



BRB Nos. 23-0174 BLA
and 23-0174 BLA-A

LAWRENCE WHITE)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 MINGO SERVICES, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED: 9/22/2023

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Patricia J. Daum,
Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson,
Kentucky, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC),
Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Denying Benefits (2020-BLA-05160) rendered on a claim filed on May 22, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with fifteen years of underground coal mine employment, but she found he did not have a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant did 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), or establish entitlement under 20 C.F.R. Part 718. Thus, she denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief. On cross-appeal, Employer argues the ALJ erred in crediting Claimant with fifteen years of coal mine employment. Neither Claimant nor the Director has filed a response to the cross-appeal.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation

¹ 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.

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 12; Director's Exhibit 3.

(pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful 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 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 the pulmonary function studies, arterial blood gas studies, and medical opinions do not support total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 8-15.

Claimant contends the ALJ erred in weighing the medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Claimant's Brief at 3-8. As they are unchallenged, we affirm the ALJ's findings that the pulmonary function and arterial blood gas studies do not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 8-10.

With respect to the medical opinions, the ALJ considered Drs. Gaziano's opinion that Claimant is totally disabled by a respiratory or pulmonary impairment. Decision and Order at 10-15; Director's Exhibits 11, 13, 29, 30, 48. In his initial report, Dr. Gaziano opined Claimant is totally disabled based on moderate hypoxemia evidenced by the September 26, 2017 resting arterial blood gas study. Director's Exhibit 11 at 4-5. He explained this impairment prevents Claimant from performing his usual coal work that required "median" exertion as Claimant had to lift and carry more than fifty pounds. Director's Exhibit 11. In a supplemental report, he noted Claimant performed a September 19, 2018 arterial blood gas study. Director's Exhibit 13 at 1-2. He opined this study demonstrated a "mild increase in alveolar arterial oxygen gradient with mild resting hypoxemia." *Id.* Based on these results, he opined Claimant is "impaired but not to the degree" as when he performed the September 26, 2017 blood gas study. *Id.* He explained

variation in arterial blood gas testing can occur due to “variation in the clinical condition.” *Id.* Nonetheless he opined Claimant is totally disabled. *Id.*

The ALJ permissibly discredited Dr. Gaziano’s opinion because she found he based his diagnosis of total disability on the September 26, 2017 resting arterial blood gas study that produced qualifying values and demonstrated moderate hypoxemia,³ but he did not adequately address the exercise portion of this study that produced non-qualifying values or the September 19, 2018 non-qualifying study that evidenced a mild impairment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (ALJ has discretion in assessing the adequacy of a physician’s explanation); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-15 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 14-15.

Claimant generally argues Dr. Gaziano’s opinion is credible because he had an adequate understanding of the exertional requirements of Claimant’s usual coal mine employment. Claimant’s Brief at 8. Claimant’s argument amounts to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Thus we affirm the ALJ’s finding that Dr. Gaziano’s opinion is not credible. Decision and Order at 14-15. Because Dr. Gaziano’s opinion is the only medical opinion supportive of Claimant’s burden of establishing total disability,⁴ we affirm the ALJ’s finding that the medical opinions do not support total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 15.

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.⁵ *Anderson*, 12 BLR at 1-112.

³ A “qualifying” arterial blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A “non-qualifying” study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(ii).

⁴ As neither Dr. Basheda nor Dr. Spagnolo 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).

⁵ As we affirm the ALJ’s finding that Claimant failed to establish total disability, a requisite element of entitlement, we need not address Employer’s contention on cross-appeal that the ALJ erred in crediting Claimant with fifteen years of underground coal mine

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

employment. *Larioni*, 6 BLR at 1-1278; Employer's Consolidated Response Brief and Cross-Appeal at 14-17.