U.S. Department of Labor

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

BRB No. 21-0346 BLA

WAYNE D. BROWNING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KINGSTON MINING, INCORPORATED	)	
	)	
and	)	
	)	
ANR INCORPORATED	)	DATE ISSUED: 11/28/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC) Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits (2020-BLA-05100) rendered on a miner's claim filed on November 21, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She 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). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding Claimant established total disability thereby invoking the Section 411(c)(4) presumption and in finding it did not rebut it.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless requested.

The Benefit 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

[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 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 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 9.

[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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 37-38.

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work.[4] *See* 20 C.F.R. §718.204(b)(1). A miner 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 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 arterial blood gas studies, medical opinions, and evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 11-23. Employer does not specifically challenge the ALJ's finding that the blood gas testing, standing alone, establishes total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 14. Thus we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the ALJ erred in finding the medical opinion evidence and the evidence as a whole establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 10-22. The ALJ weighed Dr. Green's medical opinion that Claimant is totally disabled by a respiratory or pulmonary impairment and the opinions of Drs. Basheda and Spagnolo that he is not. Decision and Order at 15-23; Director's Exhibit 14; Claimant's Exhibit 1, 2; Employer's Exhibits 1, 6, 8-9. She found Dr. Green's opinion reasoned and documented and the opinions of Drs. Basheda and Spagnolo unpersuasive. Decision and Order at 21-23.

Employer first argues the ALJ erred in rejecting the opinions of Drs. Basheda and Spagnolo. Employer's Brief at 10-22. We disagree. Both physicians discounted Claimant's qualifying[6] January 22, 2020 and February 19, 2020 arterial blood gas studies

[4] The ALJ found Claimant's usual coal mine work was as an underground electrician and this required heavy manual labor. Decision and Order at 4. This finding is not challenged. Thus we affirm it. *Skrack*, 6 BLR at 1-711.

[5] The ALJ found the pulmonary function studies do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 10 n.9, 10-11.

[6] A "qualifying" pulmonary function study or 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,

because they questioned the reliability of these tests. Employer's Exhibits 1, 6, 8-9. Dr. Basheda identified "technical factors" that can generally undermine blood gas studies, including the way blood is drawn. Employer's Exhibit 9 at 23-28. Dr. Spagnolo stated the qualifying results of the studies "raise the question of whether [Claimant] was lying down for some time" before the tests were administered. Employer's Exhibit 6 at 10. In his deposition, he also testified that several technical issues are inherent to blood gas studies that may render the testing invalid such as obtaining tissue fluid that dilutes the blood gas, venous contamination, or the patient's position while drawing blood. Employer's Exhibit 8 at 25-27. The ALJ permissibly found their opinions "speculative and not supported by any evidence of record" because neither physician identified any specific aspect of these qualifying studies that rendered them invalid. Decision and Order at 13-14; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

Both physicians further explained that, in Claimant's case, pulse oximetry is the more accurate method of measuring oxygenation than blood gas testing, and pulse oximetry testing was normal. Employer's Exhibits 8 at 24-25; 9 at 23-24. Dr. Basheda opined Claimant does not have a respiratory impairment despite the qualifying values his blood gas studies produced because of the "discordance between the arterial blood gases and the oxygen saturation levels" present on pulse oximetry testing. Employer's Exhibit 9 at 27. Similarly, Dr. Spagnolo opined Claimant has the respiratory capacity to return to his usual coal mine employment because the abnormalities seen in the blood gas studies do not "fit in this case" and as the pulse oximetry data is a more reliable and accurate. Employer's Exhibit 8 at 25, 31-32. The ALJ permissibly attributed little weight to both physicians' opinions because the "regulations do not require correlation or consistency between pulse oximetry and arterial blood gas test results, as Dr. Basheda and Dr. Spagnolo seemed to suggest was necessary to establish the validity of the latter." Decision and Order at 22; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

We next reject Employer's argument that the ALJ erred in crediting Dr. Green's opinion. Employer's Brief at 10. Dr. Green stated Claimant's usual coal mine work as an underground electrician required a moderate level of exertion because he lifted over one-hundred pounds and had to carry or drag one-hundred pounds at any given time. Director's Exhibit 14. Although Claimant's January 12, 2019 arterial blood gas study produced non-qualifying results, Dr. Green opined it still revealed "significantly abnormal gas exchange and significant hypoxemia," and he concluded Claimant cannot perform the duties of his

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

usual coal mine work based on his hypoxemia. *Id*. at 3-4. After reviewing the January 22, 2020 and February 19, 2020 qualifying blood gas testing, he reiterated that Claimant is totally disabled by his "consistent and persistent" hypoxemia. Claimant's Exhibits 1, 2. Contrary to Employer's argument, the ALJ permissibly found Dr. Green's opinion reasoned and documented because it is "consistent with the evidence he reviewed, and it is consistent with the overall weight of the arterial blood gas evidence of record, which supports a finding of total disability." Decision and Order at 21-22; *see Hicks*, 138 F.3d at 524; *Akers*, 131 F.3d at 441; Employer's Brief at 10.

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 22-23. We further affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 27. We thus affirm the ALJ's finding Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1).

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 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 establish rebuttal by either method.

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),

[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).

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Drs. Basheda's and Spagnolo's opinions that the Claimant does not have legal pneumoconiosis. Employer's Exhibits 1, 6, 8, 9. Contrary to Employer's contention, substantial evidence supports the ALJ's finding that these opinions do not credibly satisfy Employer's burden of disproving legal pneumoconiosis. Decision and Order at 31-33; Employer's Brief at 22-28. As discussed above, both doctors opined Claimant does not have a respiratory or pulmonary impairment as they questioned the validity of the arterial blood gas testing of record and indicated Claimant's pulse oximetry testing is normal. Employer's Exhibits 1, 6, 8, 9. However, the ALJ found Claimant established he has a totally disabling respiratory impairment based on the qualifying blood gas testing and Dr. Green's opinion that Claimant has totally disabling hypoxemia. Decision and Order at 22-23. Because Drs. Basheda and Spagnolo incorrectly opined Claimant does not have a respiratory or pulmonary impairment in the form of hypoxemia, the ALJ rationally found their opinions not credible with respect to the etiology of his hypoxemia, as their opinions are in conflict with her findings. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); Decision and Order at 31-32.

Because we affirm the ALJ's discrediting of Drs. Basheda's and Spagnolo's opinions,[8] the only opinions that support Employer's burden on rebuttal, we also affirm her finding that Employer did not disprove legal pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

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

[8] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Basheda and Spagnolo on legal pneumoconiosis, we need not address Employer's other arguments that the ALJ erred in weighing their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 24-28.

[9] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address its contentions of error regarding the ALJ's finding that it also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 33-34. She permissibly discredited the disability causation opinions of Drs. Basheda and Spagnolo because they failed to diagnose pneumoconiosis, contrary to her finding that Employer failed to disprove Claimant has the disease. *See Epling*, 783 F.3d at 504-05; Decision and Order at 33-34. We therefore affirm the ALJ's finding 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.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge