U.S. Department of Labor

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

BRB No. 21-0322 BLA

JOSEPH SANDERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
J M MINING CONTRACTORS, INCORPORATED	)	
	)	
and	)	
	)	
TRAVELERS INDEMNITY	)	DATE ISSUED: 9/19/2022
	)	
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 Monica Markley, Administrative Law Judge, United States Department of Labor.

Jordan D. Watson (Carr Allison), Birmingham, Alabama, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits (2019-BLA-05002) on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on September 16, 2016.[1]

The ALJ found Claimant established nineteen to twenty 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). She therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.305, 725.309. Further, she found Employer did not rebut the presumption and therefore awarded benefits.

[1] Claimant filed two prior claims. Director's Exhibits 1, 2. He filed his most recent prior claim on April 2, 2010, which the district director denied because he failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 2. Claimant took no further action on that claim. *Id*.

[2] Section 411(c)(4) 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless she 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); *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 the district director denied Claimant's prior claim for failure to establish pneumoconiosis and total disability due to pneumoconiosis, Claimant was required to submit new evidence establishing pneumoconiosis or total disability due to pneumoconiosis in order to obtain review of his subsequent claim on the merits. *See Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White*, 23 BLR at 1-3; Director's Exhibit 2. Claimant may establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by invoking the Section 411(c)(4) presumption. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, 795 (7th Cir. 2013).

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and invoked the Section 411(c)(4) presumption. Employer also argues she erred in finding it did not rebut the presumption and Claimant established a change in an applicable condition of entitlement. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[4]

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).

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

Citing *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), Employer generally 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 11-12. 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*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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

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 qualifying pulmonary function studies, qualifying arterial blood gas studies,[6] evidence of pneumoconiosis and

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

[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 Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 28; Director's Exhibit 5.

[6] 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.

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 medical opinions and in consideration of the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14. Employer asserts the ALJ erred in weighing the medical opinions. We disagree.

The ALJ summarized Claimant's testimony as to the exertional requirements of his last coal mine job and considered the opinions of Drs. Forehand, Goldstein, and Hernandez. Decision and Order at 12-14. Dr. Forehand conducted the Department of Labor's (DOL's) complete pulmonary evaluation of Claimant on December 19, 2016. He diagnosed a "significant" and totally disabling obstructive impairment based on Claimant's shortness of breath, pulmonary function study results, and job duties as set forth on DOL Form CM-913, Description of Coal Mine Work and Other Employment, where Claimant described working as a pinner and having to lift over fifty pounds.[8] Director's Exhibit 17 at 4-5. He concluded Claimant has insufficient respiratory capacity to meet the physical demands of his last coal mining job. *Id.* at 4; *see* Director's Exhibit 36.

Dr. Goldstein examined Claimant on May 25, 2017, and obtained qualifying pre- and post-bronchodilator pulmonary function results and non-qualifying blood gas results. Employer's Exhibit 1 at 1, 3, 11; Director's Exhibit 23. He opined Claimant's pulmonary

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Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The ALJ found Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 11. The ALJ also found Claimant did not establish complicated pneumoconiosis and thus did not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 20 C.F.R. §718.304; *Id.*

[8] Dr. Forehand characterized Claimant's last coal mine job duties as including operating a pinner, operating a scoop, rock dusting, setting timbers and building cribs and brattice which required him to carry timbers and cinder blocks of over fifty pounds, and shoveling belts and ribs. Director's Exhibit 17 at 1, 4.

function results showed a "definite obstructive defect of moderate to severe degree" but opined Claimant is not totally disabled. Employer's Exhibits 1 at 4, 3.

Dr. Hernandez treated Claimant from December 12, 2018, to January 14, 2019, and obtained non-qualifying pre- and post-bronchodilator pulmonary function results on January 9, 2019. Claimant's Exhibit 1; Employer's Exhibit 2. He diagnosed Claimant with dyspnea on exertion, chronic obstructive pulmonary disease and "moderate persistent asthma" but did not opine whether Claimant was totally disabled. Claimant's Exhibit 1 at 2, 4 (unpaginated).

The ALJ credited Dr. Forehand's opinion as well-documented and reasoned, and gave little weight to the opinions of Drs. Goldstein and Hernandez. Decision and Order at 12-13. Thus, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer argues Dr. Forehand's opinion is not adequately documented or reasoned because he relied on a non-qualifying pulmonary function study in diagnosing Claimant as totally disabled, and had an inaccurate understanding of Claimant's last coal mine job duties. Employer's Brief at 3-8. We disagree.

Contrary to Employer's argument, even in the absence of qualifying pulmonary function or arterial blood gas studies, total disability may be established based on a reasoned and documented medical opinion. 20 C.F.R. §718.204(b)(2)(iv); *see 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"); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests). Thus, the ALJ was not required to discredit Dr. Forehand's opinion because he relied on non-qualifying pulmonary function studies.

Employer also contends Dr. Forehand had an inaccurate understanding of the lifting requirements of Claimant's usual coal mine work. Citing portions of Claimant's hearing testimony on cross-examination, Employer alleges Claimant's lifting was limited to three to four pounds, whereas Dr. Forehand incorrectly believed Claimant had to lift fifty pounds. Employer's Brief at 7. However, Claimant's DOL Form CM-913, which he certified as being "true and correct to the best of [his] knowledge" and on which Dr. Forehand relied, identifies his last coal mine job duties as including operating both a pinner and scoop, laying tracks, cleaning rock dust, and lifting over fifty pounds. Director's Exhibit 6. Claimant's testimony that the pins he lifted weighed three to four pounds does not contradict his description of his job duties on Form CM 913. He did not testify that the pins were the heaviest item he was required to lift, or that operating the pinner was his only

job duty. Instead, consistent with his Form CM-913, he stated that in addition to operating the pinner he had to regularly perform other duties like "clean[ing] up and rock dust[ing] and lay[ing] track." Hearing Transcript at 17.

Therefore, the ALJ permissibly found Dr. Forehand's opinion reasoned and documented, and sufficient to establish Claimant has a moderate respiratory impairment precluding him from performing his usual coal mine work. *See Cornett*, 227 F.3d at 577; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (the ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony).

Regarding Employer's expert, the ALJ found Dr. Goldstein's opinion "conclusory" and inadequately explained because he did not address the exertional requirements of Claimant's last coal mine job in concluding Claimant is not totally disabled. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 13. As for Claimant's treating physician, the ALJ found Dr. Hernandez did not offer an opinion as to whether he is totally disabled. Decision and Order at 13; *see* Claimant's Exhibit 1. As Employer raises no specific challenge to these credibility findings, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer's arguments on total disability amount to a request that the Board 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 the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 14.

We therefore affirm the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and therefore established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[9] or that "no part of [his] respiratory or pulmonary total

[9] "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

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 rebutted the presumption that Claimant suffers from clinical pneumoconiosis but did not rebut the presumption that he has legal pneumoconiosis or that no part of his total disability was caused by it. Decision and Order at 14-20.

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 United States Court of Appeals for the Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on Dr. Goldstein's opinion to disprove legal pneumoconiosis.[10] The ALJ accurately noted Dr. Goldstein excluded coal mine dust exposure as a causative factor for Claimant's obstructive respiratory impairment based, in part, on Claimant's x-ray findings. Dr. Goldstein noted Claimant had been out of the mines for twenty years and his disease process had clinically worsened, "in the face of a chest x-ray that has really not changed from the standpoint of the presence of coal workers' pneumoconiosis." Employer's Exhibit 1 at 4. He stated that in persons with a "progressive disease that is at least in part related to coal dust," he would expect progressive findings of clinical

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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).

[10] Because we affirm the ALJ's discrediting of Employer's expert, we need not address Employer's assertion that the ALJ erred in weighing Dr. Forehand's opinion that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); Employer's Brief at 10-11.

pneumoconiosis on x-ray. *Id.* The ALJ permissibly found Dr. Goldstein's opinion inconsistent with the regulations stating that legal pneumoconiosis may be diagnosed "notwithstanding a negative X-ray." 20 C.F.R. §718.202(a)(4), (b); *see* 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); Decision and Order at 16-17.

Dr. Goldstein also excluded a diagnosis of legal pneumoconiosis because Claimant's shortness of breath and pulmonary function abnormalities developed and progressed after he left the mines and was no longer exposed to coal mine dust. Employer's Exhibit 3 at 1. The ALJ again permissibly discounted Dr. Goldstein's opinion as inconsistent with the regulations which recognize that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. 20 C.F.R. §718.201(c); 65 Fed. Reg. at 79,971; *see Sunny Ridge Mining Co., Inc. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491 (6th Cir. 2003); Decision and Order at 17.

Because the ALJ provided valid reasons for discrediting Dr. Goldstein's opinion that Claimant does not have legal pneumoconiosis, we need not address Employer's contention that the ALJ erred in failing to consider additional reasons Dr. Goldstein gave for his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 9-11. As it is supported by substantial evidence, we affirm the ALJ's conclusion that Employer did not disprove the existence of legal pneumoconiosis.[11] Decision and Order at 18. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [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); Decision and Order at 18-20. The ALJ

[11] The ALJ permissibly found evidence submitted with Claimant's current claim is more probative of his condition than evidence submitted in his prior claims. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than medical evidence submitted with a prior claim because of the progressive nature of pneumoconiosis); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982); Decision and Order at 20-21.

permissibly discredited Dr. Goldstein's opinion on the cause of Claimant's pulmonary disability because he did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the disease.[12] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 19. We therefore affirm the ALJ's conclusion that Employer did not rebut the Section 411 (c)(4) presumption by establishing that no part of Claimant's pulmonary disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[12] Dr. Goldstein did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of his conclusion that Claimant does not have the disease.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge