U.S. Department of Labor

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

BRB No. 22-0499 BLA

JACKIE VANOVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACK JEWELL LLC	)	DATE ISSUED: 10/13/2023
	)	
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 Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Awarding Benefits (2020-BLA-05931) 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 January 15, 2019.[1]

The ALJ found that Claimant established 43.80 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018) and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c). She further found Employer did not rebut the presumption, and thus awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant totally disabled and thereby erred in finding he invoked the Section 411(c)(4) presumption.[3] Alternatively, it argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

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

[1] On October 2, 2013, the district director denied Claimant's prior claim, filed on January 17, 2013, for failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. When 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); *see 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). Claimant was therefore required to establish total disability in order to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

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

[3] We affirm, as unchallenged on appeal, that Claimant established 43.80 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.

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 Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 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, prevents him from performing his usual coal mine work and comparable gainful work.[5] 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 Claimant established total disability based on the medical opinion evidence and the evidence as a whole.[6] Decision and Order at 14-15, 17.

Medical Opinions

The ALJ considered the medical opinions of Drs. Raj, Dahhan, Nader, and Rosenberg. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-15. Dr. Raj performed the Department of Labor-sponsored completed pulmonary evaluation of Claimant and obtained non-qualifying blood gas study results and pulmonary function study results that

[4] 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); Hearing Transcript at 23.

[5] The ALJ found Claimant's usual coal mine employment as a maintenance foreman required heavy exertion. Decision and Order at 5. Employer does not challenge this finding. Thus, we affirm it. *See Skrack*, 6 BLR at 1-711.

[6] The ALJ found Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas studies, and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 15-17.

were qualifying before the administration of bronchodilators and non-qualifying after. Director's Exhibit 14. He diagnosed a moderate obstructive defect based on the pulmonary function study results and opined Claimant is totally disabled, noting that Claimant gets short of breath walking 200 to 300 feet uphill and, therefore, cannot meet the exertional requirement of his last coal mine job. *Id*. Dr. Nader examined Claimant and obtained non-qualifying pulmonary function and blood gas study results.[7] Claimant's Exhibit 1. He diagnosed Claimant with "moderate obstructive airway disease with no response to bronchodilator" and no restrictive airway disease, and he opined Claimant is totally disabled based on the pulmonary function study Dr. Raj performed on February 5, 2019, his own pulmonary function study results, and a finding of progressive massive fibrosis. *Id*.

Dr. Dahhan examined Claimant, obtained non-qualifying pulmonary function and blood gas study results, and conducted a review of records. Director's Exhibit 19. He diagnosed a mild obstructive impairment with variable bronchodilator response but found it was not totally disabling. *Id*. Dr. Rosenberg conducted a review of records and similarly diagnosed a mild obstructive ventilatory impairment, but he found Claimant is not totally disabled. Employer's Exhibit 9.

The ALJ credited the opinions of Drs. Raj and Nader as well-reasoned, well-documented, and based on the objective testing in conjunction with Claimant's symptoms and medical history. Decision and Order at 11, 14, 17. She discredited the opinions of Drs. Dahhan and Rosenberg as not well-reasoned or documented. *Id*. at 12, 14. She specifically found that Dr. Rosenberg's opinion concerning total disability was "brief" and relied "seemingly exclusively on [Claimant's] most recent [pulmonary function studies.]" *Id*. at 14. Therefore, she concluded the medical opinion evidence establishes total disability under 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 17.

Employer contends the ALJ erred in crediting Drs. Raj's and Nader's opinions and in discrediting Dr. Rosenberg's opinion.[8] Employer's Brief at 4-8. We disagree.

[7] Dr. Nader did not conduct an exercise blood gas study because he determined it was medically contraindicated. Claimant's Exhibit 1.

[8] Employer summarizes the ALJ's findings concerning Dr. Dahhan's opinion but does not specifically challenge her discrediting of his opinion regarding disability. We affirm the ALJ's finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 11-12; Employer's Brief at 5-6.

Employer asserts the ALJ erred in crediting the opinions of Drs. Raj and Nader for relying upon the non-qualifying studies[9] she determined were insufficient to support a finding of total disability. Employer's Brief at 6-7. We reject Employer's assertion. The regulations specifically provide total disability may be established based on a physician's reasoned opinion that a miner could not perform his usual coal mine employment, even when the pulmonary function and arterial blood gas studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997).

We also reject Employer's argument that the ALJ erred in crediting Dr. Nader's opinion because he relied on Dr. Raj's older pulmonary function study despite his own non-qualifying testing which was performed more than a year later. Employer's Brief at 7. While Dr. Nader opined Claimant is totally disabled based on the qualifying pulmonary function study Dr. Raj conducted on February 5, 2019, he also opined that even though the October 2, 2020 pulmonary function study he conducted was non-qualifying, the study still showed "significant pulmonary impairment and [would] make [Claimant] unable to perform his previous exercise requirement of the last coal mine job." Claimant's Exhibit 1. As Dr. Nader did not simply rely on the "older evidence," as Employer suggests, but rather explained how his own non-qualifying study also supports a finding of total disability, we reject Employer's contention. *Cornett*, 227 F.3d at 577.

Employer further argues the ALJ erred in crediting the opinions of Drs. Raj and Nader because they "premised their disability conclusions" on a finding of complicated pneumoconiosis, which does not align with the ALJ's finding that Claimant failed to establish complicated pneumoconiosis. Employer's Brief at 8; *see* Decision and Order at 15. However, as discussed previously, independent of their complicated pneumoconiosis diagnoses, Drs. Raj and Nader diagnosed total disability based on the obstructive impairment they observed on pulmonary function testing, which they opined would prevent Claimant from performing the exertional requirements of his usual coal mine work. *See* Director's Exhibit 14; Claimant's Exhibit 1. Thus, contrary to Employer's contention, the ALJ was not required to give them less weight based on their diagnoses of complicated pneumoconiosis. *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).

[9] We note that, as summarized above, Drs. Raj and Nader relied, at least in part, on Dr. Raj's February 5, 2019 pulmonary function study, which was qualifying before the administration of bronchodilators. Director's Exhibit 14; Claimant's Exhibit 1.

Finally, Employer contends that because Dr. Rosenberg considered the entirety of the pulmonary function study and arterial blood gas study evidence, including the most recent pulmonary function studies, the ALJ erred in discrediting his opinion. Employer's Brief at 7. Contrary to Employer's assertion, the ALJ was not required to give additional weight to Dr. Rosenberg's opinion because he reviewed the most evidence. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996) (ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned and documented). While Employer takes issue with the ALJ's statement that Dr. Rosenberg's total disability opinion "relies seemingly exclusively" on Claimant's most recent pulmonary function studies, Employer does not challenge, and we therefore affirm, the ALJ's additional finding that Dr. Rosenberg's total disability opinion is entitled to less weight because it was "brief" and therefore not adequately explained.[10] *See Skrack*, 6 BLR at 1-711; Decision and Order at 14. Because it is supported by substantial evidence, 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); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 17. We therefore affirm the ALJ's 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(c); Decision and Order at 17.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[11] or "no

[10] In explaining why he found Claimant is not totally disabled from a pulmonary or respiratory impairment, Dr. Rosenberg stated:

> From a functional perspective, [Claimant's] most recent pulmonary function tests reveal mild airflow obstruction without any significant bronchodilator response. He has no restriction, and his diffusing capacity measurement is normal. Overall, he is not disabled from a pulmonary perspective.

Employer's Exhibit 9 at 5.

[11] "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

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.

Clinical Pneumoconiosis

Employer does not challenge the ALJ's finding that it did not rebut the presumed existence of simple, clinical pneumoconiosis,[12] and thus we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 19. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer failed to establish that "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 20. Employer contends it did not have to establish rebuttal by this method because the ALJ's "total disability finding was clearly in error and the credible record reveals that the Claimant does not, in fact, have a totally disabling pulmonary impairment." Employer's Brief at 11. As we have rejected this argument above, and Employer does not otherwise challenge the ALJ's total disability causation determination, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's total respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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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).

[12] The ALJ determined that the x-ray and medical opinion evidence supports a finding of simple, clinical pneumoconiosis and that the CT scan evidence neither supports nor refutes the existence of clinical pneumoconiosis. Decision and Order at 6-15, 18-19. Thus, she concluded Employer failed to rebut the presumption of clinical pneumoconiosis. *Id*. at 19.

[13] Having affirmed the ALJ's findings on clinical pneumoconiosis, we need not address Employer's arguments that the ALJ erred in concluding it failed to disprove legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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