U.S. Department of Labor

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

BRB No. 20-0440 BLA

JAMES L. WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
PROGRESS FUELS/DUKE ENERGY	)	DATE ISSUED: 11/09/2021
	)	
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits (2018-BLA-05667) rendered on a claim filed on January 7, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established thirty years of underground 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 presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[2] Employer also argues the ALJ erred in finding it did not rebut the presumption. 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 and Grylls Associates, Inc.*, 380 U.S. 359 (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,

[1] Section 411(c)(4) 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 24.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

prevents him from performing his usual coal mine work and comparable gainful work.[4] 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 the pulmonary function study and medical opinion evidence establishes total disability.[5] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 21, 24. He also found all the relevant evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 24.

Pulmonary Function Studies

The ALJ weighed seven pulmonary function studies dated December 16, 2015, January 26, 2016, August 3, 2016, December 5, 2016, June 1, 2017, June 5, 2018, and August 22, 2018. Decision and Order at 16-17; Director's Exhibits 17, 20, 23; Claimant's Exhibits 4, 5; Employer's Exhibit 2. All the studies produced qualifying[6] values for total disability with the exception of the August 3, 2016 study, which produced non-qualifying values. The ALJ found the August 22, 2018 study "may be invalid," Decision and Order at 21 n.33, but he found the remaining studies are valid. *Id*. at 18-21. Because a majority of the valid pulmonary function studies produced qualifying values, the ALJ found the pulmonary function study evidence establishes total disability. *Id*. at 17, 21.

[4] The ALJ found Claimant's usual coal mine employment was as a shuttle car operator and this job required "a significant degree of exertion." Decision and Order at 4. We affirm this finding as unchallenged. *Skrack*, 6 BLR at 1-711.

[5] The ALJ found the arterial blood gas study evidence does not establish total disability and the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 16.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Employer argues the ALJ erred in finding the qualifying December 16, 2015, January 26, 2016, December 5, 2016, June 1, 2017, and June 5, 2018 pulmonary function studies are valid. Employer's Brief at 4-13. Employer's arguments have no merit.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[7] 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B. If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b).

Substantial evidence supports the ALJ's finding that Dr. Fino's opinion is insufficient to invalidate the December 16, 2015, January 26, 2016, December 5, 2016, June 1, 2017, and June 5, 2018 studies. Dr. Fino testified that a pulmonary function study reflects poor effort if the miner did not exhale for at least six to seven seconds. Employer's Exhibit 4 at 11-12. He reviewed all the qualifying studies and opined they reflect poor effort because Claimant stopped "exhaling in the first few seconds." *Id*. at 14-15. The ALJ correctly noted, however, that the volume-time curves on the December 16, 2015, January 26, 2016, December 5, 2016, June 1, 2017, and June 5, 2018 studies show "Claimant generally exhaled for at least six seconds, with exhalations in some cases reaching the seven-second mark." Decision and Order at 20; *see* Director's Exhibits 13, 20; Claimant's Exhibits 4, 5 at 11, 14. The ALJ thus permissibly found this aspect of Dr. Fino's opinion unpersuasive as "not supported by the evidence of record."[8] Decision and Order at 19-20;

[7] An ALJ must consider a reviewing physician's opinion regarding a claimant's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

[8] The ALJ found the December 5, 2016 and June 1, 2017 pulmonary function studies are contained in Claimant's treatment records. Decision and Order at 5, 17; Claimant's Exhibit 5. Because Employer does not challenge this finding, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As such, the quality standards do not apply to them; they may be credited so long as the ALJ deems them reliable. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010). As noted, the ALJ permissibly discredited Dr.

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); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

Dr. Fino also testified that the studies reflect "marked variability" in the FEV1 results to support his opinion that all the studies are invalid. Employer's Exhibit 4 at 14-15. He did not, however, identify variability in the results within any one study; rather he stated the results are variable with one another between the years 2015 to 2018. *Id*. The ALJ permissibly rejected this reasoning because a miner "can have 'good days and bad days' and variability in test results, of itself, does not invalidate pulmonary function tests." Decision and Order at 20, *quoting Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level).

Substantial evidence also supports the ALJ's rejection of Dr. Sargent's opinion. He testified that none of the pulmonary function studies of record are valid because they do not meet the American Thoracic Society (ATS) criteria for reproducibility. Employer's Exhibit 3 at 10-13. But he did not set forth any basis for his conclusion that the December 16, 2015, January 26, 2016, December 5, 2016, June 1, 2017, and June 5, 2018 studies fail to meet the ATS criteria, and summarily concluded these studies reflect poor effort. *Id*. The ALJ thus permissibly discredited Dr. Sargent's opinion because he failed to address Dr. Michos's validation of the January 26, 2016 study, and because his "critiques of Claimant's [pulmonary function test results [are] unsupported by the evidence" of record. Decision and Order at 17-20, 23; *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; *Oreck* 10 BLR at 1-54-55 (party alleging objective study is invalid has a "two-part obligation at the hearing": "specify in what way the study fails to conform to the quality standards" and "demonstrate how this defect or omission renders the study unreliable").

Finally, the ALJ noted: the technicians who conducted the December 5, 2016 and June 1, 2017 studies indicated "Claimant's level of effort was 'good' for these tests"; Dr. Ajjarapu validated the December 16, 2015 pulmonary function study; and Dr. Michos opined Claimant's effort on the January 26, 2016 study was acceptable. Decision and Order at 17, 20, *citing* Claimant's Exhibit 5 at 11, 14, Director's Exhibits 18, 20. Based on the foregoing, the ALJ permissibly found the December 16, 2015, January 26, 2016,

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Fino's criticisms of these studies as unsupported by the record. *Stowers*, 24 BLR at 1-92; Decision and Order at 19-20.

December 5, 2016, June 1, 2017, and June 5, 2018 studies valid. *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; *Oreck* 10 BLR at 1-54-55; Decision and Order at 17-20.

Employer also argues the ALJ erred in finding the non-qualifying August 3, 2016 pulmonary function study valid. Employer's Brief at 5-13. As discussed above, however, the ALJ found this study outweighed by the qualifying studies of record. Moreover, this study does not support Claimant's burden of proof. Thus Employer has not explained how the error that it alleges could have made a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). As it is supported by substantial evidence, we affirm the ALJ's finding that the preponderance of the pulmonary function study evidence establishes total disability.[9] Decision and Order at 20-21.

Medical Opinions

The ALJ next considered Dr. Forehand's opinion that Claimant is totally disabled and the opinions of Drs. Sargent and Fino that he is not. Director's Exhibits 17, 21, 23; Employer's Exhibits 1, 2.

Dr. Forehand opined Claimant is unable to perform the work of a shuttle car operator based on the qualifying January 26, 2016 pulmonary function study. Director's Exhibits 17, 21. In a supplemental report, he stated he reviewed additional testing and noted the December 16, 2015 study produced qualifying values and demonstrated a disabling restrictive ventilatory defect. *Id*. Further, he observed that even though the pulmonary function study that Dr. Sargent administered is non-qualifying, the study was "within [one percent] of meeting the disability standard." *Id.* He therefore disagreed with Dr. Sargent's opinion and concluded Claimant's "overall medical record documents a totally disabling ventilatory impairment." *Id.* The ALJ permissibly found Dr. Forehand's opinion reasoned and documented because he accurately understood the exertional requirements of Claimant's usual coal mine employment and the objective testing of record supports his conclusion. *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 22-23.

As discussed above, the ALJ permissibly discredited Drs. Sargent's and Fino's opinions that Claimant is not totally disabled because they did not persuasively explain why the qualifying pulmonary function studies are invalid. *Hicks*, 138 F.3d at 528; *Akers*,

[9] Although the ALJ found the August 22, 2018 study "may be invalid," Decision and Order at 21 n.33, Employer argues the ALJ should have outright found it invalid. Employer's Brief at 5-13. Because Claimant established total disability based on a preponderance of the studies from December 16, 2015, January 26, 2016, December 5, 2016, June 1, 2017, and June 5, 2018, any error in weighing the August 22, 2018 study is harmless. *See Larioni*, 6 BLR at 1-1278.

131 F.3d at 441; Decision and Order at 23. Employer argues the ALJ should have credited their opinions over Dr. Forehand's opinion because they considered more objective testing and persuasively explained why Claimant is not totally disabled. Employer's Brief at 13-17. We consider Employer's arguments to be 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 findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and based on the evidence as a whole. *See Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2); Decision and Order at 23-24. Thus, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof 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). The ALJ found Employer failed to rebut the presumption by either method.[11]

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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Sargent and Fino that Claimant does not have legal pneumoconiosis. Director's Exhibit 20; Employer's Exhibit 4. Dr.

[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). "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).

[11] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. Decision and Order at 26.

Sargent opined Claimant has a mild restrictive ventilatory impairment of undetermined etiology, but unrelated to coal mine dust exposure. Director's Exhibit 23. Dr. Fino opined Claimant has no valid objective evidence of any respiratory impairment and thus does not have legal pneumoconiosis. Employer's Exhibits 2, 4 at 18, 19. The ALJ found neither opinion adequately reasoned. Decision and Order at 27-28.

Employer initially alleges the ALJ applied the wrong legal standard by requiring its physicians to "explain how [Claimant's] other issues ruled-out coal dust exposure as a contributing factor, even in part." Employer's Brief at 24-25. Contrary to Employer's contention, the ALJ applied the correct standard by requiring Employer to affirmatively disprove the existence of pneumoconiosis by a preponderance of the evidence. 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8; Decision and Order at 25, 27, 28. Moreover, he discredited Drs. Sargent's and Fino's opinions because he found they are not reasoned, not because they failed to meet a heightened legal standard. Decision and Order at 27-28.

We also reject Employer's argument the ALJ provided invalid reasons for finding the opinions of Drs. Sargent and Fino not credible. Employer's Brief at 20-26. Dr. Sargent stated he was unable to determine the etiology of Claimant's restrictive ventilatory impairment, but explained that "when coal dust exposure results in a restrictive impairment, it does so in the context of advanced profusion simple pneumoconiosis or complicated pneumoconiosis, neither of which are present in this case." Director's Exhibit 23. He also stated that, "[a]lthough pneumoconiosis can be present pathologically without a positive x-ray, it is highly unlikely that a restrictive impairment is present without demonstrable interstitial changes on chest x-ray." Employer's Exhibit 1. He further explained that because "coal miners with major category 1 pneumoconiosis frequently have no ventilatory impairment[,] … the absence of a positive x-ray is strong evidence that any restrictive impairment that may be present is not due to coal dust exposure." *Id*.

Contrary to Employer's contention, the ALJ permissibly found Dr. Sargent's opinion unpersuasive because the regulations provide that a claim shall not be denied solely on the basis of a negative chest x-ray and further recognize that legal pneumoconiosis can exist in the absence of positive x-ray evidence. *See* 20 C.F.R. §§718.202(a)(4), 718.202(b); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009) (affirming the discrediting of a physician's opinion because the ALJ "fairly read" it as requiring radiographic evidence of clinical pneumoconiosis before he would diagnose legal pneumoconiosis); Decision and Order at 27.

Dr. Fino opined Claimant has no pulmonary impairment (and therefore no impairment arising out of his coal mine dust exposure) based on his view that the record contains no pulmonary function studies constituting a valid measure of impairment. Employer's Exhibits 2, 4 at 18. The ALJ permissibly rejected Dr. Fino's opinion as inconsistent with his finding that the December 16, 2015, January 26, 2016, December 5, 2016, June 1, 2017, and June 5, 2018 pulmonary function studies are valid. *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000); *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 27, 28.

As the ALJ permissibly discredited the opinions of Drs. Sargent and Fino, the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his finding that Employer failed to disprove the existence of the disease.[12] 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Thus, we affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 28.

Disability Causation

The ALJ next considered whether Employer established "no part of the miner'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 28. He permissibly discredited the opinions of Drs. Sargent and Fino on disability causation because they were premised on the belief that Claimant does not have legal pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 28-29. We therefore affirm the ALJ's determination that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

[12] The ALJ also considered Dr. Forehand's opinion and accurately found it did not support Employer's burden to disprove the existence of legal pneumoconiosis. Decision and Order at 27; Director's Exhibits 17, 21. Thus we need not address Employer's arguments regarding Dr. Forehand's opinion. Employer's Brief at 25-26.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge