U.S. Department of Labor

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

BRB Nos. 22-0202 BLA
and 22-0202 BLA-A

JOHN OSBORNE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
EAGLE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	DATE ISSUED: 03/08/2023
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal, and Claimant cross appeals, Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2011-BLA-05993) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on December 3, 2009, and is before the Benefits Review Board for the third time.

On Claimant's first appeal, the Board vacated the ALJ's determination that Claimant did not establish at least fifteen years of qualifying coal mine employment necessary to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Specifically, the Board affirmed as unchallenged his finding Claimant had 14.25 years of coal mine employment in 1983-1984, 1986, and 1987-1998, but vacated his finding Claimant had only 0.38 years of coal mine employment in 1982 and 1985 combined. It thus remanded the claim for him to redetermine Claimant's eligibility for the presumption. *Osborne v. Eagle Coal Co., Inc.*, 25 BLR 1-195 (2016).

On remand, the ALJ found Claimant did not establish total disability, another requirement for invoking the presumption, and therefore did not readdress Claimant's length of coal mine employment. On Claimant's second appeal, the Board vacated the ALJ's finding of no total disability and remanded the claim for him to reconsider the medical opinion evidence on that issue, 20 C.F.R. §718.204(b)(2)(iv), and, if necessary, Claimant's length of coal mine employment for purposes of invoking the presumption. *Osborne v. Eagle Coal Co., Inc.*, BRB No. 18-0526 BLA (Oct. 29, 2019) (unpub.).

On second remand, the decision that is the subject of the current appeal, the ALJ found Claimant established 15.26 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the Section 411(c)(4) presumption. Further, he found Employer did not rebut the presumption and therefore awarded benefits.

[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); *see* 20 C.F.R. §718.305.

On appeal, Employer argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and total disability necessary to invoke the Section 411(c)(4) presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief. In a pleading styled as a cross appeal, Claimant generally contends the ALJ made rational findings in support of the award of benefits.[2] Neither Employer nor the Director has responded to Claimant's cross-appeal.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or "substantially similar" surface coal mine employment and has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i).

Length of Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by

[2] Claimant's cross-appeal was unnecessary. A cross-appeal permits the party that prevailed before the ALJ to challenge "any adverse findings of fact or conclusions of law" in the proceedings below. 20 C.F.R. §802.201(a)(2). Claimant, however, does not challenge any adverse determinations, but merely responds to Employer's arguments regarding the ALJ's findings on the issues of the length of his coal mine employment and total disability. Claimant's Brief at 27-44. As the respondent here, Claimant should have made any arguments in support of the decision below without filing a cross-appeal. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 369-70 (4th Cir. 1994).

[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); Director's Exhibit 3; Decision and Order at 3.

substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered Claimant's hearing testimony, CM-911a Employment History form, paystubs, Federal Insurance Contributions Act (FICA) earnings records, and Social Security Administration (SSA) earnings records. Decision and Order at 3-7; Director's Exhibits 3, 5, 6, 7; Hearing Tr. at 15-28. He again found Claimant established 1.75 years of coal mine employment in 1983-1984, one year in 1986, and 11.5 years from 1987-1998, a total of 14.25 years of coal mine employment during those periods. For 1982 and 1985, the ALJ found he could not determine the specific beginning and ending dates of that employment and therefore applied the formula at 20 C.F.R. §725.101(a)(32)(iii) and the Sixth Circuit's holding in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-06 (6th Cir. 2019) that 125 working days in any given year constitutes one "year" of coal mine employment as defined in the regulations. Comparing Claimant's SSA-reported earnings with the coal mine industry's average daily earnings during those years, *see* Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, the ALJ credited Claimant with 0.27 years in 1982 and 0.74 years in 1985. Combining those years with the remaining 14.25 years, the ALJ found Claimant established 15.26 years of qualifying coal mine employment, enough to invoke the Section 411(c)(4) presumption. *Id*.

The Board previously affirmed the ALJ's findings that Claimant established 1.75 years of coal mine employment in 1983 and 1984, one year of coal mine employment in 1986, and 11.5 years of coal mine employment from 1987 through 1998, "for an undisputed 14.25 years of qualifying coal mine employment." *Osborne*, 25 BLR at 1-202 n.9. Thus, we decline to address Employer's arguments regarding the ALJ's length of coal mine employment findings for those years. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); Employer's Brief at 5-9.

Employer next argues the ALJ's length of coal mine employment calculations for the years 1982 and 1985 are a "mish-mash of inconsistencies," "do[] not utilize a consistent method," and ignores Claimant's testimony that he "broke his leg" in 1985 and missed work "from time-to-time." Employer's Brief at 6-8; Hearing Tr. at 20, 22. We disagree.

The ALJ considered Claimant's testimony that he began working in the coal mines with Meally Coal Company, Incorporated ("Meally Coal") in 1981[4] and continued "on and off" with the company until he went to work for Midway Coal Company, Incorporated ("Midway Coal"). Hearing Tr. at 15-16. But the ALJ found Claimant's SSA earnings records and paystubs contradict his testimony that he worked for Meally Coal in 1981, but do show income from Meally Coal and Midway Coal in 1982.[5] Decision and Order at 5; *see* Director's Exhibits 5, 6, 7. Finding he could not determine the specific beginning and ending dates of Claimant's employment, and crediting Claimant's SSA earnings records as accurately reflecting his income, the ALJ found Claimant had no coal mine employment in 1981, but earned $3,389.00 from Meally Coal and Midway Coal in 1982. Decision and Order at 5; *see* Director's Exhibit 7. He therefore found Claimant had 33.36 days of coal mine employment ($3,389.00 income/$101.59 industry average daily wage) in 1982, and therefore established 0.27 years of coal mine employment in 1982 (33.36 working days/125 days under the definition of "year"). Decision and Order at 6-7.

The ALJ also considered Claimant's testimony that he worked for several coal mine operators in 1985 but could not remember the beginning and ending dates: Gillette Coal Corporation (Gillette Coal), Red River Fuels, Incorporated, Tip Top Coal Company, Incorporated, Jaymar Mining, Incorporated, Wilderness Coal, Incorporated, Salt Lick Coals, Incorporated, Northern Cross Coal Enterprises, Incorporated, and Haddix Mining & Development Company. Hearing Tr. at 19-21; *see* Director's Exhibits 6, 7. Crediting Claimant's SSA earnings records as accurately reflecting his income, the ALJ found Claimant earned $11,274.67 from those companies in 1985.[6] Decision and Order at 6; *see* Director's Exhibits 6, 7. He therefore found Claimant had 92.42 days of coal mine employment ($11,274.67 income/$122.00 industry average daily wage) in 1985, and

[4] The ALJ determined Claimant's SSA earnings records demonstrate he worked for the "transportation department" in 1981 and did not indicate any coal mine employment during that year. Decision and Order at 5; *see* Director's Exhibits 5, 6, 7.

[5] The ALJ found Claimant's paystubs show income from Meally Coal as of June 1982 and income from Midway Coal as of August 1982. Claimant's SSA earnings records show income of $3,389.00 from both companies that year.

[6] Claimant's SSA earnings records reflect the following income in 1985: $1,383.55 from Jaymar Mining, Incorporated; $4,065.80 from Red River Fuels, Incorporated; $1,995.00 from Gillette Coal Corporation; $1,144.50 from Tip Top Coal Company, Incorporated; $1,471.88 from Wilderness Coal, Incorporated; $960.00 from Salt Lick Coals, Incorporated; $85.00 from Northern Cross Coal Enterprises, Incorporated; and $168.84 from Haddix Mining & Development Company. Director's Exhibits 6, 7.

established 0.74 years of coal mine employment in 1985 (92.42 working days/125 days under the definition of "year"). Decision and Order at 6-7.

As the ALJ was unable to determine the beginning and ending dates of Claimant's employment in 1982 and 1985, he permissibly applied the method of calculation at 20 C.F.R. §725.101(a)(32)(iii).[7] *Shepherd*, 915 F.3d at 405-06. Using the formula at 20 C.F.R. §725.101(a)(32)(iii) in conjunction with Claimant's SSA earnings records for the years 1982 and 1985, the ALJ calculated the ratio of days Claimant worked to 125 to credit him with a fractional portion of a year of coal mine employment. *Shepherd*, 915 F.3d at 406; Decision and Order at 6. Then he divided Claimant's total annual earnings in coal mine employment by the daily average earnings of employees in coal mining for that year to determine the number of days he worked. *Id.* Thereafter, he divided the number of days Claimant worked by 125 to determine how long he worked in coal mine employment each year. Thus, he credited Claimant with 1.01 years of coal mine employment during those years. *Id*.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The ALJ permissibly found Claimant's SSA earnings records most probative for the purposes of determining the length of his coal mine employment in 1982 and 1985. *Muncy*, 25 BLR at 1-27; *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (ALJ may credit SSA earnings records over

[7] Further, contrary to Employer's argument, the ALJ did not ignore Claimant's testimony that he injured his leg while working for Gillette Coal in 1985 and had to take ten weeks off from work. The ALJ specifically noted Claimant's testimony and while he concluded there is no indication whether Claimant remained on Gillette's payroll during that time, the record belies Employer's argument that the ALJ should have deducted ten weeks from his calculation of Claimant's employment. The ALJ credited Claimant's SSA earnings records as accurately reflecting income of $1,995.00 from Gillette in 1985, equating to 16.35 days of employment ($1995.00 income/$122.00 industry average daily wage), well short of the ten weeks Employer alleges the ALJ may have over-credited Claimant's employment. Decision and Order at 7. Even had the ALJ given Claimant no credit for any employment with Gillette, Claimant still would have established 76.06 days, or .609 years of coal mine employment in 1985 ($9,279.67 income/$122 per day/125 days), and greater than 15 years overall. *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"); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019) (125 days of coal mine employment equates to one year of coal mine employment for all purposes under the Act.).

testimony and other sworn statements); Decision and Order at 6. Because the ALJ applied a reasonable method of calculation in determining the length of Claimant's coal mine employment in 1982 and 1985, and we discern no error in his findings, we affirm his finding of 1.01 years of coal mine employment for those years and at least fifteen years overall. *See Shepherd*, 915 F.3d at 402; *Muncy*, 25 BLR at 1-27 (2011); *Vickery*, 8 BLR at 1-432.

Finally, Employer does not raise any specific allegations of error in the ALJ's finding that all of Claimant's coal mine employment took place underground or in conditions substantially similar to those in an underground coal mine; thus we affirm it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 7.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established over fifteen years of qualifying coal mine employment. *See Shepherd*, 915 F.3d at 405-06; *Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280.

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. 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 opinions and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12.[8]

Employer argues the ALJ erred in weighing the medical opinion evidence on the issue of total disability. Employer's Brief at 9-13. We disagree.

The ALJ considered the opinions of Drs. Rasmussen, Jarboe, and Dahhan. Decision and Order at 8-12. Dr. Rasmussen opined Claimant has a totally disabling respiratory

[8] The Board previously affirmed the ALJ's findings that Claimant did not establish total disability through pulmonary function and arterial blood gas studies or with evidence of cor pulmonale with right-sided congestive heart failure. *Osborne*, BRB No. 18-0526

impairment whereas Dr. Jarboe opined he does not.[9] Director's Exhibit 11; Claimant's Exhibit 1 at 23-24; Employer's Exhibit 1. Dr. Dahhan opined Claimant does not have a pulmonary or respiratory impairment caused or related to coal mine dust exposure. Director's Exhibit 13. The ALJ found Dr. Rasmussen's opinion well-reasoned and well-documented and Drs. Jarboe's and Dahhan's opinions inadequately explained and unpersuasive.[10] Decision and Order at 10-12. Thus he found Claimant established total disability based on Dr. Rasmussen's opinion. *Id.* at 10, 12.

Employer argues the ALJ erred in finding Dr. Rasmussen's opinion credible and sufficient to establish total disability because the doctor based his opinion, in part, on the two most recent non-qualifying[11] arterial blood gas study results. Employer's Brief at 11-13. We disagree.

Contrary to Employer's argument, a physician may conclude a miner is totally disabled based on non-qualifying objective studies if the studies nonetheless demonstrate sufficient impairment to preclude the miner's usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (Claimant can establish total disability despite non-qualifying objective tests).

Dr. Rasmussen examined Claimant and documented his symptoms, coal mine dust exposure and smoking histories, and objective testing results. Director's Exhibit 11; Claimant's Exhibit 1. He noted that while the pulmonary function and arterial blood gas studies he conducted produced non-qualifying values, Claimant "has at least minimal loss of lung function as reflected by his gas exchange impairment during light exercise."

BLA, slip op. at 3 n.4; *see* 20 C.F.R. §718.204(b)(2)(i), (ii), (iii); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005).

[9] Dr. Jarboe opined Claimant has mild resting hypoxemia but is not disabled from a pulmonary or respiratory standpoint and retains the pulmonary capacity to perform his last coal mine work. Employer's Exhibit 1.

[10] Employer does not challenge the ALJ's discrediting of Dr. Jarboe's opinion; thus we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[11] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Director's Exhibit 11 at 40. Further, he opined Claimant "could not perform very heavy exercise, which would be required for his regular coal mine employment requiring an oxygen consumption of almost twice what he achieved in this study." *Id.* The ALJ noted Claimant's usual coal mine work required "heavy manual labor" as he "often lifted between 50 and 100 pounds" and "Dr. Rasmussen took these exertional requirements into consideration when examining the objective testing." Decision and Order at 10. He permissibly found Dr. Rasmussen's opinion well-reasoned and well-documented because the doctor "took into consideration both the objective testing and Claimant's exertional requirements." *Id.*; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp,* 866 F.2d at 185.

We also reject Employer's argument that the ALJ inaccurately characterized Dr. Dahhan's "clear and unambiguous" opinion that Claimant does not have a pulmonary disability. Employer's Brief at 12-13.

Dr. Dahhan opined there is "no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by inhalation of coal dust." Director's Exhibit 13 at 4. He also determined Claimant has "no abnormalities in his respiratory mechanics as documented by the normal clinical examination of the chest and the pulmonary function studies." *Id.* Further, he stated Claimant "has abnormalities in the blood gas exchange mechanism that improved with exercise in the face of normal respiratory mechanics indicating it is due to non-pulmonary causes." *Id.* Finally, he stated Claimant's coronary artery disease and lower back pain "can both cause alterations in the blood gas exchange mechanism at rest and after exercise."[12] *Id.*

The ALJ accurately recognized the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment, while the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption. Decision and Order at 11. He rationally found "[i]t is unclear whether Dr. Dahhan is stating that Claimant has no pulmonary disability or [is] simply stating the pulmonary impairment is caused by [his]

[12] The February 6, 2010 arterial blood gas study Dr. Dahhan conducted produced qualifying results at rest and during exercise. Director's Exhibit 13 at 4. Dr. Dahhan interpreted the study as demonstrating moderate hypoxemia at rest and minimum hypoxemia at peak exercise. *Id.* He explained the fact that the abnormalities in the blood gas exchange mechanism improved with exercise in the face of normal respiratory mechanics indicated the results were due to non-pulmonary causes. *Id.* But he did not address whether Claimant has a totally disabling respiratory or pulmonary impairment regardless of cause. *Id.*

other [conditions]." Decision and Order at 11; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. Further, he permissibly found Dr. Dahhan did not "adequately explain" why a pulmonary impairment could not have explained the arterial blood gas study results. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *See Morrison*, 644 F.3d at 478; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in weighing the opinions of Drs. Rasmussen, Jarboe, and Dahhan, we affirm his finding that Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). Further, as Employer raises no additional arguments, we affirm the ALJ's finding that Claimant established total disability based on his consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232.

As Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's finding that he invoked the Section 411(c)(4) presumption. Decision and Order at 12; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. Decision and Order at 18; *see Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge