U.S. Department of Labor

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

BRB No. 22-0435 BLA

RAYMOND J. CARTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 9/06/2023
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 Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2020-BLA-05032) rendered 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 subsequent claim filed on October 26, 2016.[1]

The ALJ found Claimant established 25.8 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). Further, she found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[3] It also argues she erred in finding it failed to rebut the presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30

[1] Claimant filed two previous claims. The record indicates the first claim was administratively closed and the second claim was withdrawn. Director's Exhibits 1; 2; 50 at 5. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibit 2. The ALJ stated "the record does not contain evidence supporting that any prior element of entitlement had been established." Decision and Order at 3; Director's Exhibit 1. She thus proceeded as if Claimant had not established any elements of entitlement. Decision and Order at 3.

[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); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 25.8 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 12.

[4] The Board 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); Decision and Order at 2 n.2; Director's Exhibit 5; Hearing Tr. at 26.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (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)(i). 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. *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 weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 studies, medical opinions, and evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 5-12.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated December 7, 2016, August 30, 2017, December 4, 2017, and April 16, 2019. Decision and Order at 5-9; Director's Exhibits 18 at 12; 21; 22 at 21; 23 at 14. The December 7, 2016 study produced non-qualifying[6] results without the administration of bronchodilators. Director's Exhibit 22 at 21. The August 30, 2017 study produced qualifying results without the administration of bronchodilators and the December 4, 2017 study produced qualifying results before and after the administration of bronchodilators. Director's Exhibits 18 at 12; 21. The April 16, 2019 study produced non-qualifying results before the administration of bronchodilators

[5] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 9.

[6] A "qualifying" pulmonary function study yields values equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values greater than those values. 20 C.F.R. §718.204(b)(2)(i).

and qualifying results after the administration of bronchodilators.[7] Director's Exhibit 23 at 14.

The ALJ found the December 7, 2016 study does not support a finding of total disability, and the April 16, 2019 study is entitled to "limited" probative weight. Decision and Order at 8. She further determined the August 30, 2017 and December 4, 2017 studies are entitled to "probative" weight and support a finding of total disability. *Id.* at 8-9.

Employer argues the ALJ erred in crediting the observations of the technicians who administered the August 30, 2017 and December 4, 2017 pulmonary function studies and explained that Claimant gave good effort over Dr. Fino's opinion that the studies are invalid. Employer's Brief at 7-9. We disagree.

When considering pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the quality standards.[8] 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B. If a study

[7] The ALJ found her ability to accurately assess the April 16, 2019 pulmonary function study "undermined by lack of an explanation regarding why pulmonary function decreased following administration of bronchodilators and by the lack of a recorded assessment by the technician of Claimant's efforts." Decision and Order at 8. She noted Dr. Fino opined the study is invalid due to a lack of an abrupt onset of inhalation and a failure to exhale for at least seven seconds. *Id.*; Director's Exhibit 23 at 8. Further, she stated Claimant did not offer any interpretation of the study's validity. Decision and Order at 8. While she assigned the study "limited probative weight," she determined that even if she gave it "full probative weight," she would find it neither confirms nor excludes a total disability finding because of its "split" between non-qualifying pre-bronchodilator and qualifying post-bronchodilator results. *Id.* at 8 n.5. As Employer does not challenge these findings, we affirm them. *Skrack*, 6 BLR at 1-711; Decision and Order at 8.

[8] An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in her role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

The ALJ noted the technician who administered the August 30, 2017 study stated that Claimant provided "good effort" and Dr. Forehand found "acceptable spirograph." Decision and Order at 7; *see* Director's Exhibit 21 at 2-4. She also noted the technician who administered the December 4, 2017 study stated that Claimant "gave good effort on test."[9] Decision and Order at 7; *see* Director's Exhibit 18 at 12. Further, she noted Dr. Fino stated that "for a [pulmonary function test] to be considered valid [a miner] must take a 'big deep breath in and then blow vigorously as hard as [he] can, and to breath[e] out for at least seven seconds.'" Decision and Order at 7 (citing Employer's Exhibit 10 at 12-14). In addition, she noted Dr. Fino opined "the tracings do not support that Claimant was able to blow out for seven seconds to reach a plateau." Decision and Order at 7. She permissibly found Dr. Fino's opinion inadequately explained because the doctor did "not address whether Claimant reached an obvious plateau for at least [two] seconds, regardless of whether he was able to blow out for a full seven seconds."[10] *Id.*; 20 C.F.R. Part 718, App. B (2)(ii)(C); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Orek*, 10 BLR at 1-54-55 (party alleging objective study is invalid must "specify in what way the study fails to conform to the quality standards" and "demonstrate how this defect or omission renders the study unreliable"). Thus, contrary to Employer's argument, the ALJ did not summarily credit the technicians' notations over a medical professional, but permissibly found Dr. Fino's statements inadequately explained and thus unpersuasive. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 7-8.

Because Employer has not shown that the ALJ erred in determining that the August 30, 2017 and December 4, 2017 pulmonary function studies are qualifying and valid, we

[9] Additionally, the technician who administered the December 4, 2017 study stated that Claimant's degree of cooperation and ability to understand instructions and follow directions were good, and Dr. Ranavaya found the vents acceptable. Director's Exhibits 17; 18 at 12, 14-16.

[10] The ALJ noted "[t]he regulation that Dr. Fino refers to states that effort shall be judged unacceptable when the patient 'has not continued expiration for at least 7 sec. *or* until an obvious plateau for at least 2 sec. in the volume-time curve has occurred.'" Decision and Order at 7 (emphasis in original) (citing Appendix B to Part 718 at 2(ii)(C)).

affirm her finding that these studies establish total disability. 20 C.F.R. §718.204(b)(2)(i); *see Owens*, 724 F.3d at 557 (explaining that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 7-9.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Ajjarapu and Fino. Decision and Order at 9-12. Dr. Ajjarapu opined Claimant has a totally disabling respiratory or pulmonary impairment, while Dr. Fino opined he does not. Director's Exhibits 18, 23, 24; Employer's Exhibits 2, 10. The ALJ found Dr. Ajjarapu's opinion "sufficiently-documented" and "well-reasoned," and thus entitled to "probative" weight. Decision and Order at 11. She found Dr. Fino's opinion "not well-documented" and thus entitled to "less" weight. *Id.* at 12.

Employer asserts the ALJ erred in crediting Dr. Ajjarapu's opinion because the doctor did not consider the April 16, 2019 non-qualifying pulmonary function study and other testing developed after she examined Claimant on December 4, 2017. Employer's Brief at 10-11. We disagree. Contrary to Employer's argument, in a supplemental report dated July 29, 2019, Dr. Ajjarapu reviewed Dr. Fino's report and the tests from his April 16, 2019 examination of Claimant. Director's Exhibits 23, 24. Moreover, even assuming Dr. Ajjarapu had not reviewed Dr. Fino's subsequent report, an ALJ is not required to discredit a physician who did not review all of a miner's medical records when her opinion, as is the case here, is otherwise well-reasoned, documented, and based on her own examination and objective test results. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

Additionally, Employer generally argues Dr. Fino's opinion is well-reasoned and documented, and therefore sufficient to establish that Claimant is not totally disabled. Employer's Brief at 11-12. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Looney*, 678 F.3d at 316-17. Employer's argument is 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).

Because it is supported by substantial evidence, we affirm the ALJ's finding 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); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 12. Consequently, Claimant has established a change in an applicable condition of

entitlement. 20 C.F.R. §725.309.[11] We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 12-13.

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 nor clinical pneumoconiosis,[12] or "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.

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).

[11] 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 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 ALJ proceeded as if Claimant had not established any elements of entitlement in his previous filed claim, Claimant was required to submit new evidence establishing any element of entitlement to warrant a review of this subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibits 1, 2.

[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).

The ALJ considered Dr. Fino's opinion that Claimant does not have legal pneumoconiosis but a mild respiratory impairment unrelated to coal mine dust exposure. Decision and Order at 16-17; Director's Exhibit 23 at 12-13; Employer's Exhibits 2; 10 at 17. She found Dr. Fino's opinion not "well-documented" or "well-reasoned." Decision and Order at 17.

We reject Employer's argument that the ALJ applied the wrong standard when addressing rebuttal of legal pneumoconiosis. Employer's Brief at 18-21. Contrary to Employer's argument, the ALJ correctly stated Employer can rebut the presumption of legal pneumoconiosis by establishing Claimant "does not have a chronic lung disease or impairment 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" Decision and Order at 13 (quoting 20 C.F.R. §718.201(b)); *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. Moreover, as discussed below, she discredited Dr. Fino's opinion because he failed to adequately explain his own conclusion that any lung disease or impairment Claimant has is unrelated to coal mine dust exposure -- not because he failed to meet a particular legal standard. Decision and Order at 17.

We also reject Employer's assertion that the ALJ provided invalid reasons for finding Dr. Fino's opinion not credible. Employer's Brief at 15-18.

Dr. Fino excluded coal mine dust exposure as a contributing cause of Claimant's mild respiratory impairment. Director's Exhibit 23 at 12; Employer's Exhibits 2; 10 at 17. The ALJ permissibly found the doctor did not adequately explain why Claimant's significant history of coal mine dust exposure is not a contributing or aggravating factor to his respiratory impairment. Decision and Order at 21; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017); *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; 20 C.F.R. §718.201(a)(2), (b).

Employer generally asserts Dr. Fino's opinion is well-reasoned and documented, and therefore sufficient to disprove the existence of legal pneumoconiosis. Employer's Brief at 15-18. Its argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-112.

Because the ALJ permissibly discredited Dr. Fino's opinion,[13] the only medical opinion supportive of Employer's burden on rebuttal, we affirm her finding that Employer

[13] Because the ALJ provided a valid reason for discrediting Dr. Fino's opinion, we need not address Employer's additional arguments regarding the weight she assigned to it.

failed to disprove the existence of legal pneumoconiosis. Decision and Order at 17, 20. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(i). Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 20.

Disability Causation

The ALJ next considered whether Employer established "no part of [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 20-21. She discredited Dr. Fino's opinion on disability causation because he did not diagnose legal pneumoconiosis, contrary to her finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (physician who fails to diagnose pneumoconiosis, contrary to the ALJ's finding, cannot be credited on rebuttal of disability causation absent specific and persuasive reasons); Decision and Order at 20-21. As the ALJ's finding that Employer failed to prove that no part of Claimant's total respiratory disability is due to legal pneumoconiosis is unchallenged, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 21-22.

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits. Decision and Order at 22.

Kozele v. Rochester & Pittsburgh Coal Co., 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 15-21.

[14] Because Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we need not address its allegations of error regarding the ALJ's findings on clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.305(d)(1)(i); Employer's Brief at 12-14.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge