U.S. Department of Labor

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

BRB No. 20-0398 BLA

MICHAEL W. CHONCEK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	
	)	
and	)	
	)	
CONSOL ENERGY, INC.	)	DATE ISSUED: 09/16/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05921) rendered on a claim filed on April 20, 2018, pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 21.83 years of underground coal mine employment, based on the parties' stipulation, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4)(2018). He further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[2] Employer further argues he erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (Director), filed a limited response urging rejection of Employer's argument that the ALJ erroneously failed to consider an x-ray reading.

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] 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 21.83 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5, 7; Employer's Brief at 4.

accordance with applicable law.[3] 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).

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 found Claimant established total disability based on the medical opinions and when weighing the evidence as a whole.[4] Decision and Order at 24. The ALJ considered the opinions of Drs. Celko, Sood, Krefft, Rosenberg, and Basheda. Decision and Order at 21-24. Drs. Celko, Sood, and Krefft opined Claimant has a totally disabling respiratory impairment, while Drs. Rosenberg and Basheda opined he does not. Director's Exhibits 12, 17; Claimant's Exhibits 3, 4, 4a, 6, 6a; Employer's Exhibits 2, 4-7. The ALJ found the opinions of Drs. Celko, Sood, and Krefft well-documented and well-reasoned, but found the opinions of Drs. Rosenberg and Basheda not well-reasoned or persuasive.

Employer generally contends the ALJ erred in finding Claimant totally disabled because a preponderance of the pulmonary function and arterial blood gas studies are non-qualifying. Employer's Brief at 15-19. This argument lacks merit. As the ALJ correctly noted, the regulations specifically provide that even where the pulmonary function studies and blood gas studies are non-qualifying, "total disability 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

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] The ALJ found the pulmonary function studies and arterial blood gas studies did not support total disability, 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 19-20.

condition prevents . . . [him] from" performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20.

Employer further contends the ALJ erred in crediting the opinions of Drs. Celko, Sood, and Krefft because they "solely rely on" the August 7, 2018 arterial blood gas study showing oxygen desaturation with exercise to support their conclusions that Claimant is totally disabled. Employer's Brief at 19. It argues the ALJ should have credited the conflicting opinions of Drs. Basheda and Rosenberg, whose opinions it contends are better supported. *Id.* We disagree.

As the trier-of-fact, the ALJ has broad authority to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). As the ALJ noted, Drs. Celko, Sood, and Krefft explained their opinions, specifically discussing Claimant's elevated alveolar arterial gradient and reduced oxygen diffusion with exercise.[5] Decision and Order at 21, 23; Director's Exhibits 12, 17; Claimant's Exhibits 4, 4a, 6, 6a. The ALJ concluded their opinions "reflect the diagnostic testing data contained in the record." Decision and Order at 23. In contrast, he found the opinions of Drs. Basheda and Rosenberg not well-reasoned because they are conditional in nature. *Id.* at 23-24; Employer's Exhibits 2 at 15, 7 at 24; Employer's arguments ignore the objective evidence that the ALJ cited to as documentation for the opinions he credited and amount to 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); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20

[5] Dr. Celko opined Claimant is totally disabled due to his elevated alveolar arterial (A-a) gradient. Director's Exhibit 12 at 1. He further explained that while Claimant's arterial blood gas study did not meet the Department of Labor's standard for disability, his oxygen desaturation with exercise demonstrates he would be unable to perform his last coal mine employment. *Id.* at 1-2; Director's Exhibit 17. Dr. Sood explained Claimant would be unable to perform his last coal mining job as his A-a gradient was abnormally elevated, his oxygenation decreased with exercise, and his peak oxygen consumption during a July 23, 2019 six minute walk test would be inadequate to allow him to perform heavy physical labor. Claimant's Exhibit 4 at 5-9; 4a at 2. Dr. Krefft explained Claimant would be unable to perform his last coal mining job given a gas exchange abnormality at rest that worsens with exercise, a decrease in diffusion capacity, and the desaturation exhibited in the six minute walk test. Claimant's Exhibit 6 at 5-7; Claimant's Exhibit 6a at 2-4; Decision and Order at 23.

(1988). We thus affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(iv).

Employer raises no further challenge to the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b). Thus, because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 24.

Rebuttal of 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,[6] or that "no 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

We first reject Employer's argument that the ALJ erred in finding the x-ray evidence insufficient to rebut the presumption of clinical pneumoconiosis. Employer's Brief at 5-9.

The ALJ considered seven interpretations of three x-rays taken on June 21, 2018, June 12, 2019, and July 23, 2019. Decision and Order at 10-11. All the physicians who read these x-rays are dually-qualified B readers and Board-certified radiologists. Director's Exhibits 12, 18; Claimant's Exhibit 9; Employer's Exhibits 1, 3.

Drs. DePonte and Smith read the June 21, 2018 x-ray as positive for clinical pneumoconiosis, but Dr. Simone read it as negative for the disease. Director's Exhibits 12, 18; Employer's Exhibit 1. Dr. Alexander read the June 12, 2019 x-ray as positive for clinical pneumoconiosis, but Dr. Meyer read it as negative for the disease. Claimant's

[6] "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).

Exhibit 8; Employer's Exhibit 3. Dr. Smith read the July 23, 2019 x-ray as positive for clinical pneumoconiosis, but Dr. Meyer read it as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 8. Noting the June 21, 2018 x-ray was read as positive for clinical pneumoconiosis by two physicians and negative by one, the ALJ found this x-ray positive for clinical pneumoconiosis. Decision and Order at 11. Because the June 12, 2019 and July 23, 2019 x-rays were both read as positive by one physician and negative by another, he found the readings of these x-rays in equipoise. *Id.* Thus, because the record contains one positive x-ray and the readings of two in equipoise, the ALJ found the x-ray evidence does not rebut the presumption that Claimant has clinical pneumoconiosis. *Id.*

Employer argues the ALJ erred in evaluating the x-ray evidence because he did not consider Dr. Meyer's reading of the June 21, 2018 x-ray indicating the x-ray was unreadable.[7] Employer's Brief at 5, *citing* Director's Exhibit 20. The Director responds, noting Employer did not designate Dr. Meyer's reading of the June 21, 2018 x-ray as rebuttal evidence, and therefore consideration of this x-ray interpretation would have exceeded the evidentiary limitations. Director's Brief at 2-3.

The ALJ noted in his summary of the x-ray evidence that the x-rays he considered were "in accordance with the parties' Black Lung Evidence Summary Forms." Decision and Order at 10. As the Director accurately indicates, Employer did not designate Dr. Meyer's reading of the June 21, 2018 x-ray as a rebuttal or affirmative reading.[8] *See* Employer's Evidence Summary Form at 2 (admitted as ALJ Exhibit 3); Hearing Transcript at 6; Director's Brief at 2. Because Employer designated Employer's Exhibit 1, Dr. Simone's February 17, 2019 reading of the June 21, 2018 x-ray, as its rebuttal reading on its Evidence Summary Form, it was reasonable for the ALJ to consider Dr. Simone's reading as its rebuttal reading. Moreover, the Director correctly notes consideration of Drs.

[7] Employer further submits the ALJ failed to consider Dr. DePonte's opinion that the June 21, 2018 x-ray was "overexposed and not suitable for interpretation." Employer's Brief at 8. Employer mischaracterizes the opinion of Dr. DePonte. While she indicated the film quality was "3" and noted it was "overexposed," she did not mark the x-ray as "U/R" and found the x-ray of sufficient quality to provide a reading of 1/1. Director's Exhibit 12. The regulations do not require an x-ray be of optimal quality; instead, it must only be of "suitable quality for proper classification of pneumoconiosis." 20 C.F.R. § 718.102(a). We thus reject Employer's allegation of error.

[8] While Employer referred to Employer's Exhibit 1 as an x-ray reading by Dr. Meyer at the hearing (Hearing Transcript at 9), Dr. Simone's reading of the June 21, 2019 x-ray is Employer's Exhibit 1 in the documentary record; Dr. Meyer's reading of the same x-ray is identified as Director's Exhibit 20.

Meyer's and Simone's readings of the June 21, 2018 x-ray would exceed the evidentiary limitations, which permit each party to submit only one x-ray in rebuttal of the DOL x-ray and two affirmative x-ray readings.[9] 20 C.F.R. §725.414(a)(3)(i)-(ii). Finally, as the Director submits, Employer made no argument before the ALJ or this Board that good cause existed to exceed the evidentiary limitations and admit and consider Dr. Meyer's reading of the June 21, 2018 x-ray. *See* 20 C.F.R. §725.456(b)(1); *Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004); Director's Brief at 2. We thus identify no error in the ALJ not considering Dr. Meyer's reading of the June 21, 2018 x-ray.[10]

We thus affirm the ALJ's finding that the x-ray evidence fails to rebut the presence of clinical pneumoconiosis as supported by substantial evidence. As Employer raises no additional arguments regarding the rebuttal of clinical pneumoconiosis, we further affirm the ALJ's finding that Employer failed to rebut the presumption of clinical pneumoconiosis. Decision and Order at 15. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Nonetheless, we address Employer's arguments regarding legal pneumoconiosis, as they are relevant to disability causation.

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 Co.*, 25 BLR 1-149, 159 (2015).

The ALJ considered the opinions of Drs. Krefft, Celko, and Sood that Claimant has legal pneumoconiosis,[11] and the opinions of Drs. Basheda and Rosenberg that he does not. Director's Exhibits 12, 17; Claimant's Exhibits 4, 4a, 6, 6a; Employer's Exhibits 2, 4, 6-7. Dr. Basheda diagnosed mild restriction, secondary to obesity, and intermittent asthma unrelated to coal mine dust exposure. Employer's Exhibit 2 at 14-15; 6 at 13-14, 17, 19-

[9] Employer designated Employer's Exhibit 3 and Employer's Exhibit 8 as its two affirmative x-ray readings. Employer's Evidence Summary Form at 2.

[10] We thus reject Employer's related argument that the ALJ erred in discrediting the opinions of Drs. Basheda and Rosenberg because, having considered Dr. Meyer's interpretation of the June 21, 2018 x-ray, their opinions were not based on the "totality of the x-ray evidence." Employer's Brief at 8; *see* Decision and Order at 15.

[11] The ALJ found the opinions of Drs. Krefft, Celko, and Sood do not aid Employer in rebutting the existence of legal pneumoconiosis. Decision and Order at 27.

20. Dr. Rosenberg diagnosed obesity and "hyperactive airways" or asthma unrelated to coal mine dust exposure. Employer's Exhibit 4 at 5-6; Employer's Exhibit 7 at 16-19; 22-23. The ALJ discounted the opinions of Drs. Basheda and Rosenberg because the preamble to the revised regulations finds that chronic obstructive pulmonary disease (COPD), including COPD in the form of asthma, "constitutes legal coal workers' pneumoconiosis and directly links asthma to coal mine dust exposure." Decision and Order at 16.

Employer contends the ALJ erred in summarily rejecting the opinions of Drs. Basheda and Rosenberg based on the preamble to the revised regulations and in failing to consider their specific explanations for why Claimant's asthma is not legal pneumoconiosis.[12] Employer's Brief at 9-12. We agree.

The ALJ's only rationale for discrediting Drs. Basheda's and Rosenberg's opinions is because the preamble "finds that COPD (including in the form of chronic bronchitis and asthma) constitutes legal coal workers' pneumoconiosis and directly links asthma to coal mine dust exposure." Decision and Order at 16, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). The ALJ appears to conclude, erroneously, that COPD, including asthma, must be attributable to coal mine dust inhalation and therefore Claimant's asthma constitutes legal pneumoconiosis. Decision and Order at 16; Employer's Brief at 10-12. Contrary to the ALJ's finding, whether a particular miner's COPD/asthma is due to coal mine dust exposure must be determined on a case-by-case basis in light of his consideration of the evidence. *See* 65 Fed. Reg. at 79,938; *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012). The ALJ failed to properly determine, based on the specific facts of this case, whether Employer's experts provided reasoned and documented opinions establishing that coal mine dust exposure did not significantly contribute to, or substantially aggravate, Claimant's asthma, or whether there were other deficiencies in their opinions, beyond his reference to the preamble. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354-55 (3d Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Because the ALJ did not adequately address the specific rationales for the opinions of Drs. Basheda and Rosenberg on legal pneumoconiosis and explain the weight he accorded them, his findings do not satisfy the requirements of the Administrative Procedure

[12] Employer also asserts the opinions of Drs. Celko, Krefft, and Sood are not credible because, *inter alia*, they are internally contradictory and based on Claimant's self-reported symptoms. Employer's Brief at 12-14. We decline to address these contentions as premature.

Act (APA).[13] *See Wojtowicz*, 12 BLR at 1-165; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). We therefore vacate the ALJ's determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

Total Disability Causation

The ALJ further found Employer failed to establish that no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27. He discredited the opinions of Drs. Basheda and Rosenberg based on the same reasoning he provided for undermining their opinions regarding legal pneumoconiosis. Decision and Order at 27. Because we have vacated the ALJ's findings on legal pneumoconiosis, we also vacate his similar, dependent determination that Employer did not establish Claimant's respiratory disability is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, we vacate the award of benefits.

On remand, the ALJ must reconsider whether Employer disproved the existence of legal pneumoconiosis by affirmatively establishing 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*, 25 BLR at 1-155 n.8. In doing so, he must fully address Drs. Basheda's and Rosenberg's opinions as to why Claimant's asthma does not constitute legal pneumoconiosis. If he finds the opinions of Drs. Basheda and Rosenberg would rebut the presumption of legal pneumoconiosis, if considered in isolation, he must further weigh the credibility of their opinions against those of Drs. Celko, Krefft, and Sood.

[13] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires the ALJ to set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

[14] The ALJ incorrectly stated "that employer 'must rule out the miner's coal mine employment as a contributing cause of the totally disabling respiratory or pulmonary impairment.'" Decision and Order at 24-25, *quoting* 77 Fed. Reg. 19,456, 19,463 (Mar. 30, 2012). The correct standard is whether Employer disproved disability causation by showing that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

In evaluating the medical opinions on remand, the ALJ should address the physicians' explanations for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Balsavage*, 295 F.3d at 396-97; *Witmer*, 111 F.3d at 354-55. Further, he must consider all the relevant evidence in reaching his determinations. *See McCune*, 6 BLR at 1-998. He must also set forth his findings in detail, including the underlying rationale for his decision as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

Because we affirm the ALJ's determination that Employer failed to rebut the presumption of clinical pneumoconiosis, Decision and Order at 15, Employer is precluded from rebutting the finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). The ALJ must therefore determine whether Employer has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible evidence that "no part of [Claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge