U.S. Department of Labor

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

BRB No. 20-0500 BLA

ANDREW W. MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADDINGTON, INCORPORATED	)	
	)	DATE ISSUED: 10/26/2021
Employer-Petitioner	)	
	)	
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 Natalie A. Appetta, 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) Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-05486) 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 subsequent claim filed on February 22, 2018.[1]

The ALJ credited Claimant with twenty-three years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c),[2] and 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). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and therefore entitled to the Section 411(c)(4) presumption. It also argues the ALJ erred in finding it did not rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

[1] Claimant filed three prior claims. Directors' Exhibits 1-4. The district director denied Claimant's most recent prior claim on March 18, 2013, because he failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3.

[2] Where 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); *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). As the district director denied Claimant's prior claim because he failed to establish total disability, he must submit new evidence establishing total disability to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

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

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.[5] 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, 362 (1965).

Invocation of the Section 411(c)(4) Presumption – 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. *See* 20 C.F.R. §718.204(b)(1). 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 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the pulmonary function studies and medical opinions.[6] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 13, 21. Employer challenges the ALJ's finding that the medical opinions establish total disability. Employer's Brief at 23-25. As an initial matter, we affirm as unchallenged on appeal the ALJ's determination that the pulmonary function study evidence establishes total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 13.

With respect to the medical opinion evidence, the ALJ found Drs. Rosenberg, Gaziano, Raj, and Alvarez opined Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20-21; Director's Exhibit 40; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 3. She found their opinions well-reasoned and documented. Decision and Order at 20-21. Employer does not challenge the ALJ's finding

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 11; Hearing Transcript at 18, 23.

[6] The ALJ found Claimant did not establish total disability based on the blood gas studies or through evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 11, 14.

that Dr. Rosenberg's opinion supports a finding of total disability and is well-reasoned and documented. Thus we affirm this finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 20-21. The ALJ found Dr. Tuteur's opinion does not support a finding that Claimant is totally disabled. Decision and Order at 20-21; Employer's Exhibits 2, 4. But she found his opinion not credible. *Id.*

Employer argues the ALJ erred in so ruling. Employer's Brief at 23-25. We disagree. In his initial report, Dr. Tuteur summarized the pulmonary function study results and stated the April 2018 studies reflect an "apparent dramatic decrease" in Claimant's pulmonary function. Employer's Exhibit 2 at 4. He opined that Claimant has coronary artery disease, however, and his pattern of "serial pulmonary function values are not typical of a primary pulmonary disease process," and are "highly compatible with waxing and waning cardiac dysfunction and the development of congestive heart failure." Employer's Exhibit 2. At his deposition Dr. Tuteur testified that Claimant's congestive heart failure is causing the respiratory impairment seen on his pulmonary function studies, and "in that sense" he is disabled due to a pulmonary process. Employer's Exhibit 4 at 30-31.

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant's respiratory or pulmonary condition precludes the performance of his usual coal mine work. The etiology of Claimant's pulmonary condition concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or on rebuttal of the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1). Thus, contrary to Employer's contention, we see no error in the ALJ's finding that Dr. Tuteur's opinion does not undermine the pulmonary function studies or Dr. Rosenberg's opinion indicating Claimant is totally disabled.[7] *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *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); Decision and Order at 21.

Thus we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm her finding 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, 725.309; Decision and Order at 9, 21.

[7] Because we affirm the ALJ's finding the pulmonary function studies and Dr. Rosenberg's medical opinion establish total disability, we need not address Employer's arguments regarding the ALJ's finding that the medical opinions of Drs. Gaziano, Raj, and Alvarez also establish total disability, as any error would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 23-25.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[8] or "no part of [his] respiratory or pulmonary total disability is caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal by either method.

We affirm as unchallenged the ALJ's finding that Employer did not disprove clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25, 28. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The ALJ also found Employer failed to establish "no part of [Claimants] 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); *see* Decision and Order at 29. The ALJ discredited Dr. Tuteur's disability causation opinion because he failed to diagnose clinical pneumoconiosis, legal pneumoconiosis, or total disability. Decision and Order 29. She discredited Dr. Rosenberg's opinion because he failed to adequately explain why no part of Claimant's total disability was caused by clinical pneumoconiosis. *Id*.

Employer argues the ALJ erred in discrediting Dr. Tuteur's opinion because it asserts the doctor did not actually exclude a diagnosis of clinical pneumoconiosis. Employer's Brief at 18-21. Contrary to Employer's contention, Dr. Tuteur reviewed the objective testing of record and opined the "pattern of radiographic interpretations and serial pulmonary function values are not typical of a primary pulmonary disease process." Employer's Exhibit 2 at 5. He noted that some x-rays demonstrate a profusion of "1/0" clinical pneumoconiosis in early 2018, but then opined there are "no changes compatible with coal workers' pneumoconiosis six months later." *Id*. The ALJ permissibly discredited Dr. Tuteur's opinion on disability causation because he did not diagnose clinical

[8] "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 that is 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).

pneumoconiosis, contrary to her finding that Employer failed to disprove Claimant has clinical pneumoconiosis.[9] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 29; Employer's Exhibits 2, 4.

Employer also argues the ALJ erred in discrediting Dr. Rosenberg's opinion. Employer's Brief at 21-23. Dr. Rosenberg opined that Claimant has clinical pneumoconiosis and is totally disabled by a severe obstructive respiratory impairment. Employer's Exhibit 3 at 14-15, 17, 20. He stated pneumoconiosis can cause obstruction on pulmonary function testing and acknowledged the length of Claimant's coal mine dust exposure is sufficient to cause disabling pneumoconiosis in a susceptible host. *Id.* at 31. He opined, however, that the variation in Claimant's respiratory impairment over time does not "represent a coal mine dust related disorder." *Id.* at 20-22, 32. Thus he opined Claimant's impairment is due to cigarette smoking alone. *Id.*

The ALJ found Dr. Rosenberg did not specify the data he relied on in concluding that Claimant's disabling obstructive lung disease is unrelated to clinical pneumoconiosis. Decision and Order at 29. Thus, she permissibly found his opinion unpersuasive because he did not explain how he ruled out clinical pneumoconiosis as a cause of Claimant's total disability. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 29.

Employer generally argues Drs. Rosenberg and Tuteur credibly explained why no part of Claimant's disability was caused by clinical pneumoconiosis. Employer's Brief at 18-23. Employer's argument amounts to a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

We therefore affirm the ALJ's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by clinical pneumoconiosis.[10] *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29.

[9] Because the ALJ provided a valid reason for discrediting Dr. Tuteur's disability causation opinion, any error in discrediting it for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] Because we affirm the ALJ's finding Employer failed to rebut the presumption that Claimant is totally disabled due to clinical pneumoconiosis, we need not address Employer's arguments with respect to the issue of legal pneumoconiosis, as any error in the ALJ's determination would be harmless. *See Larioni*, 6 BLR at 1-1278.

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