U.S. Department of Labor

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

BRB Nos. 21-0570 BLA
and 21-0570 BLA-A

CHARLES HAYSE, JR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	
	)	
and	)	
	)	
Self-Insured through PEABODY ENERGY CORPORATION, c/o UNDERWRITERS SAFETY AND CLAIMS	)	DATE ISSUED: 11/18/2022
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals and Employer and its Carrier (Employer) cross-appeal Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Denying Benefits (2019-BLA-06322) rendered on a claim filed on February 13, 2017,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 5.22 years of coal mine employment, and therefore found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (Director), has not responded to Claimant's appeal.

On cross-appeal, Employer argues it is not the responsible operator and therefore not liable for benefits in the event of a remand or ultimately an award. In response to the cross-appeal, the Director has filed a letter stating he will not respond to Employer's arguments unless requested to do so by the Benefits Review Board, but noting that, if the case is remanded, the ALJ should be instructed to determine whether Employer is the responsible operator.

[1] Claimant filed a prior claim but withdrew it. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's total disability is 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.

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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Total Disability

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 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 did not establish total disability based on any category of evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 13, 16-18. Claimant alleges the ALJ erred in discrediting a pulmonary function study and in finding the medical opinions did not establish total disability.[4]

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 22, 39.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that the arterial blood gas studies do not support total disability and there is no evidence of cor pulmonale with

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated March 16, 2017, May 30, 2017, and December 7, 2018. 20 C.F.R. §718.204(b)(i); Decision and Order at 6-11. The March 16, 2017 and May 30, 2017 studies produced qualifying values before and after the administration of a bronchodilator, whereas the December 7, 2018 study, conducted during the course of Claimant's treatment, produced non-qualifying values before and after bronchodilators.[5] Director's Exhibits 10 at 13; 16 at 4; Claimant's Exhibit 2 at 86. Relying on the opinions of Drs. Gaziano, Broudy, and Tuteur, as well as the statements of the technicians who administered the studies, the ALJ determined the March 16, 2017 and May 30, 2017 studies are invalid and unreliable. Decision and Order at 10-11; Director's Exhibits 10 at 14; 15 at 1; 16 at 2, 4; 17 at 1; 19 at 1; 20 at 3-4, 12-14; Employer's Exhibits 4 at 11; 5 at 15-16. He further relied on the opinion of Dr. Tuteur and the statement of the technician performing the study to determine the December 7, 2018 pulmonary function study is invalid and unreliable. Decision and Order at 12-13; Claimant's Exhibit 2 at 87; Employer's Exhibit 5 at 17, 23-24. Thus, having determined the record contains no valid or reliable pulmonary function studies, the ALJ found Claimant did not establish disability at 20 C.F.R. §718.204(b)(2)(i).

Claimant argues the ALJ erred in determining the December 7, 2018 nonqualifying pulmonary function study is invalid and unreliable. Claimant's Brief at 6-10.[6] We disagree.

Claimant initially asserts the ALJ applied an incorrect standard, as the December 7, 2018 pulmonary function study was conducted during the course of Claimant's treatment and thus is not required to meet the quality standards in Appendix B to 20 C.F.R. Part 718. Contrary to Claimant's argument, the ALJ correctly observed that objective studies contained in treatment records are not subject to the quality standards, but that the regulations nonetheless require that he determine whether the study is sufficiently reliable to support a finding of total disability. Decision and Order at 11, *citing* 20 C.F.R.

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right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 13.

[5] 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).

[6] We affirm, as unchallenged on appeal, the ALJ's findings that the March 16, 2017 and May 30, 2017 pulmonary function studies are invalid. *See Skrack*, 6 BLR at 1-711; (1983)

§718.101(b); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Further, the ALJ did not find this study invalid because it did not meet the quality standards but rather because he found the statement of the administering technician most persuasive that "claimant did not follow instructions well at all" and the opinion of Dr. Tuteur that the study did not reliably represent Claimant's maximum lung function. Decision and Order at 12-13, *quoting* Claimant's Exhibit 2 at 87; Employer's Exhibit 5 at 17.

We further reject Claimant's contentions that the ALJ erred in not crediting the validity opinions of Drs. Ryon, Broudy, and Istanbouly. Claimant's Brief at 7-10. The ALJ permissibly discredited Dr. Ryon's opinion because, though he initially opined the December 8, 2018 pulmonary function study is valid, he later conceded he was not confident Claimant performed optimally during this study and was unsure if the results reflected Claimant's abilities. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990); Decision and Order at 11-12; Claimant's Exhibit 5 at 42, 45-46, 53-54. The ALJ further correctly observed Dr. Broudy did not specifically opine as to whether the study is valid.[7] Decision and Order at 11; Director's Exhibit 20 at 13-14; Employer's Exhibit 4 at 32-33. Likewise, the ALJ permissibly discredited Dr. Istanbouly because he gave only a conclusory statement that the study is valid but provided no explanation to support his validity opinion and did not address the administering technician's statement that Claimant did not follow instructions well. *See Smith v. Director, OWCP*, 843 F.2d 1053, 1057 (7th Cir. 1988); *Lango v. Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997) (ALJ may

[7] Claimant asserts the ALJ "failed to consider" aspects of Dr. Broudy's opinion weighing in favor of finding the study reliable. Claimant's Brief at 8. Contrary to Claimant's argument, however, the ALJ observed Dr. Broudy stated the tracings "looked like" Claimant put forth a "fairly good effort," and that the study was of higher quality than the studies conducted on March 16, 2017 and May 30, 2017. Decision and Order at 12 (quoting Director's Exhibit 20 at 12-14). He further noted, however, that Dr. Broudy stated that aspects of the December 8, 2018 pulmonary function study did not conform to the quality standards and that such noncompliance did not necessarily render the study invalid, and permissibly concluded that, as a whole, Dr. Broudy did not specifically provide an opinion as to whether the study is valid. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990); Decision and Order at 12; Director's Exhibit 20 at 13-14; Employer's Exhibit 4 at 32-33. To the extent Claimant asserts the ALJ erred in finding Dr. Broudy did not specifically provide an opinion as to the reliability of the study, he asks us 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).

permissibly require treating physician to provide more than a conclusory statement); Decision and Order at 12; Claimant's Exhibits 2 at 87; 4 at 2.

It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). Employer's arguments are a request to reweigh the evidence, which we are not permitted to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ weighed all of the relevant evidence and his credibility findings are supported by substantial evidence, we affirm his finding that the December 8, 2018 pulmonary function study is not sufficiently reliable to establish total disability. Decision and Order at 11-12; 20 C.F.R. §718.101(b). We thus further affirm his conclusion that the pulmonary function study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Medical Opinion Evidence

Before weighing the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the ALJ addressed the exertional requirements of Claimant's usual coal mine work. Decision and Order at 5. We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine work as a belt line shoveler "required heavy manual labor" and included lifting objects weighing between 75 and 100 pounds. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 5 (quoting Hearing Transcript at 27-29; Claimant's Exhibit 1 at 23-24).

The ALJ considered the medical opinions of Drs. Ryon and Istanbouly that Claimant is totally disabled and those of Drs. Broudy and Tuteur that he is not. Decision and Order at 13-17; Director's Exhibits 10, 18-20; Claimant's Exhibits 4-5. Claimant contends the ALJ erred in weighing the medical opinion evidence. Claimant's Brief at 11-25. We disagree.

Contrary to Claimant's contentions, the ALJ permissibly discredited the opinions of Drs. Ryon and Istanbouly because neither physician explained their conclusion that Claimant's reduced diffusion capacity (DLCO) results demonstrate he is totally disabled. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94 (7th Cir. 1990); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 14-15. As the ALJ observed, although Dr. Ryon explained that DLCO studies measure how well a person's lungs exchange gases, the physician conceded he does not know of any disability standards based on DLCO values, and he did not explain why the DLCO value in this case demonstrates Claimant is totally disabled. Decision and Order at 14; Claimant's Exhibit 5 at 23-24, 28. Likewise, Dr. Istanbouly opined the DLCO value

"meet[s] the total disability criteria due to pulmonary impairment per [Department of Labor] guidelines," Claimant's Exhibit 4 at 3. As the ALJ noted, however, the regulations do not contain criteria for establishing disabling DLCO values, and Dr. Istanbouly did not otherwise explain his conclusion that the DLCO value he obtained demonstrates total disability. Decision and Order at 15; *see* Claimant's Exhibit 4.

The ALJ further permissibly discredited Drs. Ryon's and Istanbouly's opinions because both physicians relied in part on the pulmonary function studies in concluding Claimant is totally disabled, contrary to his finding that the pulmonary function studies are all invalid and unreliable. *See Poole*, 897 F.2d at 895; *Crisp* 866 F.2d at 185; Decision and Order at 14-15. Dr. Ryon conceded the pulmonary function studies "were a significant part of [his] diagnosis of total disability" and that he was unsure if he would conclude Claimant is disabled absent those studies. Claimant's Exhibit 5 at 25. Likewise, as the ALJ observed, Dr. Istanbouly diagnosed total disability in part based on his conclusion that Claimant's December 8, 2018 pulmonary function study demonstrated a significant abnormality. Decision and Order at 15; Claimant's Exhibit 4 at 3.

It is the province of the ALJ to evaluate the medical evidence, draw inferences, and assess probative value. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Poole*, 897 F.2d at 895; *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). Claimant's arguments, again, amount to a request to reweigh the evidence, which we are not permitted to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited Drs. Ryon's and Istanbouly's opinions,[8] the only opinions supportive of a finding that Claimant is totally disabled,[9] we affirm his determination that the medical opinions do not establish the existence of a totally disabling impairment. We thus further affirm the ALJ's finding that the relevant evidence, when weighed together, does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 17-18. As Claimant failed to establish total disability, an essential element of

[8] Because the administrative law judge provided valid bases for according less weight to Drs. Ryon's and Istanbouly's opinions, we need not address Claimant's additional arguments regarding their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[9] Claimant contends the ALJ ignored portions of Drs. Broudy's and Tuteur's opinions favorable to a finding of total disability. Claimant's Brief at 22-24. However, both physicians expressly opined Claimant is not disabled. Employer's Exhibits 4 at 14; 5 at 15-16. Thus, any error in evaluating their opinions is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

entitlement, we affirm the ALJ's conclusion that Claimant failed to establish entitlement to benefits. *See Trent*, 11 BLR at 1-27.

Employer's Cross-Appeal

On cross-appeal, Employer sets forth multiple arguments in the event of a remand, urging the Board to instruct the ALJ that it is not liable for the payment of benefits. Employer's Brief at 2-47. Because we affirm the denial of benefits, we need not address Employer's cross-appeal.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge