U.S. Department of Labor

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

BRB No. 21-0168 BLA

BURRELL N. CULBERTSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 9/27/2022
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2015-BLA-05862) rendered on a subsequent claim

filed on March 18, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ[2] accepted the parties' stipulation that Claimant had 26.39 years of underground coal mine employment and found he established 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),[3] and invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

[1] On August 28, 1995, the district director denied Claimant's prior claim for failure to establish any element of entitlement. Director's Exhibit 1.

[2] ALJ Morris D. Davis previously issued a Decision and Order Awarding Benefits on November 22, 2017. Pursuant to Employer's appeal, the Benefits Review Board remanded the case to ALJ Davis, directing him to reconsider the substantive and procedural actions he took before the Secretary of Labor ratified his appointment on December 21, 2017, and to issue a decision accordingly. *Culbertson v. Clinchfield Coal Co.*, BRB No. 18-0140 BLA (June 6, 2018) (Order) (unpub.). On remand, ALJ Davis issued an Order vacating the award of benefits and returning the claim to the docketing office for reassignment for a new hearing before a different, properly appointed ALJ in light of the intervening decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). ALJ Applewhite was then assigned the case.

[3] Where 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 "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). Consequently, Claimant had to submit evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id.*; Director's Exhibit 1.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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.

On appeal, Employer argues the ALJ erred in finding the evidence establishes total disability and therefore erred in finding Claimant invoked the Section 411(c)(4) presumption. Employer further argues the ALJ erred in finding it failed to rebut the presumption.[5] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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.[6] 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

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 pulmonary function studies and medical opinions.[7] *See* 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 8.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies conducted on February 29, 2014, July 16, 2014, December 17, 2014, and March 26, 2019. Decision and Order at 5;

[5] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant has 26.39 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.

[6] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 17.

[7] The ALJ found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 6.

Director's Exhibits 12-14; Employer's Exhibit 6. Because all were qualifying,[8] the ALJ found they established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 5.

Employer argues the ALJ failed to consider Dr. Sargent's opinion that the March 26, 2019 post-bronchodilator pulmonary function study is not disabling after taking into account Claimant's age.[9] Employer's Brief at 5-9. We disagree.

After reviewing the March 26, 2019 pulmonary function study, Dr. Sargent opined the post-bronchodilator study is not qualifying when taking into consideration Claimant's age of 84. Employer's Exhibits 6, 11. He concluded Claimant is not totally disabled based upon that study. Employer's Exhibit 11 at 17-18. The ALJ permissibly found that, even if she accepted the physician's conclusions, the single post-bronchodilator result was not an adequate assessment of Claimant's respiratory impairment. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [though] it may aid in determining the presence or absence of pneumoconiosis."); Decision and Order at 5. Thus, contrary to Employer's argument, the ALJ did not "fail to weigh or consider" Dr. Sargent's opinion. Employer's Brief at 5. She permissibly found it did not call into question the four uncontradicted, qualifying pre-bronchodilator studies. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 5.

Because it is supported by substantial evidence, we affirm the ALJ's determination that the pulmonary function studies establish total disability.[10] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 5.

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[8] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[9] The table values at 20 C.F.R. Part 718, Appendix B do not go beyond seventy-one years of age. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008) (absent contrary probative evidence, the values for a seventy-one-year-old miner listed in Appendix B of the regulations should be used to determine if miners over the age of seventy-one qualify as totally disabled). At the time Claimant performed the March 26, 2019 pulmonary function study, he was eighty-four years old.

[10] Employer argues "[t]he ALJ in determining the claimant's height failed to properly take into account Dr. Sargent's opinion, which constituted contrary probative evidence." Employer's Brief at 5. While it is unclear how Employer believes Dr. Sargent's

Medical Opinions

The ALJ next considered the medical opinions of Drs. Ajjarapu, Fino, and Sargent. Decision and Order at 6-8. Drs. Ajjarapu and Fino opined Claimant is totally disabled from a respiratory standpoint, while Dr. Sargent opined he is not. Director's Exhibits 15, 17; Employer's Exhibits 3, 6, 10, 11. The ALJ credited the opinions of Drs. Ajjarapu and Fino as supported by the objective testing. Decision and Order at 8. Conversely, she found Dr. Sargent's opinion was not adequately explained. *Id.* The ALJ therefore found the medical opinion evidence establishes total disability. *Id.*; *see* 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the ALJ should have found Dr. Ajjarapu's opinion is not adequately documented because it was based solely on her own examination of Claimant.[11] Employer's Brief at 10-13. Contrary to Employer's arguments, an ALJ is not required to discredit a physician who did not review all of a miner's medical records if the opinion is otherwise well reasoned, well documented, and based on her own examination of the miner and objective test results. *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). Moreover, the ALJ accurately noted Dr. Ajjarapu's opinion was based upon Claimant's occupational, smoking, family, and medical histories; his symptoms; a physical examination; blood gas studies; pulmonary function studies; and a review of Dr. Fino's examination of Claimant. Decision and Order at 6; Director's Exhibit 15. The ALJ permissibly found Dr. Ajjarapu's opinion supported by the objective testing and entitled to probative weight. *See Hicks*, 138 F.3d at 528; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Church*, 20 BLR at 1-13; *Hess*, 7 BLR at 1-296; Decision and Order at 6.

Nor is there any merit to Employer's argument that the ALJ erred in discrediting Dr. Sargent's opinion. Employer's Brief at 11-12. The ALJ accurately noted Dr. Sargent opined Claimant is not disabled based upon his March 26, 2019 post-bronchodilator pulmonary function study and extrapolated disability standards for an eighty-four year old man. Decision and Order at 8; Employer's Exhibits 6, 11. As discussed above, the ALJ permissibly found his opinion did not call into question the qualifying pre-bronchodilator

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opinion would affect the ALJ's determination of Claimant's height, we reject its argument. The ALJ permissibly determined an average height of 65.75 inches based on Claimant's reported heights at each of the examinations, and rounded the value up to 66.1 inches to conform to the nearest greater height appearing in the tables set forth in Appendix B. *Meade*, 24 BLR at 1-44; Decision and Order at 5 n.7.

[11] We affirm the ALJ's crediting of Dr. Fino's opinion that Claimant is totally disabled as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 8.

pulmonary function study testing. *See* 45 Fed. Reg. at 13,682; Decision and Order at 5. She thus rationally found Dr. Sargent's opinion not well-reasoned to the extent he concluded the allegedly non-qualifying post-bronchodilator study demonstrates Claimant is not totally disabled, contrary to her determination that the pulmonary function studies establish total disability. *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 8.

Employer's arguments amount to a request for the Board 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). Consequently, we affirm the ALJ's determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 8. As Employer raises no other challenges to the ALJ's weighing of the evidence, we affirm her determination that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 8. 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 8.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[12] 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 did not establish rebuttal by either method. Decision and Order at 12.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must demonstrate 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),

[12] "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).

718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the medical opinions of Drs. Fino and Sargent.[13] Decision and Order at 10. Dr. Fino opined Claimant does not have legal pneumoconiosis, but has emphysema and severe disabling pulmonary disease due to cigarette smoking. Director's Exhibit 17; Employer's Exhibits 3, 10. Dr. Sargent similarly opined Claimant has obstructive pulmonary disease due to cigarette smoking. Employer's Exhibits 6, 11. The ALJ found neither opinion sufficiently reasoned to disprove legal pneumoconiosis. Decision and Order at 12.

Employer contends the ALJ applied an improper legal standard and required "mere proof of a pulmonary impairment and diagnosis of a chronic lung disease" to essentially create an irrebuttable presumption of legal pneumoconiosis. Employer's Brief at 24. We disagree.

Although the ALJ initially offered a conclusory determination that Employer did not rebut the presumption of legal pneumoconiosis because Claimant established he has the disease, she subsequently analyzed Dr. Fino's and Dr. Sargent's rationales for excluding coal mine dust as a cause of his disabling obstructive impairment.[14] Decision and Order at 11-12. In so doing, she did not require Employer to "rule out" coal mine dust as a cause of Claimant's impairments; she found their opinions inadequately reasoned and thus not credible to rebut the presumption Claimant has legal pneumoconiosis.[15] *Id.*

[13] The ALJ also considered Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis in the form of chronic bronchitis due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 15; Decision and Order at 12 (according the opinion "some weight").

[14] The ALJ stated, "The overall medical evidence establishes that the Claimant suffers from chronic bronchitis or emphysema, which are chronic respiratory/pulmonary impairments. Accordingly, I find that the Claimant has established legal pneumoconiosis. Therefore, I find that the Employer has not rebutted the presumption of legal pneumoconiosis." Decision and Order at 11.

[15] In purporting to discuss the second method of rebuttal, disability causation, the ALJ framed the issue as whether Employer rebutted coal mine employment as a cause of Claimant's impairment. Decision and Order at 11. Her analysis therein reflects her consideration of whether the physicians credibly explained why Claimant's impairment

Dr. Fino opined Claimant's emphysema and obstructive lung disease are due solely to smoking because cigarette smoking causes more significant declines in lung function than coal mine dust exposure.[16] Decision and Order at 12; Director's Exhibit 17; Employer's Exhibits 3, 10. The ALJ permissibly found this opinion not adequately explained because Dr. Fino failed to address why Claimant's 26.39 years of underground coal mine employment did not aggravate his allegedly smoking related obstructive pulmonary disease. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 12. The ALJ further permissibly found Dr. Fino failed to explain why Claimant's obstructive lung disease was not due to a combination of smoking and coal mine dust exposure. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 12.

The ALJ also accurately noted that Dr. Sargent opined Claimant's obstructive pulmonary disease is due solely to cigarette smoking, despite acknowledging Claimant had sufficient coal mine dust exposure to place him at risk for developing pneumoconiosis.[17] Decision and Order at 12; Employer's Exhibits 6, 11. The ALJ permissibly found his opinion entitled to "lesser weight" because the physician did not address the possible additive nature of coal mine dust exposure and smoking on Claimant's obstructive lung disease. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Stallard*, 876 F.3d at 674; Decision and Order at 12.

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was not significantly related to or substantially aggravated by coal mine dust exposure, i.e., legal pneumoconiosis. *Id.*

[16] Dr. Fino attributed Claimant's impairment to cigarette smoking and not coal mine dust exposure based on his opinion that cigarette smoking is the leading cause of COPD and has a significantly greater impact on lung function than coal mine dust exposure, as well as Claimant's personal smoking history, the lack of clinical pneumoconiosis on x-ray, and the significant reduction in diffusion capacity. Director's Exhibit 13; Employer's Exhibits 3, 10.

[17] Dr. Sargent attributed Claimant's COPD to cigarette smoking and not coal mine dust exposure because his impairment was partially reversible with the administration of bronchodilators and coal mine dust exposure generally results in only a 10% or less loss of lung function when associated with a negative x-ray. Employer's Exhibit 6, 11.

Because the ALJ permissibly discredited Drs. Fino's and Sargent's opinions that Claimant's obstructive lung disease is not due to coal mine dust exposure, we affirm her finding that Employer failed to rebut the presumption that Claimant has legal pneumoconiosis.[18] *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 11. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1).

Disability Causation

The ALJ found the opinions of Drs. Fino and Sargent inadequately reasoned to establish "no part of the [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis." Decision and Order at 11, *citing* 20 C.F.R. §718.305(d)(1)(ii). Employer contends the ALJ failed to provide an adequate analysis of their opinions at disability causation. Employer's Brief at 25-27. Because the ALJ permissibly found Employer did not rebut the presumption that Claimant's totally disabling obstructive impairment *is* legal pneumoconiosis, Employer cannot establish that "no part" of that disability is due to pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505-06 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 12.

Therefore, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); Decision and Order at 11-12.

[18] Because the ALJ permissibly discredited Drs. Fino's and Sargent's opinions, the only opinions supportive of Employer's burden, we need not address its challenges to the ALJ's crediting of Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 25.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge