U.S. Department of Labor

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

BRB No. 20-0523 BLA

BURT LEE MELTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SCOTTS BRANCH COMPANY, C/O MAPCO COAL, INCORPORATED	)	
	)	
and	)	
	)	
SELF-INSURED THROUGH ALLIANCE COAL, LLC	)	DATE ISSUED: 02/16/2022
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

Anne E. Bonfiglio (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05577) rendered on a claim filed on July 1, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the properly designated responsible operator. He credited Claimant with eleven-and one-quarter years of coal mine employment, and thus found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[1] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish clinical pneumoconiosis, but established legal pneumoconiosis. 20 C.F.R. §718.202(a). He further found Claimant is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c). He thus awarded benefits commencing July 2015.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. It also contends he erred in finding Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. It further challenges the ALJ's setting July 2015 as the date for Employer to start paying benefits.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Benefits Review Board to affirm the ALJ's responsible operator determination.

[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 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 of eleven-and-one-quarter years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

The 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 & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Operator

Employer argues the ALJ erred in finding it is the responsible operator. Employer's Brief at 4-5 (unpaginated). We disagree.

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the operator must have employed the miner in coal mine employment for a cumulative period of at least one year.[4] 20 C.F.R. §725.494(a)-(e). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates the responsible operator, it may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 3-4. We affirm this finding as Employer does not challenge it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Nor does it allege it is financially incapable of assuming liability for benefits.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 42.

[4] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Thus, it can avoid liability only by establishing that another financially capable operator employed the miner more recently for at least one year.

The ALJ acknowledged Claimant worked as a mine safety inspector for the United Mine Workers of America (UMWA) after he worked for Employer. Decision and Order at 3-4, 6. He found the UMWA is not a coal mine operator and Claimant's work as a mine safety inspector for the UMWA does not constitute coal mine employment. *Id*. at 3-4, 6. The ALJ thus concluded Claimant did not work for one year as a coal miner for the UMWA. *Id*. He also found no evidence the UMWA is capable of assuming liability for this claim. *Id*. at 3-4. Therefore, the ALJ concluded Employer failed to establish another operator financially capable of assuming liability more recently employed Claimant for at least one year. *Id*.

Employer argues the ALJ erred in finding the UMWA is not financially capable of assuming liability; however, it does not challenge his finding Claimant's UMWA work does not constitute coal mine employment and the UMWA is not an operator. Employer's Brief at 4-5 (unpaginated). We thus affirm the ALJ's finding that the UMWA is not an operator and did not employ Claimant as a miner for at least one year. *Navistar, Inc. v. Forester*, 767 F.3d 638, 645-47 (6th Cir. 2014); *Spatafore v. Consolidation Coal Co.*, 25 BLR 1-181, 1-188 (2016); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §725.495(c). Consequently, we need not address whether the ALJ erred in finding the UMWA is not financially capable of assuming liability for the claim. *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, 1-1278 (1984). Because Employer failed to establish another potentially liable operator more recently employed Claimant for at least one year, we affirm the ALJ's responsible operator finding. 20 C.F.R. §725.495(c).

Part 718 Entitlement

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 (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 of them precludes an award of benefits. *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).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held a miner may establish his lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

The ALJ considered the opinions of Drs. Green, Dahhan, and Rosenberg. Decision and Order at 12-17. Dr. Green diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine dust employment. Director's Exhibits 18, 19. Drs. Dahhan and Rosenberg opined Claimant does not have legal pneumoconiosis but has an obstructive ventilatory impairment due to asthma. Director's Exhibit 24; Employer's Exhibit 3. Both doctors opined asthma is not caused by coal mine dust exposure. *Id*.

In weighing the opinions, the ALJ rejected Drs. Dahhan's and Rosenberg's opinions because he found their explanations for excluding legal pneumoconiosis unpersuasive and inconsistent with the medical science set forth in the preamble to the 2001 revised regulations. Decision and Order at 15-17, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). Employer does not challenge the ALJ's decision to discredit their opinions; thus we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 15-17.

The ALJ found Dr. Green's opinion well-reasoned and well-documented because it is "based on the Claimant's physical examination, symptoms and history, and objective testing."[5] Decision and Order at 13-14. We reject Employer's assertion that the ALJ erred in crediting Dr. Green's opinion because the doctor had an inaccurate understanding of Claimant's coal mine employment history. Employer's Brief at 5-7 (unpaginated). The effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion is a determination for the ALJ to make. *See Trumbo v. Reading Anthracite Co.*,

[5] The ALJ also considered the opinions of Drs. Raj and Nader. They both diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease arising out of coal mine dust exposure. Claimant's Exhibits 1, 2. The ALJ declined to credit their opinions, but found they supported Dr. Green's opinion. Decision and Order at 12-17.

17 BLR 1-85, 1-89 (1994); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988).

The ALJ acknowledged Dr. Green assumed Claimant worked for nineteen years in coal mining, contrary to the ALJ's determination Claimant worked for eleven-and-one-quarter years. Decision and Order at 13-14. He noted, however, that Dr. Green "had an accurate understanding of the dust conditions to which Claimant was exposed," as the doctor "wrote that Claimant had heavy coal and rock dust exposure at his last coal mine job." *Id*. The ALJ also noted that Claimant never smoked cigarettes. *Id*. Contrary to Employer's argument, the ALJ permissibly found the difference of eleven-and-one-quarter years versus nineteen years of coal mine employment "is not so great that it undermines the overall reliability of Dr. Green's opinion on legal pneumoconiosis." Decision and Order at 13-14; *see Trumbo*, 17 BLR at 1-89; *Sellards*, 17 BLR at 1-81; *Bobick*, 13 BLR at 1-54. As Employer raises no further arguments, we affirm the ALJ's finding that Dr. Green's opinion is well-reasoned and well-documented. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 13-14.

We thus affirm the ALJ's determination that Claimant established legal pneumoconiosis in the form of COPD arising out of coal mine employment. 20 C.F.R. §718.202(a); Decision and Order at 17-18.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or 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 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).

The ALJ found Claimant established total disability based on the pulmonary function studies and medical opinions.[6] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and

[6] The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 18-27.

Order at 18-27. Employer argues the ALJ erred in finding Claimant established total disability based on the pulmonary function studies. Employer's Brief at 7 (unpaginated). We disagree.

The ALJ considered five pulmonary function studies conducted on August 9, 2016, September 15, 2016, March 28, 2018, October 15, 2019, and November 6, 2019. Decision and Order at 19-22. The August 9, 2016, September 15, 2016, and October 15, 2019 studies yielded non-qualifying[7] values before and after the administration of a bronchodilator. Director's Exhibits 24, 26; Claimant's Exhibit 1. The March 28, 2018 and November 6, 2019 studies yielded qualifying pre-bronchodilator values but non-qualifying post-bronchodilator values. Director's Exhibit 18; Claimant's Exhibit 2.

The ALJ first permissibly found pre-bronchodilator testing is "more probative of Claimant's level of disability" and thus entitled to more weight than post-bronchodilator testing. Decision and Order at 21-22; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("the use of a bronchodilator [during pulmonary function testing] does not provide an adequate assessment of disability"). He then noted both pulmonary function studies taken in 2016 produced non-qualifying pre-bronchodilator values, but two of the three studies taken more recently in 2018 and 2019 produced qualifying values while the third study was nearly qualifying.[8] Decision and Order at 21-22. He permissibly credited the more recent 2018 and 2019 pre-bronchodilator studies over the 2016 pre-bronchodilator studies because pneumoconiosis is a progressive and irreversible disease and all three revealed diminished pulmonary capacity as compared to the 2016 studies. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Decision and Order at 21-22. Because a preponderance of the more recent pre-bronchodilator studies is qualifying for total disability, the ALJ rationally found the pulmonary function studies as a whole establish total disability. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Employer generally argues the ALJ should have found the pulmonary function studies do not establish total disability because three of the five pre-bronchodilator studies

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

[8] The ALJ noted the October 2019 study revealed a "pre-bronchodilator FEV1 value [that] is less than one tenth of a point above the qualifying value of 2.18 and the MVV value is qualifying." Decision and Order at 22.

are non-qualifying. Employer's Brief at 7 (unpaginated). Employer's argument is a request that we reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus we affirm the ALJ's finding the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 21-22.

The ALJ also weighed the opinions of Drs. Green, Nader, and Raj that Claimant is totally disabled and the opinions of Drs. Dahhan and Rosenberg that he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 24-27. He found the opinions of Drs. Green, Nader, and Raj reasoned, documented, and consistent with the weight of the pulmonary function studies. *Id*. He found the opinions of Drs. Dahhan and Rosenberg unpersuasive and contrary to the weight of the objective testing. *Id*.

Employer raises no specific arguments regarding the medical opinion evidence other than its contention the pulmonary function studies do not establish total disability, which we have rejected. Employer's Brief at 7 (unpaginated). We therefore affirm the ALJ's finding that the medical opinions establish total disability. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 24-27.

We further affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 27.

Disability Causation

Finally, the ALJ considered whether Claimant established his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

The ALJ credited Dr. Green's opinion that Claimant's totally disabling respiratory impairment is due to legal pneumoconiosis, over the contrary opinions of Drs. Dahhan and Rosenberg. 20 C.F.R. §718.204(c); Decision and Order at 27-28. Employer raises no specific arguments regarding disability causation other than its assertion that Dr. Green relied on an inaccurate coal mine employment history and the ALJ should not have found legal pneumoconiosis established. Employer's Brief at 7-8 (unpaginated). As discussed above, we have rejected these arguments. We therefore affirm the ALJ's determination

that Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); *Skrack*, 6 BLR at 1-711; Decision and Order at 28.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The ALJ found the onset date of Claimant's total disability due to pneumoconiosis is not ascertainable from the record and awarded benefits commencing July 2015, the month in which he filed his claim. Decision and Order at 29. Employer maintains the earliest date benefits can commence is March 2018, the month in which Dr. Green evaluated Claimant and obtained a qualifying pulmonary function study. We disagree.

Contrary to Employer's contention, the onset date is not established by the first "qualifying" pulmonary function study because this evidence shows only that Claimant became totally disabled at some time prior to the date of that evidence. *See Owens*, 14 BLR at 1-50; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). The ALJ found Claimant established total disability based on the qualifying, pre-bronchodilator values of the March 28, 2018 and November 6, 2019 pulmonary function studies. Decision and Order at 21-22. He further recognized "the pulmonary function tests administered by Drs. Dahhan and Rosenberg in 2016 produced non-qualifying" results. *Id*. at 29 n. 73. The ALJ rationally found, however, that these studies do not establish Claimant was not totally disabled due to pneumoconiosis at that time as "neither physician explained how Claimant could perform the heavy exertional requirements of his usual coal mine employment with an obstructive, albeit non-qualifying, ventilatory defect." *Id.*; *see Napier*, 301 F.3d at 712-14; *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").

Because it is supported by substantial evidence, we affirm the ALJ's finding that the onset date of Claimant's total disability is not ascertainable from the record; therefore, benefits should commence in July 2015, the month in which Claimant filed his claim. 20 C.F.R. §725.503(b); *see Edmiston*, 14 BLR at 1-69; *Owens*, 14 BLR at 1-47; Decision and Order at 31.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge