U.S. Department of Labor

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

BRB No. 22-0326 BLA

ALVIN E. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREENWICH COLLIERIES COMPANY	)	
	)	
and	)	
	)	
PENNSYLVANIA MINES CORPORATION c/o SMART CASUALTY CLAIMS	)	DATE ISSUED: 9/28/2023
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Ralph J. Trofino, Johnstown, Pennsylvania, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05956) rendered on a subsequent claim[1] filed on November 18, 2020, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had thirty years of underground coal mine employment and found he has a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption, thereby establishing a change in an applicable condition of entitlement, 20 C.F.R. §725.309,[3] and awarded benefits.

[1] Claimant filed three prior claims but withdrew two, which are therefore considered not to have been filed. *See* 20 C.F.R. §725.306; Director's Exhibits 1, 3. Claimant filed the remaining claim on July 27, 2011. Director's Exhibit 2. That claim was denied on May 4, 2012, because the evidence did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. *Id.*

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018).

[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 also deny the subsequent claim unless he 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); *see 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 Claimant did not establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. Director's Exhibit 2.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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.[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 (1965).

Invocation of the Section 411(c)(4) Presumption - Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). 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 all 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 and the evidence as a whole.[6] Decision and Order at 19-20.

The ALJ considered the medical opinions of Drs. Zlupko and Fino. Director's Exhibits 13, 20, 38. Dr. Zlupko conducted the Department of Labor (DOL) sponsored

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant had thirty years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7; Hearing Transcript at 5, 9.

[5] 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 6.

[6] The ALJ determined the pulmonary function and blood gas studies do not support total disability and there was 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 17-18.

complete pulmonary evaluation of Claimant on January 25, 2021, and obtained non-qualifying pulmonary function and blood gas study results.[7] Director's Exhibit 13. Based on the objective studies, he diagnosed "a mild obstructive ventilatory impairment" and "a low oxygen level, both at rest and with activity." *Id*. at 20. He indicted neither of these impairments "are in the severe range" but "combined, I feel that they would prevent this patient from performing his previous coal mine duties." *Id*. In his supplemental report, Dr. Zlupko clarified that even though the objective studies were non-qualifying, the impairments identified on these studies were totally disabling based on the exertional requirements of Claimant's role as "foreman underground," which included "crawling all day long, carrying approximately thirty-five pounds of equipment on his belt, shoveling, and setting posts." Director's Exhibit 20 at 1.

Dr. Fino examined Claimant on May 13, 2021, and obtained pulmonary function and blood gas studies with non-qualifying values. Director's Exhibit 38. He also reviewed additional records before preparing his report. *Id*. He stated Claimant's last job was as a "face boss and air course runner" and that it required heavy labor ten percent of the time and moderate labor ninety percent of the time. *Id*. at 4. After analyzing the objective testing, he opined that "blood gases at rest and with exertion were normal for a man of 83 years old" and the pulmonary function studies "indicate[] a very mild obstruction," but Claimant developed "no disability." *Id*. at 10. Dr. Fino concluded "it is reasonable to say that there is a very mild obstruction" and no respiratory impairment, and Claimant is not totally disabled. *Id*. at 11.

The ALJ determined that Dr. Zlupko's description of the exertional requirements of Claimant's usual coal mine work was more detailed than Dr. Fino's. Decision and Order at 20. In addition, the ALJ discredited Dr. Fino's opinion because he commented on Claimant's age when evaluating the blood gas studies; the ALJ noted age is not a factor when considering blood gas studies. *Id*. He therefore found Dr. Zlupko's medical opinion to be better-reasoned and gave it more probative weight. *Id.* Thus, the ALJ found that Claimant established a total pulmonary disability based on the totality of the expert medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20. Further, the ALJ found that a preponderance of the evidence demonstrated the existence of a totally disabling respiratory or pulmonary impairment. *Id.*

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Employer argues the ALJ erred in discrediting Dr. Fino's opinion and in giving more weight to Dr. Zlupko's opinion. We disagree.

In considering the medical opinions, the ALJ noted he was evaluating them concerning "whether Claimant could perform 'his usual coal mine work or comparable and gainful employment.'" Decision and Order at 20. Thus, in finding that Dr. Fino did not provide a thorough or adequate understanding of the exertional requirements of Claimant's usual coal mine work, the ALJ permissibly concluded, contrary to Employer's assertion, that Dr. Fino did not adequately explain why the mild obstructive impairment he diagnosed was not totally disabling.[8] *See Gonzales v. Director, OWCP*, 869 F.2d 776, 779 (3d Cir. 1989) (ALJ can reasonably discount a physician's opinion if the ALJ finds that the physician relied upon an inadequate understanding of the exertional requirements of a claimant's usual coal mine employment); Decision and Order at 20; Employer's Brief at 7.

Further, although Employer is accurate that the ALJ did not set out the specific results of Dr. Fino's blood gas study,[9] he noted the description Dr. Fino provided of all of the studies when summarizing his medical opinion. Decision and Order at 20; Employer's Brief at 8. Moreover, as the ALJ noted, the relevant inquiry at total disability is whether Claimant has a respiratory or pulmonary impairment that precludes the performance of his usual coal mine work. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Thus, as the ALJ permissibly found when stating that age "is not a factor when evaluating arterial blood gas results," Dr. Fino's opinion that Claimant's blood gas studies were "normal" for his age nonetheless does not indicate whether Claimant could or could not perform his usual coal mine work based on the results of that testing. Decision and

[8] Thus, contrary to Employer's argument, Dr. Fino did not diagnose "no respiratory or pulmonary impairment" whatsoever. Employer's Brief at 7. Given Dr. Fino's diagnosis of an obstructive impairment, albeit very mild, the ALJ appropriately considered whether Dr. Fino adequately explained why he concluded that impairment does not preclude Claimant from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv).

[9] Employer contends the ALJ erred in not evaluating the May 13, 2021 blood gas study Dr. Fino conducted as part of his evaluation. Employer's Brief at 7-8. However, as the ALJ found the blood gas evidence as a whole to be non-qualifying, Employer has not explained how the ALJ's failure to consider this study at 20 C.F.R. §718.204(b)(2)(ii) made a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); Decision and Order at 18.

Order at 20; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162-63 (3d Cir. 1986).

We also reject Employer's contention that Dr. Zlupko's opinion cannot be well-reasoned as the objective studies conducted in conjunction with his exam do not support a finding of total disability. Employer's Brief at 6. Contrary to Employer's argument, a physician may conclude a miner is totally disabled even if the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 578. Employer further contends the ALJ should have given more weight to Dr. Fino's blood gas study, which was conducted four months after Dr. Zlupko's study. It asserts that when all of the blood gas values are considered, they support Dr. Fino's opinion that the values were normal versus Dr. Zlupko's belief that they indicate a "low oxygen level." Similarly, it contends the "normal" pulmonary function study values on all of the tests better support Dr. Fino's opinion. Employer's Brief at 8-9. Despite Employer's allegations to the contrary, the ALJ was not required to give greater weight to the more recent blood gas study, especially given that both studies had non-qualifying values and were conducted only four months apart. *See Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 10 (June 27, 2023); *see also Greer v. Director*, OWCP, 940 F.2d 88 (4th Cir.1991) (pulmonary function studies conducted two months apart "should be considered contemporaneous" given that pneumoconiosis is "slowly-progressing"); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (affirming ALJ's finding that pulmonary function studies conducted within seven months were "sufficiently contemporaneous"). In addition, as Employer acknowledged, in evaluating objective studies, "the determination as to whether a test is normal or abnormal . . . is a medical, not a judicial, finding." Employer's Brief at 8. Within his role as factfinder, the ALJ permissibly resolved the dispute among the medical experts by crediting Dr. Zlupko's opinion over Dr. Fino's.

The ALJ permissibly found Dr. Zlupko's opinion to be better-reasoned because he had a more detailed understanding of the exertional requirements of Claimant's last coal mining job and explained why Claimant would not be able to perform those requirements due to his pulmonary impairments.[10] *See Kramer*, 305 F.3d at 211; Decision and Order at

[10] We reject Employer's general contention that the ALJ failed to consider the physicians' credentials when weighing their opinions, as Employer acknowledges that the ALJ "correctly cited the qualifications of both Dr. Zlupko and Dr. Fino," and the ALJ discussed their credentials when evaluating their opinions on total disability. Employer's Brief at 9-10; *see* Decision and Order at 19-20. In addition, Employer does not offer any support for its contention that because Dr. Fino is Board-certified in internal and pulmonary medicine, his opinion is automatically entitled to more weight than Dr. Zlupko's opinion. Further, we reject Employer's assertion that even if the Board "would deem Dr. Zlupko's opinion to be well-reasoned, it cannot consider Dr. Fino's opinion to be any less well-

20; Director's Exhibits 13, 20. Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Consequently, we affirm the ALJ's determination that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and based on a weighing of the evidence as a whole. *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3d Cir. 1979); Decision and Order at 20. Thus, we also affirm that Claimant invoked the Section 411(c)(4) presumption.

reasoned based solely upon the doctor's own test results." Employer's Brief at 10. It argues that if the opinions carried the same probative weight and neither is deemed superior based on their qualifications, the evidence would be in equipoise; thus, Claimant would not carry his burden. *Id.* However, the ALJ did not find that their opinions carry the same probative weight and, therefore, the evidence was not in equipoise. Decision and Order at 19-20. Employer's arguments are again 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).

As Employer raises no other challenges to the ALJ's Decision and Order, we affirm, as unchallenged, the ALJ's finding that Employer failed to rebut the presumption of both clinical and legal pneumoconiosis, Claimant's totally disabling pulmonary impairment was caused by pneumoconiosis, and Claimant proved a change in an applicable condition of entitlement. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §§718.305(d)(1), 725.309(c).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge