U.S. Department of Labor

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

BRB No. 20-0355 BLA

ARTHUR P. SUBLETT, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KINGWOOD MINING COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 09/24/2021
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.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-05239) rendered on a subsequent claim[1] filed on October 2, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established forty-one years of underground coal mine employment and 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), and 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). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding Claimant established total disability, and in invoking the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Benefits Review Board to reject Employer's challenge to the constitutionality of the Section 411(c)(4) presumption.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Claimant filed one previous claim. The district director denied it on November 12, 2013 because Claimant failed to establish any element of entitlement. Director's Exhibit 2.

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

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

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 18-21. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id.* Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, U.S. , No. 19-840, 2021 WL 2459255 at *10 (Jun. 17, 2021).

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. 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 the relevant evidence supporting total disability against the 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).

The ALJ found Claimant established total disability based on the medical opinion evidence.[5] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18-19. Employer challenges this finding.[6] Employer's Brief at 5-17. Its arguments, however, have no merit.

Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[5] The ALJ found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(ii) because none of the pulmonary function or arterial blood gas studies produced qualifying results. Decision and Order at 10-12. She further found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 9 n.9.

[6] Employer also raises arguments relevant to the ALJ's consideration of the pulmonary function and arterial blood gas testing. Employer's Brief at 9-11. As the ALJ found this evidence does not establish total disability, Employer has not explained how the

The ALJ first addressed the exertional requirements of Claimant's usual coal mine employment as "a safety supervisor/safety foreman," finding it required "heavy labor." Decision and Order at 5-6. She then weighed the medical opinions of Drs. Celko, Krefft, Sood, and Basheda that Claimant is totally disabled by a respiratory or pulmonary impairment, and Dr. Zaldivar's opinion that he is not. Decision and Order at 12-19; Director's Exhibit 14; Claimant's Exhibits 3, 3a, 5, 5a; Employer's Exhibits 1-2, 7-8. She found the opinions of Drs. Celko, Krefft, Sood, and Basheda well-reasoned and documented, and Dr. Zaldivar's opinion equivocal. Decision and Order at 18-19.

We first reject Employer's argument that the ALJ erred in finding Claimant's usual coal mine employment required heavy labor. Employer's Brief at 5-9.

Claimant testified his most recent coal mine employment involved working as a safety and section foreman. Hearing Tr. at 18-19. He worked in the office only two hours a day; for the remainder of the day he performed any tasks he was assigned, including daily physical labor. *Id*. at 18-20. He inspected the mine for safety violations, retrieved and carried necessary equipment and supplies to the site, and assisted the crew with correcting or repairing hazardous conditions. *Id*. at 21, 45-46. His job involved repair work, including: putting in posts or setting steel beams in place to support a "bad top"; repairing roof falls; setting timbers to make the escape ways safe; correcting a lack of air; fixing a high voltage issue; and rerouting safety lines. *Id*. at 20-21, 23. He walked extensively on a daily basis, usually for up to six or seven miles on uneven terrain in the mine each day. *Id*. at 22. Ultimately, Claimant described his last coal mine job as requiring "heavy labor." *Id*. at 23.

Substantial evidence supports the ALJ's finding. Decision and Order at 5-6; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion). As noted, Claimant described his daily tasks and specifically testified his usual coal mine employment required heavy labor. Hearing Tr. at 23. The ALJ permissibly found Claimant's testimony credible.[7] *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663,

errors it alleges would have made a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[7] The ALJ also cited a September 21, 2017 employment form on which Claimant stated his job required him to stand for eight hours a day, lift twenty to eighty pound loads, and carry the loads twenty to two-hundred feet up to fifteen times per day. Decision and Order at 5-6. Employer argues the ALJ erred in failing to discuss evidence that conflicts with this form. Employer's Brief at 6-9. It specifically alleges Claimant stated on a 2013 employment form that his job only required him to lift forty pounds, not up to eighty

670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order at 5-6.

In challenging the ALJ's finding, Employer argues Claimant's testimony "describes intermittent moderate and perhaps some heavy tasks," but not "continuous heavy work." Employer's Brief at 7-8. In establishing the exertional requirements of a miner's usual coal mine employment, however, an ALJ must determine the exertional requirements of the most difficult job the miner performed. *See Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991). If Claimant's usual coal mine employment required "some heavy tasks," as Employer concedes, it requires heavy work. Employer's Brief at 9-10; *see Eagle*, 943 F.2d at 512 n.4. We therefore reject Employer's argument and affirm the ALJ's finding that Claimant's usual coal mine work required heavy labor. Decision and Order at 6.

Employer next argues the ALJ erred in weighing the medical opinions. Employer's Brief at 12-17. We first reject its argument that she erred in finding Dr. Basheda's opinion supports the conclusion that Claimant is totally disabled. Employer's Brief at 12-13. Dr. Basheda applied the *AMA Guides to the Evaluation of Permanent Impairment* to assess Claimant's pulmonary impairment and, based on the values obtained on a July 18, 2018 pulmonary function study, diagnosed Claimant with "a Class II (10-25%) impairment." Employer's Exhibit 2. He opined that while this level of impairment would not prevent Claimant from performing "non-exertional work," it would prevent him from performing "exertional work." Employer's Exhibits 2, 8 at 28-29. In light of her finding that Claimant's usual coal mine job "involved heavy labor," the ALJ rationally found Dr. Basheda's opinion supports a finding of total disability. Decision and Order at 18-19; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997). As Employer does not challenge the ALJ's finding that Dr. Basheda's opinion is reasoned and

---

pounds as he alleged in 2017. *Id.* It also argues Claimant described his job to Dr. Celko and did not specify lifting up to eighty pounds. *Id.* Employer does not explain, however, how Claimant's 2013 employment form and Dr. Celko's description of his job duties undermine the ALJ's findings, other than a general assertion that it is not, or did not "always require," heavy labor. Because the ALJ rationally found Claimant's usual coal mine work required "heavy labor" based on his credible hearing testimony, Decision and Order at 5-6, any error she made by not addressing this evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

documented, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-19.

The ALJ also did not err in weighing the opinions of Drs. Celko, Krefft, and Sood. Dr. Celko opined Claimant cannot perform his usual coal mine work based on pulmonary function testing demonstrating a moderate obstructive ventilatory impairment and a mild reduction in diffusing capacity, and blood gas testing evidencing hypoxemia with exercise. Director's Exhibit 14. Dr. Krefft opined pre-bronchodilator pulmonary function studies demonstrate a moderate obstructive impairment and blood gas studies reveal "substantial" exertional hypoxemia that would cause "exacerbations and likely accelerated lung function decline," thus preventing Claimant from performing his previous coal mine work. Claimant's Exhibits 5, 5a. Dr. Sood diagnosed Claimant with a "Class II [AMA] impairment" based on "his most affected test parameter of diffusing capacity measurement on July 18, 2018 of 61% predicted," and opined Claimant "would not be able to perform his last coal mining job which included 'constant strenuous labor and hard, heavy lifting.'" Claimant's Exhibit 3. The ALJ permissibly found their opinions well-reasoned and documented.[8] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 18-19.

The ALJ also did not err in weighing Dr. Zaldivar's opinion. In his August 20, 2018 report, Dr. Zaldivar opined that, from a pulmonary standpoint, Claimant is sufficiently impaired from performing his usual coal mine work. Employer's Exhibit 1. During his September 30, 2019 deposition, Dr. Zaldivar attributed Claimant's disability to neuromuscular disease. Employer's Exhibit 7 at 21-22. Dr. Zaldivar concluded he was unsure whether the pulmonary function studies showed disability, but stated "the blood gases certainly will allow [Claimant] to do what he wants to do" and, "unless he were going to do heavy labor on a regular basis . . . he can do the work of an inspector." Employer's Exhibit 7 at 38. Because Employer does not challenge the ALJ's finding that Dr. Zaldivar is equivocal on whether Claimant is totally disabled, we affirm this finding. *Hicks*, 138

[8] We reject Employer's argument that the ALJ was required to discredit the opinions of Drs. Celko, Krefft, and Sood because the pulmonary function and arterial blood gas study evidence did not establish total disability. Employer's Brief at 14-15. Total disability can be established with reasoned medical opinions even in the absence of qualifying pulmonary function or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); *see also 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"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests).

F.3d at 533; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Skrack*, 6 BLR at 1-711; Decision and Order at 18-19.

Employer generally argues Dr. Zaldivar's opinion is more consistent with the objective testing of record, and the doctor fully explained why Drs. Celko, Krefft, and Sood improperly diagnosed total disability. Employer's Brief at 12-17. It argues Drs. Celko, Krefft, and Sood did not adequately explain their opinions or address non-pulmonary causes of Claimant's objective testing. *Id*. Employer's argument amounts to a request to reweigh the evidence, which the Board cannot do.[9] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because they are supported by substantial evidence, we affirm the ALJ's findings that the medical opinions establish total disability, 20 C.F.R. §718.204(b)(2)(iv), and that all the relevant evidence when weighed together establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 19. We therefore affirm her determinations that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309.

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,[10] or that "no part

[9] Moreover, the existence of a respiratory or pulmonary impairment is addressed at 20 C.F.R §718.204(b); its cause is addressed at 20 C.F.R. §718.204(c) or in consideration of whether Employer rebutted the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(a) (if "a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis").

[10] 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). This definition encompasses 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 pneumoconiosis, *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).

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 did not establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Zaldivar and Basheda. Dr. Zaldivar opined Claimant has asthma due to cigarette smoking, and unrelated to coal mine dust exposure. Employer's Exhibits 1, 7. Dr. Basheda opined Claimant has chronic obstructive pulmonary disease due to cigarette smoking and asthma, and unrelated to coal mine dust exposure. Employer's Exhibit 2. The ALJ discredited their opinions as inadequately reasoned and inconsistent with the regulations. Decision and Order at 23-24.

Employer generally argues the ALJ erred in failing to "weigh and resolve all of the relevant information to be considered." Employer's Brief at 18. Regarding the ALJ's discrediting of the opinions of Drs. Zaldivar and Basheda, however, Employer fails to identify any specific error she made in rendering her credibility determinations. *Id*. The Board must limit its review to contentions of error the parties specifically raise. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). As Employer's brief raises no specific allegations of error regarding the ALJ's discrediting of its experts' opinions, we affirm her finding that Employer failed to disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer failed to establish "no part of [Claimant'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); *see* Decision and Order at 25-26. As Employer

[11] Consequently, we need not address Employer's challenge to the ALJ's finding that it failed to establish Claimant does not have clinical pneumoconiosis. Employer's Brief at 17-18.

does not separately challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711. Because Employer did not rebut the Section 411(c)(4) presumption, we affirm the award of benefits.

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