"); Decision and Order at 20-21. Thus, given that Dr. Dahhan acknowledged Claimant's blood gas studies demonstrate mild hypoxemia with exercise, the ALJ permissibly found he failed to adequately address whether Claimant maintained the pulmonary capacity to perform the exertional requirements of his usual coal mine work given this abnormality, notwithstanding that the values are non-qualifying. *See Cornett*, 227 F.3d at 587; *Napier*, 301 F.3d at 713-14; Decision and Order at 21.

[10] Employer argues the ALJ did not consider Dr. Dahhan's supplemental report where he considered Dr. Nader's December 17, 2020 study. Employer's Brief at 8. However, the ALJ specifically addressed this report and the fact that Dr. Dahhan considered Dr. Nader's December 17, 2020 study. Decision and Order at 13, 20.

[11] Employer alleges Dr. Dahhan was not careless, but that Dr. Nader's report was "deliberately misleading" because Dr. Nader stated, "the patient could not exercise on treadmill given his history of coronary artery disease." Employer's Brief at 8 (quoting Claimant's Exhibit 4 at 7). However, Dr. Nader also noted that an "ergometer was elected" instead of a treadmill in the following sentence and further included the "total exercise time." Claimant's Exhibit 4 at 7.

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). We therefore affirm the ALJ's finding that the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21.

As Employer raises no other contentions of error, we further affirm the ALJ's conclusion that the evidence weighed together establishes total disability. 20 C.F.R. §718.204(b)(2); *see Skrack*, 6 BLR at 1-711; Decision and Order at 21. We thus affirm the ALJ's finding Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1).

Employer has not challenged the ALJ's determination that it failed to rebut the presumption; consequently, we affirm this finding and the award of benefits. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge