U.S. Department of Labor

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

BRB No. 22-0404 BLA

HARRY E. ORR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 9/26/2023
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Toni J. Williams (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2020-BLA-05513) rendered on a claim filed on January 28, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty years of underground coal mine employment, but she found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant could not invoke 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); 20 C.F.R. §718.305. Because Claimant did not establish total disability, an essential element of entitlement, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability.[2] Employer and its Carrier (Employer) respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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 or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine

[1] 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 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 4.

[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 6.

work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[4] pulmonary function studies or 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 all relevant supporting evidence against all relevant 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 failed to establish total disability by any method. 20 C.F.R. §718.204(b)(2); Decision and Order at 7-10, 16-18.

Claimant contends the ALJ erred in weighing the conflicting medical opinions.[5] Claimant's Brief at 7-10. The ALJ weighed Dr. Zlupko's opinion that Claimant is totally disabled by a respiratory or pulmonary impairment and the opinions of Drs. Basheda and Rosenberg that he is not. Decision and Order at 10-18; Director's Exhibits 13-15; Employer's Exhibits 1-4. She found Dr. Zlupko's opinion is not reasoned or documented, while she found the opinions of Drs. Basheda and Rosenberg are reasoned and documented. Decision and Order at 16-18. Thus she found the opinions of Drs. Basheda and Rosenberg outweigh Dr. Zlupko's diagnosis of total disability. *Id*.

Claimant argues the ALJ erred in discrediting Dr. Zlupko's opinion. Claimant's Brief at 7-10. We disagree.

In his initial report, Dr. Zlupko noted Claimant has experienced daily shortness of breath for five years that gets worse with exertion and when Claimant walks on hills, steps, or grades. Director's Exhibit 13 at 2. He stated this shortness of breath prevents Claimant from performing exertional activities. *Id*. at 3. Specifically, he opined Claimant has a mild to moderate restrictive ventilatory impairment on pulmonary function testing that would prevent him from performing the exertional requirements of his usual coal mine employment as a general laborer, which involved bolting and working at the face. *Id*. at 4, 13.

[4] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] We affirm, as unchallenged, the ALJ's findings that the pulmonary function and arterial blood gas studies do not support total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 7-10.

In a supplemental report, Dr. Zlupko further elaborated on his opinion. He reiterated Claimant has a "pulmonary function impairment, which is mild to moderate in degree, even though [the pulmonary function testing] does not meet certain disability standards." Director's Exhibit 14. Again he opined this impairment would prevent Claimant from performing his usual coal mine employment as a general laborer, which he stated required heavy lifting, carrying heavy objects, and bolting. *Id*. He stated the bolting itself required Claimant to be in a "squatting position and perform physical work." *Id*. He also stated Claimant worked at the face of the mine, "which would also be a heavy task job, requiring [Claimant] to have exposure to additional amounts of coal dust in that position." *Id*. In addition, he noted Claimant "has complained of shortness of breath for the last five years, becoming progressively more severe, worsening on exertion." *Id*. He explained this symptom is associated with the pulmonary impairment evidenced by objective testing. *Id*. In a second supplemental report, Dr. Zlupko explained Claimant's Parkinson's disease has no effect on whether he has a totally disabling respiratory or pulmonary impairment. Director's Exhibit 15.

The ALJ permissibly found Dr. Zlupko's opinion unpersuasive because he did not "point to any *specific data* from the [pulmonary function testing to] support [] his opinion that Claimant is totally disabled." Decision and Order at 17 (emphasis added); *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). Claimant argues this finding is "irrational and contrary to the evidence of record" because "Dr. Zlupko considered and applied the objective data in reaching his diagnosis of restriction." Claimant's Brief at 9-10. He asserts a restrictive impairment, "by definition, is present when there is an abnormal FVC and normal FEV/FVC ratio" on pulmonary function testing and "Dr. Zlupko found such here by virtue of his diagnosis (FVC = 64% of predicted, FEV1/FVC ratio [is] 0.75)." *Id*. But Claimant identifies no statement from Dr. Zlupko defining a restrictive impairment and his argument invites the Board to substitute our opinion for that of a medical expert, which we cannot do. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Because substantial evidence supports the ALJ's determination to discredit Dr. Zlupko's opinion,[6] the sole physician who diagnosed total disability,[7] we affirm her finding

[6] Because the ALJ provided a valid reason for discrediting Dr. Zlupko's opinion on total disability, we need not address Claimant's remaining arguments regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Claimant's Brief at 7-10.

[7] As neither Dr. Basheda nor Dr. Rosenberg diagnosed total disability, we need not address Claimant's argument that the ALJ erred in crediting their opinions. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Brief at 10.

that the medical opinion evidence does not support total disability. 20 C.F.R. §718.204(b)(2)(iv). As Claimant has not established total disability through any of the methods at 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the ALJ's finding that Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2). In addition, we affirm the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption or establish entitlement to benefits as he has failed to establish an essential element of entitlement.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge