U.S. Department of Labor

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

BRB No. 22-0500 BLA

RAYMOND DANIEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRANHAM & BAKER	)	
	)	
and	)	
	)	
Self-Insured Through QUAKER COAL Through AMERICAN ELECTRIC POWER CORPORATION	)	DATE ISSUED: 10/24/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Sara May (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2020-BLA-05304) rendered on a subsequent claim[1] filed on April 26, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 30.78 years of qualifying coal mine employment and determined he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he concluded Claimant established a change in an applicable condition of entitlement at 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, 30 U.S.C. §921(c)(4) (2018).[3] The ALJ further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed and withdrew three prior claims. Director's Exhibits 1-4. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b). On May 13, 2015, the district director denied Claimant's previous claim, filed on August 21, 2014, because Claimant did not establish that he was totally disabled. Director's Exhibit 5. Claimant filed a request for modification on September 28, 2015, which the district director denied on December 2, 2016. *Id*. Claimant did not take any further action before filing his current claim. Director's Exhibit 7.

[2] 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 he 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)(1); *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). Because Claimant did not establish total disability in his prior claim, he had to submit new evidence establishing this element of entitlement to obtain review of the merits of his current claim. *Id*.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling

On appeal, Employer argues the ALJ erred in finding Claimant established total disability.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to submit a substantive 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 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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based upon 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

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

[4] We affirm, as unchallenged, the ALJ's finding that Claimant established 30.78 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[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); Decision and Order at 4; Hearing Transcript at 23; Director's Exhibit 8.

establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Employer contends the ALJ erred in finding Claimant established total disability based on the medical opinions and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19-20. We disagree.

Medical Opinions

The ALJ considered four medical opinions.[7] Decision and Order at 15-19. Dr. Raj examined Claimant on June 12, 2020, and obtained non-qualifying pulmonary function studies and a qualifying[8] blood gas study at rest.[9] Claimant's Exhibit 1. He opined Claimant suffers from mild obstruction evident on his pulmonary function study and resting hypoxemia based on the blood gas study results. Claimant's Exhibit 1 at 4. Further, he noted Claimant "gets short of breath walking about 25-50 feet of distance uphill" and explained that Claimant's "physical capacity is greatly diminished due to his pulmonary impairment." *Id*. He therefore concluded Claimant "cannot meet the exertional requirements of his last job." *Id*.

Dr. Nader conducted the Department of Labor's complete pulmonary evaluation of Claimant and diagnosed a mild obstructive respiratory impairment based on the pulmonary function study and hypoxemia shown on the qualifying blood gas study he obtained.

[6] The ALJ found Claimant failed to establish total disability based on the pulmonary function studies or arterial blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 10-15.

[7] We affirm, as unchallenged, the ALJ's determination that Claimant's usual coal mine work "required moderate to heavy manual labor." Decision and Order at 11; *Skrack*, 6 BLR at 1-711.

[8] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] Dr. Raj stated Claimant was not exercised because the blood gas study showed "resting hypoxemia." Claimant's Exhibit 1 at 3.

Director's Exhibit 18 at 3. He concluded Claimant is totally disabled from performing his usual coal mine work. *Id*. at 4.

Dr. Jarboe examined Claimant and opined he has a very mild reversible obstructive respiratory impairment shown on pulmonary function testing and "persistently low diffusion capacity of moderate severity." Employer's Exhibit 7 at 9-10. He indicated the diffusion impairment would not result in an oxygen impairment. *Id*. at 10. Dr. Dahhan examined Claimant and opined there were insufficient objective findings to indicate any functional impairment or disability; however, he later reviewed Dr. Raj's blood gas study and agreed Claimant had resting hypoxemia. Director's Exhibit 21 at 5; Employer's Exhibit 5. Drs. Jarboe and Dahhan each opined Claimant's respiratory impairment would not preclude him from performing his usual coal mine work and that he is not totally disabled. Director's Exhibit 21 at 5; Employer's Exhibit 7 at 10.

The ALJ credited Dr. Raj's opinion and rejected the opinions of Drs. Nader, Jarboe, and Dahhan. He noted, however, that neither Dr. Nader's nor Dr. Dahhan's opinions weighed against a finding that Claimant is totally disabled. Decision and Order at 16, 20. Thus, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 20.

Employer generally contends Claimant is not totally disabled because a preponderance of the pulmonary function studies and blood gas studies are non-qualifying. However, as the ALJ accurately observed, even if total disability cannot be established by pulmonary function or arterial blood tests, it "may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents" him from performing his usual coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (explaining a claimant can establish total disability despite non-qualifying objective tests); Decision and Order at 16.

Employer also contends Dr. Raj's opinion is not well-reasoned because he did not review the non-qualifying objective testing by Drs. Jarboe and Dahhan. Contrary to Employer's contention, an ALJ is not required to discredit a physician who did not review all of the record evidence when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner, objective test results, and exposure histories. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Employer's Brief at 5. Here, the ALJ acknowledged that Dr. Raj did not consider all of the evidence of record, but he permissibly

found Dr. Raj's opinion is reasoned and documented based on Dr. Raj's examination of Claimant, the abnormal objective testing results he obtained, and his understanding of the exertional requirements of Claimant's coal mine work.[10] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (it is within the purview of the ALJ to weigh the evidence, draw inferences, and determine credibility); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 16-17.

We also reject Employer's assertion that Dr. Raj's opinion is not well reasoned because he relied in part on Claimant's description of becoming short of breath after walking twenty-five to fifty feet. Employer's Brief at 5. Dr. Raj did not base his opinion solely on Claimant's symptoms; considering both Claimant's symptoms and his objective testing results together, Dr. Raj concluded Claimant would not be able to meet the exertional requirements of his last coal mine work. Claimant's Exhibit 1 at 4. Because the ALJ acted within his discretion in finding Dr. Raj's opinion reasoned and documented, we affirm his reliance on it to find Claimant is totally disabled. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Regarding the opinions of Drs. Jarboe and Dahhan, Employer generally contends the ALJ erred in rejecting them because they relied on non-qualifying objective tests and the ALJ did not otherwise explain his credibility determinations. However, the ALJ specifically explained the opinions of Drs. Jarboe and Dahhan were not well-reasoned because neither physician adequately addressed why the respiratory impairment they diagnosed would not prevent Claimant from performing the moderate to heavy manual labor required by his usual coal mine work. Decision and Order at 18-19; *see Cornett*, 227 F.3d at 587; *see also Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (physician who asserts a miner is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991). As Employer does not identify any specific error with the ALJ's rationale, we affirm it.[11] *See* 20 C.F.R. §802.211(b); *see*

[10] The ALJ acknowledged Dr. Raj believed Claimant's usual coal mine employment required heavy exertion, as opposed to the moderate to heavy exertion that the ALJ determined. Decision and Order at 17; Claimant's Exhibit 1 at 1. However, the ALJ found the discrepancy was insufficient to detract from the overall credibility of Dr. Raj's opinion and Employer does not contend otherwise. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 17.

[11] The ALJ found Dr. Dahhan did not address whether Claimant's resting hypoxemia would preclude him from performing his usual coal mine work and thus

also Cox v. Benefits Review Board, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

Employer's arguments on total disability are a request 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). Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established total disability based on Dr. Raj's opinion and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999) (Administrative Procedure Act's duty of explanation is satisfied if reviewing court can discern what the ALJ did and why he did it); Decision and Order at 18-19.[12] We therefore affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c)(1); Decision and Order at 18-19, 27.

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,[13] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined

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concluded his opinion does not weigh against a finding that Claimant is totally disabled. Decision and Order at 18. As Employer does not challenge this finding, we affirm it. *Skrack*, 6 BLR at 1-711.

[12] The Administrative Procedure Act (APA) provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[13] "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).

in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.

Although Employer contends it successfully rebutted the presumption, it does not make any specific allegations of error with regard to the ALJ's findings. *See* Employer's Brief at 6-7. Thus, we affirm the ALJ's determination that Employer did not rebut the presumption by establishing either that Claimant does not have pneumoconiosis or that his respiratory disability is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i), (ii); *see Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21; Decision and Order at 24-27.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge