U.S. Department of Labor

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

BRB No. 20-0486 BLA

JAMES MENEAR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL COAL-WEST VIRGINIA, LLC	)	
	)	DATE ISSUED: 09/23/2021
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 Drew A. Swank, 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.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-06057) rendered on a claim filed on October 26, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-one years of surface coal mine employment, with at least fifteen years in conditions substantially similar to those in an underground mine, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined 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 found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and thus invoked the Section 411(c)(4) presumption.[2] It also 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, has not 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 accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

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 a finding of

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[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 at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 7, 28.

[3] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3, 4.

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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the pulmonary function study, blood gas study, and medical opinion evidence.[4] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 18-24. He further found all of the relevant evidence weighed together establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 24

Relevant to Employer's appeal, the ALJ found Drs. Sood, Krefft, and Fino diagnosed Claimant with a disabling pulmonary impairment, and he determined their opinions are well-reasoned and documented. Decision and Order 20-23. Although Dr. Jaworksi also opined Claimant is totally disabled, the ALJ assigned his opinion reduced weight because he found it is not well-reasoned. *Id.* The ALJ found Dr. Schwarzenberg opined Claimant is not totally disabled by a respiratory or pulmonary impairment, but determined his opinion is contrary to the weight of the objective testing. *Id.* Thus the ALJ rejected his opinion. *Id.*

Employer argues the ALJ erred in considering the opinions of Drs. Fino and Schwarzenberg.[5] Employer's Brief at 20-22. We disagree.

There is no merit in Employer's argument the ALJ erred in finding Dr. Fino's opinion supports a finding of total pulmonary disability. Employer's Brief at 20-22. Dr. Fino stated Claimant "*is disabled*, but his disability is not due to primary lung disease; it is

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[4] The ALJ determined there is no evidence of cor pulmonale with right-sided congestive heart failure, and thus Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 20. Further, because Employer does not challenge the ALJ's findings that the pulmonary function study and arterial blood gas study evidence establish total disability, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 18-20.

[5] As Employer does not challenge the ALJ's findings that the medical opinions of Drs. Sood and Krefft diagnosing total disability are well-reasoned and documented, we affirm these findings. *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); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23.

due to the adverse effects of obesity on his lungs," and "because of his obesity, *his lungs cannot function properly* and therefore *he is disabled from a pulmonary standpoint*." Employer's Exhibit 2 at 7 (emphasis added). Employer argues the opinion does not support total disability because the doctor stated Claimant's pulmonary impairment "arose from a combination of obesity, edema of the lower extremities, and fluid retention" and not any intrinsic lung condition. Employer's Brief at 21, *citing* Employer's Exhibit 2.

Employer conflates the issues of total disability and causation. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). As Employer does not dispute the ALJ's finding that Dr. Fino's opinion is reasoned and documented, we affirm it. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; *Skrack*, 6 BLR at 1-711; Decision and Order at 23.

We also find no merit in Employer's assertion the ALJ erred in discrediting Dr. Schwarzenberg's opinion. Employer's Brief at 20-22. Dr. Schwarzenberg opined Claimant's lung examination was normal and that Claimant is not totally disabled by a respiratory or pulmonary impairment. Employer's Exhibit 5 at 8-9, 11. The ALJ permissibly discredited Dr. Schwarzenberg's opinion because it is "contradicted by the qualifying diagnostic testing results and therefore not well-reasoned." Decision and Order at 23; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40.

Because they are supported by substantial evidence, we affirm the ALJ's findings the medical opinions establish total disability, 20 C.F.R. §718.204(b)(2)(iv), and that all the relevant evidence 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 24. We therefore affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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[6] nor clinical pneumoconiosis,[7] 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.[8]

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).

Employer relied on Dr. Fino's medical opinion and deposition testimony to rebut the presumption of legal pneumoconiosis. Employer's Exhibits 2, 3. Dr. Fino opined Claimant has a restrictive impairment based on reduced FEV1 and FVC values on pulmonary function testing. Employer's Exhibit 2 at 5-6; 3 at 10-11. He also diagnosed hypoxemia and hypercarbia based on blood gas testing. *Id.* He opined these impairments are due to the "adverse effects of obesity on [Claimant's] lungs" and not any intrinsic lung disease caused by coal mine dust exposure. Employer's Exhibit 2 at 6-7. The ALJ found Dr. Fino's opinion unpersuasive. Decision and Order at 15-16.

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[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).

[7] "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).

[8] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 15.

We first reject Employer's argument that the ALJ applied an improper legal standard with respect to rebuttal of the presumption of legal pneumoconiosis. Employer's Brief at 6-8. Insofar as Dr. Fino diagnosed Claimant with a restrictive impairment based on pulmonary function testing and hypoxemia/hypercarbia based on blood gas testing, the ALJ correctly noted Dr. Fino must persuasively explain why these impairments are not significantly related to, or substantially aggravated by, dust exposure in coal mine employment.[9] 20 C.F.R. §§718.201(b), 718.305(d)(1)(i); Decision and Order at 8, 15. Moreover, the ALJ did not reject Dr. Fino's opinion based on failure to meet a heightened legal standard; he found the physician's opinion inadequately reasoned. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (ALJ may accord less weight to a physician who fails to adequately explain why a miner's lung disease "was not due at least in part to his coal dust exposure").

We also reject Employer's argument that the ALJ discredited Dr. Fino's opinion based on invalid reasons. Employer's Brief at 11-16. Dr. Fino opined Claimant does not have legal pneumoconiosis because the amount of pulmonary fibrosis, as demonstrated on x-rays, is insufficient to cause his restriction. Employer's Exhibit 3 at 11. The ALJ permissibly rejected this argument because the regulations provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis.[10] *See* 20 C.F.R. §§718.202(a)(4), 718.202(b); *Looney*, 678 F.3d at 313

[9] Employer argues the ALJ erred in failing to address the deposition testimony of Claimant's treating physician, Dr. Schwarzenberg, on the issue of rebuttal of legal pneumoconiosis. It asserts the ALJ should have accorded controlling weight to the opinion based on the doctor's status as Claimant's treating physician. Employer's Brief at 8-11. We consider the alleged error to be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Dr. Schwarzenberg diagnosed Claimant with chronic obstructive pulmonary disease caused by his smoking history, but never stated if this disease is significantly related to, or substantially aggravated by, coal mine dust exposure. Employer's Exhibit 5. Thus, even if Employer is correct that his opinion "fails to support a finding of legal pneumoconiosis," it is insufficient to meet Employer's burden to *rebut the presumption* of legal pneumoconiosis. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017) (medical opinion that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause" not credible); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

[10] Thus, contrary to Employer's argument, the ALJ did not reject Dr. Fino's opinion because the physician failed to diagnose an obstructive impairment; he discredited Dr.

(regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009) (affirming the discrediting of a physician's opinion because the ALJ "fairly read" it as requiring radiographic evidence of clinical evidence before he would diagnose legal pneumoconiosis).

Employer generally argues Dr. Fino's opinion is well-reasoned and documented on the issue of legal pneumoconiosis. Employer's Brief at 11-16. As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses, and to assign those opinions appropriate weight. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Westmoreland Coal Co. v. Cochran,* 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in discrediting Dr. Fino's opinion, we affirm his finding that Employer did not disprove legal pneumoconiosis.[11] 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); Decision and Order at 16. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20

Fino's opinion because the physician failed to persuasively explain why the restrictive impairment he diagnosed is not legal pneumoconiosis.

[11] Because the ALJ provided a valid reason for discrediting Dr. Fino's opinion, any error in discrediting his opinion for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address Employer's remaining arguments regarding the weight accorded to his opinion. Employer's Brief at 8-17. Further, because Employer has the burden of proof and we have affirmed the ALJ's rejection of its medical expert, we need not address Employer's contention that Drs. Krefft's and Sood's medical opinions that Claimant has legal pneumoconiosis are not credible. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 17-20.

C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24-27. He rationally discounted Dr. Fino's disability causation opinion because the physician did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 24-27. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and 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