U.S. Department of Labor

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

BRB Nos. 23-0234 BLA
and 23-0234 BLA-A

HOWARD T. CORDLE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
APPLE JACKS COAL COMPANY	)	
INCORPORATED	)	DATE ISSUED: 03/22/2024
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Howard T. Cordle, Richlands, Virginia.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] and Employer cross-appeals, Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2021-BLA-05090) rendered on a subsequent claim[2] filed on March 18, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least fifteen years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c).[4] However, she found Employer rebutted the presumption and denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed two prior claims for benefits. Director's Exhibit 35 at 7. His previous claim, filed on September 23, 2015, was closed but the record does not indicate the basis for the denial. *Id.* Because the basis for the previous denial was unavailable to the ALJ, she proceeded as if Claimant failed to establish any element of entitlement. Decision and Order at 5-6.

[3] 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.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R §725.309(c)(3). Because the ALJ proceeded as if Claimant failed to establish any element of entitlement in the prior claim, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of this claim. *Id.*

Director), has not filed a response brief. On cross-appeal, Employer challenges the ALJ's weighing of the medical opinions on the issue of total disability.[5] Neither Claimant nor the Director have responded to Employer's cross-appeal.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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, 361-62 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, a 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). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[7] 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).

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

[6] 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); Hearing Tr. at 10.

[7] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

The ALJ found Claimant established total disability based on the medical opinion evidence.[8] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11.

The ALJ considered the medical opinions of Drs. Harris, McSharry, and Sargent. Decision and Order at 8-11. Dr. Harris opined Claimant is totally disabled based on his symptoms, the markedly reduced lung function seen on his pulmonary function study, and significant hypoxemia seen on his exercise blood gas study. Director's Exhibits 15 at 8-9; 20. Drs. McSharry and Sargent opined Claimant is totally disabled due to his obesity and cardiovascular disease which are causing a pulmonary impairment seen on his pulmonary function and blood gas studies. Director's Exhibit 19 at 3; Employer's Exhibits 1 at 2-3; 3. The ALJ gave all three opinions equal weight and found they establish total disability at 20 C.F.R. §718.204(b(2)(iv). *Id.* at 10-11.

Employer argues the ALJ mischaracterized the opinions of Drs. McSharry and Sargent in finding the doctors diagnosed a totally disabling respiratory or pulmonary impairment.[9] Employer's Brief at 5-8. We disagree.

Dr. McSharry opined that Claimant has a "modest pulmonary impairment" as evidenced by mild restriction "seen by lung volumes" and that his blood gas studies show mild hypoxemia at rest. Employer's Exhibit 1 at 3. He opined Claimant's mild restriction is due to obesity and his mild hypoxemia is due to heart disease. *Id.* Further, he opined Claimant is totally disabled by his obesity and heart disease. *Id.*

Dr. Sargent opined Claimant's June 18, 2020 pulmonary function study showed mild obstruction and restriction, and that his blood gas study showed moderate hypoxemia with borderline hypercarbia. Director's Exhibit 19 at 17. He further opined Claimant is totally disabled due to his cardiovascular disease and obesity, and that his cardiovascular disease and obesity are causing his respiratory impairment. *Id.* at 3-4.

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the miner had a totally disabling respiratory or pulmonary impairment; 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 pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*,

[8] The ALJ found the pulmonary function and arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 7-8.

[9] We affirm, as unchallenged, the ALJ's finding that Dr. Harris's opinion supports a finding of total disability. *See Skrack*, 6 BLR at 1-711; Decision and Order at 10-11.

892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023). While Drs. McSharry and Sargent opined Claimant does not have a pulmonary or respiratory impairment due to coal mine dust exposure, they diagnosed a totally disabling pulmonary or respiratory impairment due to Claimant's heart disease and obesity. Director's Exhibit 19; Employer's Exhibits 1; 3. Thus, contrary to Employer's contention, the ALJ did not err in finding their medical opinions support total disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 10-11.

As Employer raises no further argument, we affirm the ALJ's finding Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11. Consequently, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305(b), (c), 725.309(c); Decision and Order at 11.

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[10] 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer rebutted the existence of clinical pneumoconiosis, legal pneumoconiosis, and disability causation. 20 C.F.R. §718.305(d)(1)(i), (ii); Decision and Order at 15-16.

The ALJ considered ten interpretations of five x-rays dated March 1, 2019, September 16, 2019, June 18, 2020, June 7, 2021, and August 16, 2021. Decision and

[10] "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).

Order at 12. She noted all interpreting physicians are dually qualified as Board-certified radiologists and B readers. *Id.*

She found the interpretations of the March 1, 2019, June 7, 2021, and August 16, 2021 x-rays in equipoise because an equal number of dually-qualified radiologists read each x-ray as positive and negative for the disease. Decision and Order at 12; Claimant's Exhibits 1-3; Employer's Exhibits 1; 2; 13. She found the September 16, 2019 x-ray positive for clinical pneumoconiosis because a greater number of dually-qualified radiologists read it as positive for the disease. Decision and Order at 12; Director's Exhibits 15; 18; Claimant's Exhibit 4. She found the June 18, 2020 x-ray negative for clinical pneumoconiosis because one physician read it as negative for the disease, and her reading is unrebutted. Decision and Order at 12; Director's Exhibit 19.

Weighing the evidence together, the ALJ found the x-ray evidence "neither supports nor refutes a finding" of clinical pneumoconiosis. Decision and Order at 12. The ALJ then found "Claimant has not established" clinical pneumoconiosis. *Id.* This was error. Once Claimant invokes the Section 411(c)(4) presumption, "there is no need for [him] to prove the existence of pneumoconiosis; instead, pneumoconiosis arising from coal mine employment is presumed, subject only to rebuttal by [Employer]." *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018). The inquiry at rebuttal is "whether [Employer] has come forward with affirmative proof that [Claimant] does not have [pneumoconiosis]," *id.*; the burden of persuasion is thus on Employer. *See Minich*, 25 BLR at 1-159 n.14. Because the burden is on Employer to establish rebuttal, a finding that the x-ray evidence is in equipoise must weigh against rebuttal. Decision and Order at 12.

Next, with respect to legal pneumoconiosis, the ALJ considered Dr. Harris's opinion that Claimant has legal pneumoconiosis and the opinions of Drs. McSharry and Sargent that he does not have the disease. Director's Exhibits 15; 19; 20; Employer's Exhibits 1; 3. The ALJ summarized their opinions and gave them each "some weight." Decision and Order at 13. She then concluded "the overall medical opinion evidence does not establish that the Claimant suffers from any chronic lung disease or impairment" arising out of coal mine employment and thus "Claimant has not established legal pneumoconiosis." *Id.* Again, this was error. Because legal pneumoconiosis is presumed, the ALJ was tasked with evaluating whether Employer, relying on the opinions of Drs. McSharry and Sargent, disproved the existence of legal pneumoconiosis by a preponderance of the evidence, not whether Claimant had proved the existence of the disease. *Smith*, 880 F.3d at 699.

Because the ALJ applied an incorrect standard, we vacate her finding Employer established rebuttal of the Section 411(c)(4) presumption via the first prong by disproving the existence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Finally, in considering whether Employer established rebuttal of disability causation, the ALJ found Claimant "cannot demonstrate that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment" because "the record does not support a finding of pneumoconiosis." Decision and Order at 16; 20 C.F.R. §718.305(d)(1)(ii). Because we have vacated the ALJ's finding that Employer rebutted the existence of pneumoconiosis, we also vacate her finding Claimant cannot establish disability causation because he has not established pneumoconiosis. Decision and Order at 16. Moreover, the ALJ has again applied the incorrect standard. Because Claimant invoked the 411(c)(4) presumption, the burden is on Employer to establish "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).

Consequently, we vacate the ALJ's finding Employer established rebuttal of the Section 411(c)(4) presumption via the second prong by disproving disability causation, 20 C.F.R. §718.305(d)(1)(ii). We thus vacate the denial of benefits.

Remand Instructions

On remand, the ALJ must reconsider her finding Employer rebutted the Section 411(c)(4) presumption. She must consider and weigh all relevant evidence,[11] and adequately explain her findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If Employer establishes Claimant has neither clinical nor legal pneumoconiosis, it will have rebutted the presumption, and the ALJ can reinstate the denial of benefits. However, if Employer does not disprove both forms of the disease, a rebuttal finding that Claimant does not have pneumoconiosis is precluded. The ALJ must then specifically address the second rebuttal method and render a finding as to whether Employer established that no part of Claimant's respiratory disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[11] In addition to the evidence discussed above, the ALJ should properly weigh the computed tomography scan evidence and other treatment record evidence alongside the other evidence relevant to rebuttal of clinical and legal pneumoconiosis. Claimant's Exhibits 5-7; Employer's Exhibits 4-12, 14, 15.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge