U.S. Department of Labor

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

BRB No. 22-0088 BLA

LARRY W. LAWSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMONT COAL COMPANY VIRGINIA, LLC	)	
	)	
and	)	
	)	DATE ISSUED: 6/13/2023
SUMMITPOINT INSURANCE COMPANY, INCORPORATED	)	
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia for Employer.

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

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2019-BLA-05433) rendered on a claim filed on

August 15, 2016, 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 worked thirty-seven years in underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found he 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] The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer challenges the ALJ's conclusions that Claimant is totally disabled and that it failed to rebut the presumption.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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).

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). Claimant may establish total disability based on qualifying[4] pulmonary function studies or arterial blood gas studies, evidence of

[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] We affirm, as unchallenged on appeal, the ALJ's finding of 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 3.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 20.

[4] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R.

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). The ALJ found Claimant established total disability based on the pulmonary function study evidence and the evidence as a whole.[5] Decision and Order at 9.

Pulmonary Function Studies

The ALJ considered six pulmonary function studies dated November 25, 2014, May 3, 2016, August 29, 2016, April 10, 2017, October 30, 2017, and November 3, 2020.[6] Director's Exhibits 16, 19, 21, 22, 43; Employer's Exhibit 1. The November 25, 2014 pulmonary function study yielded non-qualifying values without the administration of a bronchodilator and did not include post-bronchodilator results. Director's Exhibit 21. The May 3, 2016 study produced qualifying pre-bronchodilator values and did not include post-bronchodilator results. Director's Exhibit 43. The August 29, 2016 study produced qualifying pre-and post-bronchodilator values. Director's Exhibit 16. The April 10, 2017 study produced qualifying pre-bronchodilator values and did not include post-bronchodilator results. Director's Exhibit 43. The October 30, 2017 study produced qualifying pre-and post-bronchodilator values. Director's Exhibit 122. Finally, the November 3, 2020 study produced non-qualifying pre- and post-bronchodilator values. Employer's Exhibit 1.

The ALJ found that, as the majority of the pulmonary function studies produced qualifying values, the pulmonary function study evidence established total disability. 20 C.F.R. §718.204(b)(2)(i). Employer argues the ALJ substituted "her lay opinion for the

---

Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The ALJ found the blood gas studies did not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 8 n.7, 10-11.

[6] Because the pulmonary function studies reported varying heights for Claimant ranging from 63.5 to 65.5 inches, the ALJ calculated an average height for Claimant of 64.75 inches. She then permissibly used the closest greater table height at Appendix B of 20 C.F.R. Part 718 for determining the qualifying or non-qualifying results of the studies. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114, 116 n.6 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 6 nn.8, 9.

opinions of medical experts by simply finding the 'majority' of the pulmonary function studies established total disability without addressing Dr. Sargent's full opinion," and erred in failing to provide an explanation for crediting the earlier, qualifying studies over the most recent, non-qualifying study. Employer's Brief at 8. We disagree.

The ALJ did not substitute a "lay opinion" by making a finding based on the quantity and quality of the pulmonary function study evidence here. She instead permissibly weighed the pulmonary function study evidence and explained how she arrived at her conclusion, which is her duty. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012). Further, the ALJ was not required to weigh Dr. Sargent's non-disability opinion against the pulmonary function study evidence when considering the pulmonary function study evidence in isolation at this stage. Rather, Dr. Sargent's medical opinion is evidence to be weighed under 20 C.F.R §718.204(b)(2)(iv), prior to weighing the like and unlike evidence together, in considering the evidence as a whole. Because substantial evidence supports the ALJ's finding that the weight of the pulmonary function study evidence is qualifying, when considered in isolation, it is appropriate to find that the pulmonary function studies support the establishment of total disability at 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ considered the medical opinions of Drs. Ajjarapu, McSharry, and Sargent. Decision and Order at 7-9. Dr. Ajjarapu opined that Claimant is totally disabled by a pulmonary impairment. Director's Exhibits 16, 25. Dr. McSharry opined that Claimant suffers from "disabling airflow limitation." Director's Exhibit 22. Dr. Sargent opined that Claimant is not totally disabled. Employer's Exhibit 1. The ALJ afforded each opinion "some weight" and found that "the overall medical opinion evidence neither establishes nor refutes total disability." Decision and Order at 9.

Employer argues the ALJ erred by not providing "adequate reasons for rejecting Dr. Sargent's opinion." Employer's Brief at 12. The ALJ, however, did not reject Dr. Sargent's opinion; instead, she found it entitled to "some weight" that put it in equipoise with the contrary opinions of Drs. Ajjarapu and McSharry and, therefore, Claimant did not carry his burden to establish total disability by the medical opinions. Decision and Order at 9. A petitioner must identify any alleged error with specificity, and a threshold requirement for Board review is that the petitioner's argument must be framed in terms of the decision below. *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Here, Employer mischaracterizes the ALJ's weighing of Dr. Sargent's opinion and fails to identify an error in terms of the ALJ's decision. Thus, the Board has no basis upon which to review the ALJ's finding. *See* 20 C.F.R. §802.211(b); *Sarf*, 10 BLR at 1-120;

Fish, 6 BLR at 1-109. We affirm the ALJ's finding that the medical opinions neither establish nor refute total disability. 20 C.F.R §718.204(b)(2)(iv). Decision and Order at 9. Furthermore, we affirm her finding Claimant established total disability based on 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 at 9.

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,[7] or "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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ found Employer failed to establish rebuttal by either method. Decision and Order at 10-12.

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).

Employer relied on the opinions of Drs. McSharry and Sargent.[8] Dr. McSharry concluded there was no convincing evidence of legal pneumoconiosis. Director's Exhibit 22. Dr. Sargent opined that Claimant does not have legal pneumoconiosis but suffers from a mild restrictive impairment due in part to obesity, and concluded it was "very unlikely" that coal mine dust exposure contributed. Employer's Exhibit 1 at 2. He further opined Claimant has chronic bronchitis "consistent with industrial bronchitis," but stated the

[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 also considered Dr. Ajjarapu's opinion diagnosing Claimant with legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure. Decision and Order at 11; Director's Exhibits 16, 22.

chronic bronchitis does not result in a significant impairment. *Id.* Thus, Dr. Sargent did not "believe that [Claimant] has any significant respiratory impairment due to his coal dust exposure . . . ." *Id.*

The ALJ found Dr. McSharry's opinion "unsupported," and found Dr. Sargent's opinion internally inconsistent, given that he diagnosed Claimant with chronic bronchitis "consistent with industrial bronchitis." Decision and Order at 12. Finding Dr. Ajjarapu's opinion, in contrast, merited "great weight,"[9] the ALJ found the medical opinion evidence did not support Employer's rebuttal burden. *Id.*

Employer contends the ALJ mischaracterized Dr. Sargent's opinion, erroneously finding that it supports a diagnosis of legal pneumoconiosis.[10] Employer's Brief at 19. We disagree.

Contrary to Employer's arguments, the ALJ acknowledged Dr. Sargent did not believe that Claimant's restrictive impairment is related to his coal mine dust exposure. Decision and Order at 11; Employer's Brief at 19. However, the ALJ accurately noted Dr. Sargent went on to diagnose a "severe chronic cough consistent with industrial bronchitis" and chronic bronchitis. Decision and Order at 12; Employer's Exhibit 1 at 2.

Given the ALJ's unchallenged determination that Dr. Ajjarapu's diagnosis of chronic bronchitis due to coal mine dust exposure merited great weight, we see no error in her determination that Dr. Sargent's diagnosis of chronic bronchitis "consistent with industrial bronchitis" does not rebut the presumed existence of legal pneumoconiosis.[11] As it is supported by substantial evidence, we affirm the ALJ's determination that Employer did not rebut legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 12.

[9] The ALJ accorded great weight to Dr. Ajjarapu's diagnosis of chronic bronchitis due to coal mine dust exposure because Dr. Ajjarapu based it on her consideration of Claimant's lengthy coal mine dust exposure history, pulmonary function study values, and symptoms. Decision and Order at 12.

[10] We affirm, as unchallenged, the ALJ's finding that Dr. McSharry's opinion does not rebut legal pneumoconiosis, and her crediting of Dr. Ajjarapu's diagnosis of legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure. *See Skrack*, 6 BLR at 1-711; Decision and Order at 12.

[11] Dr. Sargent noted only exposure to coal mine dust and no other industrial exposure histories. Employer's Exhibit 1 at 2.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish that Claimant does not have any of the 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).

The ALJ considered eight interpretations of four x-rays, dated August 9, 2013, August 29, 2016, October 30, 2017, and November 3, 2020. Decision and Order at 10-11. All the physicians who provided an x-ray interpretation were dually qualified as Board-certified radiologists and B readers. *Id*. Dr. Alexander interpreted the August 9, 2013 x-ray as positive for pneumoconiosis, Director's Exhibit 18, while Dr. Colella interpreted it as negative for the disease. Director's Exhibit 23. Drs. DePonte and Miller interpreted the August 29, 2016 x-ray as positive for pneumoconiosis, while Dr. Colella interpreted it as negative. Director's Exhibits 16, 20, 23. Drs. Colella and DePonte both interpreted the October 30, 2017 x-ray as positive for pneumoconiosis. Director's Exhibit 22; Claimant's Exhibit 1. Finally, Dr. Colella interpreted the November 3, 2020 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

Because an equal number of dually qualified experts read the August 9, 2013 x-ray as positive and negative for pneumoconiosis, the ALJ found the readings to be in equipoise. Decision and Order at 10. Further, because a majority of the dually qualified experts read the August 29, 2016 x-ray as positive, and both experts who read the October 30, 2017 x-ray read it as positive, the ALJ found both x-rays positive for pneumoconiosis. Decision and Order at 11. Because a dually qualified expert read the November 3, 2020 x-ray as negative, the ALJ found that x-ray negative for pneumoconiosis. *Id.* Based on these findings, the ALJ concluded the overall x-ray evidence supports a finding of clinical pneumoconiosis. *Id.*

Employer argues the ALJ failed to provide adequate reasoning for her finding regarding the readings of the August 29, 2016 x-ray which, Employer contends, are "at best in equipoise" for pneumoconiosis, as nothing indicates Drs. DePonte's and Miller's positive readings should receive greater weight than Dr. Colella's negative reading. Employer's Brief at 14. We need not resolve this issue.

If the readings of the August 29, 2016 x-ray were in equipoise for the presence or absence of pneumoconiosis, it would not support Employer's rebuttal burden. Further, Employer has not explained how the overall x-ray evidence, even if that were the case, would support its rebuttal burden. Instead of there being, as the ALJ found, the readings of one x-ray in equipoise, two positive x-rays, and one negative x-ray, there would be

readings of two x-rays in equipoise, one positive x-ray,[12] and one negative x-ray. Employer has not explained how the readings of two x-rays in equipoise for pneumoconiosis and two conflicting x-rays would support its burden to establish by a preponderance of the evidence that Claimant does not have clinical pneumoconiosis. We therefore decline to address its argument.[13] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). Therefore, we affirm the ALJ's finding that Employer failed to rebut the presumed existence of clinical pneumoconiosis. 20 C.F.R §718.305(d)(1)(i)(B).

Disability Causation

The ALJ next 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 12-13.

Employer argues the ALJ erred in "discount[ing] Dr. Sargent's opinions regarding the cause of [C]laimant's disability by asserting he was not entitled to any weight as he did not find [C]laimant had clinical or legal pneumoconiosis." Employer's Brief at 20. Contrary to Employer's contention, however, the ALJ did not discount Dr. Sargent's opinion in finding Employer did not rebut the presumption of disability causation. Further, even if the ALJ had discounted Dr. Sargent's disability causation opinion because he failed to diagnose Claimant with pneumoconiosis, it would not have been error. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (where a physician erroneously fails to diagnose pneumoconiosis, his opinion as to disability causation "is not

[12] Contrary to Employer's characterization of the record, there were not conflicting positive and negative readings of the October 30, 2017 x-ray and the ALJ did not find the readings of that x-ray were in equipoise for the existence of pneumoconiosis. Employer's Brief at 15. Rather, she found it positive for pneumoconiosis because Drs. Colella and DePonte both read it as positive. Director's Exhibit 22; Claimant's Exhibit 1. There were no contrary readings.

[13] Moreover, even if we considered Employer's argument, we would reject it. In weighing the August 29, 2016 x-ray, the ALJ found that, as Drs. DePonte, Miller, and Colella were all dually qualified physicians, and two of the three interpretations were positive for pneumoconiosis, the x-ray supported a finding of pneumoconiosis. The ALJ based her finding on a qualitative analysis of the x-ray evidence, i.e., considering both the number of positive and negative readings and the qualifications of the readers. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

worthy of much, if any, weight"). As Employer raises no further arguments, 20 C.F.R §802.211(b), we affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge