U.S. Department of Labor

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

BRB No. 21-0015 BLA

DEREK W. FARMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICG HAZARD, LLC, a/k/a PINE BRANCH RESOURCES, LLC	)	
	)	
and	)	
	)	DATE ISSUED: 10/08/2021
ARCH COAL INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Derek W. Farmer, Stinnett, Kentucky.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Denying Benefits (2019-BLA-05285) rendered on a claim filed on August 30, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. He further found Claimant established 30.57 years of coal mine employment but failed to establish total disability and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4), or establish entitlement pursuant 20 C.F.R. Part 718. He therefore denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds, urging affirmance of the denial of benefits.[3] The Director, Office of Workers' Compensation Programs, declined to file a response brief.

In an appeal a claimant files without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

[2] Section 411(c)(4) provides a rebuttable presumption that a 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.

[3] We affirm, as unchallenged, the ALJ's finding of 30.57 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See*

To be entitled to benefits under the Act without the benefit of statutory presumptions, 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. 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).

Section 411(c)(3) Presumption

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis before finding Claimant has invoked the presumption. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ considered nine interpretations of three x-rays dated June 1, 2016, October 12, 2016, and July 28, 2017. 20 C.F.R. §718.304(a); Decision and Order at 13-14. The ALJ determined all the physicians who read the x-rays were dually-qualified B-readers and Board-certified radiologists. Decision and Order at 13-14. Dr. DePonte read the June 1, 2016 x-ray as positive for complicated pneumoconiosis, while Dr. Adcock read the same x-ray as negative for the disease. Director's Exhibit 15; Employer's Exhibit 2. Dr. DePonte read the October 12, 2016 x-ray as positive for complicated pneumoconiosis, while Drs. Miller and Adcock read the same x-ray as negative. Director's Exhibit 13; Employer's Exhibits 1, 5. Finally, Drs. DePonte and Meyer read the July 28, 2017 x-ray as positive for complicated pneumoconiosis, while Drs. Adcock and Seaman read the same x-ray as negative. Claimant's Exhibits 1-2; Employer's Exhibits 3-4.

The ALJ permissibly found the June 1, 2016 and July 28, 2017 x-rays inconclusive because an equal number of dually-qualified radiologists gave conflicting readings of them. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Staton*

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2 at 1; Hearing Transcript at 12, 15.

v. Norfolk & Western Ry. Co., 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 13-14. He also permissibly found the October 12, 2016 x-ray negative because two dually-qualified radiologists read it as negative and one dually-qualified radiologist read it as positive. *Ondecko*, 512 U.S. at 281; *Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; Decision and Order at 13. As he found the record contains one negative x-ray reading, and the remaining x-rays are inconclusive, he concluded Claimant failed to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 14. We affirm this finding as supported by substantial evidence.

Next, the ALJ considered the medical opinions of Drs. Ajjarapu, Dahhan, and Vuskovich. Decision and Order at 14-15. Dr. Ajjarapu opined Claimant has complicated pneumoconiosis. Director's Exhibit 13. Dr. Vuskovich initially opined Claimant has either complicated pneumoconiosis or a precursor to complicated silicosis[5] but later opined Claimant has complicated pneumoconiosis. Claimant's Exhibit 17. Dr. Dahhan denied Claimant has the disease. Director's Exhibit 17. The ALJ permissibly rejected Dr. Ajjarapu's opinion as based, "in large part," on Dr. DePonte's October 12, 2016 positive x-ray interpretation, which is contrary to his weighing of the x-ray evidence. Decision and Order at 14; *see 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). The ALJ further permissibly discredited Dr. Vuskovich's opinion as vague and equivocal because, though he eventually concluded Claimant has complicated pneumoconiosis, he initially provided alternative diagnoses and did not explain how he reached that conclusion given his initial equivocation, and he did not explain why he relied on one x-ray interpretation while rejecting others in reaching his conclusions. Decision and Order at 15 (citing Claimant's Exhibit 7 at 9); *see Island Creek Coal Co. v. Holdman*, F.3d 873, 882 (6th Cir. 2000); *Crisp*, 866 F.2d at 185; *Melnick*, 16 BLR at 1-37. Because the ALJ permissibly rejected the only medical opinions that could support a finding of complicated pneumoconiosis, we affirm his finding that the medical opinions do not establish Claimant has the disease.[6] 20 C.F.R. §718.304(c).

[5] The ALJ correctly found Dr. Vuskovich's alternative diagnosis of silicosis meets the definition of clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1); Decision and Order at 15. A diagnosis of a precursor to complicated pneumoconiosis that does not yet meet the statutory requirements for the disease, however, does not qualify as complicated pneumoconiosis. *See* 20 C.F.R. §718.304.

[6] As the ALJ indicated, there is no autopsy, biopsy, or CT scan evidence of record. 20 C.F.R. §718.304(b)-(c); Decision and Order at 13. He also correctly noted that, while Claimant's treatment records diagnose complicated pneumoconiosis based on an undated

Weighing all the evidence together, the ALJ found Claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 16. Because this finding is supported by substantial evidence, we affirm it. We further affirm the ALJ's finding Claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3).

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. *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 accurately found no qualifying pulmonary function studies[7] of record.[8] Decision and Order at 9, 16-17; Director's Exhibits 13, 17. We therefore affirm his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

The ALJ next considered the results of two arterial blood gas studies, dated October 12, 2016, and July 28, 2017. Decision and Order at 9, 17. Neither study produced

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x-ray, no interpretation of that x-ray was submitted to support that diagnosis. Decision and Order at 15; Claimant's Exhibit 6. Thus, he permissibly found the treatment records insufficient to support a finding of complicated pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 15.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] As the ALJ indicates, Dr. Vuskovich opined the October 12, 2016 pulmonary function study was invalid due to poor effort. Director's Exhibit 16, Claimant's Exhibit 7 at 4-5. The ALJ permissibly found his comments do not detract from the probative weight of the study given the values were non-qualifying. *See Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-479 (1983); Decision and Order at 16 n.51.

qualifying values at rest. Director's Exhibits 13, 17. The study obtained on October 12, 2016, produced qualifying exercise results while the July 28, 2017 study did not. Director's Exhibits 13, 17. The ALJ permissibly credited Dr. Vuskovich's uncontroverted opinion that the October 12, 2016 exercise study is invalid.[9] *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 17; Claimant's Exhibit 7 at 6. He further permissibly found that, even if the qualifying exercise portion of the October 12, 2016 study was valid, he could not find that the blood gas studies establish total disability because of the conflicting results. *Rowe*, 710 F.2d at 255; Decision and Order at 17. We see no error in the ALJ's reasoning. Thus, we affirm his finding Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).[10]

Turning to the medical opinion evidence, the ALJ considered the opinions of Drs. Ajjarapu and Vuskovich that Claimant is totally disabled, and the opinion of Dr. Dahhan that he is not. Decision and Order at 18; Director's Exhibits 13, 17; Claimant's Exhibit 7. The ALJ permissibly found the opinions of Drs. Ajjarapu and Vuskovich not well-reasoned or documented because their opinions are based solely on their diagnoses of complicated pneumoconiosis, contrary to his finding that Claimant did not establish the existence of the disease.[11] *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 18 (citing Director's Exhibit 13; Claimant's Exhibit 7). As the ALJ permissibly rejected the opinions of Drs. Ajjarapu and Vuskovich, the only medical opinions of record that could support a finding of total disability, we affirm his finding that Claimant failed to establish total disability at 20 C.F.R §718.204(b)(2)(iv) as supported by substantial evidence.[12]

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[9] Dr. Vuskovich opined the October 12, 2016 exercise study is invalid because the pO2 result is too high, resulting in a negative alveolar-atrial pO2 difference, a condition he indicated is incompatible with life. Director's Exhibit 16 at 3; Claimant's Exhibit 7 at 5-6. He opined the study was likely contaminated with air during its collection and transport. Claimant's Exhibit 7 at 6.

[10] The ALJ also noted Claimant's treatment records did not specify whether he is totally disabled. Decision and Order at 18 (citing Claimant's Exhibit 6).

[11] The ALJ also correctly noted that, while Dr. Vuskovich stated there was a "mild" obstructive impairment on pulmonary function study results, he did not discuss whether this impairment would prevent Claimant from doing his previous coal mining work. Decision and Order at 18 n.56 (citing Claimant's Exhibit 7 at 10); 20 C.F.R. §§718.204(b)(1), 718.204(b)(2)(iv).

[12] The ALJ did not make a specific finding regarding whether Claimant could establish total disability under 20 C.F.R. §718.204(b)(2)(iii). However, any such error is

We also affirm, as supported by substantial evidence, the ALJ's finding the medical evidence, weighed separately and together, fails to establish total respiratory or pulmonary disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 8. As Claimant failed to establish he has a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's finding he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).

As Claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, and did not establish total disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

harmless as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).