U.S. Department of Labor

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

BRB No. 21-0130 BLA

JOE F. HARRISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL COAL COMPANY, LLC	)	
	)	DATE ISSUED: 02/24/2022
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.
PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2018-BLA-05574) rendered on a claim filed on July 20, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 24.54 years of underground 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 rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] She further found Employer did not rebut the presumption and awarded benefits beginning in July 2016, the month in which Claimant filed his claim.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption, and in finding Employer did not rebut it.[2] In addition, Employer argues the ALJ erred in determining July 2016 is the commencement date for benefits. Claimant has not filed a response brief. 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.[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).

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

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). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant is totally disabled due to pneumoconiosis if he establishes 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 24.54 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] 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.1; Hearing Transcript at 11.

pulmonale with right-sided congestive heart failure, or medical opinions.[4] 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 established total disability based on pulmonary function studies, medical opinions, and the totality of the evidence. Decision and Order at 5, 7. Employer contends the ALJ failed to adequately address the validity of the pulmonary function studies and erred in weighing the medical opinion evidence. Employer's Brief at 6-9. We disagree.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies. Decision and Order at 5. The August 15, 2016 study was qualifying[5] before and after the administration of a bronchodilator based on the FEV1 and MVV values; the March 15, 2017 study was non-qualifying before and after the administration of a bronchodilator; the June 18, 2019 study was qualifying based on the FEV1 and MVV values, and no post-bronchodilator study was performed at that time. Director's Exhibits 13; 19; Claimant's Exhibit 5. The ALJ gave greatest weight to the most recent qualifying study and found the pulmonary function study evidence established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 5.

Employer argues for the first time on appeal that the August 15, 2016 study is invalid because the variation between the two largest MVVs is not within ten percent and that the June 18, 2019 study is invalid because it contains only one MVV trial. Employer's Brief at 7-8, 9, *citing* 20 C.F.R. §718.103(b). Because Employer did not raise these arguments before the ALJ, we will not address them. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987). Employer also argues the ALJ failed to consider Dr. Jarboe's opinion that the August 15, 2016 and June 18, 2019 studies are invalid because Claimant did not achieve an "optimal rate."

[4] The ALJ found the arterial blood gas studies did 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)(ii), (iii); Decision and Order at 5-6.

[5] 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).

Employer's Brief at 8, 9; Employer's Closing Argument at 11-13, 15-17, 23-24, 32-33, 39-42. Dr. Jarboe explained with regard to the August 15, 2016 study that "breath frequency prior to [broncho]dilators was 51 breaths per minute as it was after [broncho]dilators," yet the "[i]deal rate of breaths per minute during an MVV measurement should be 92 to 110." Employer's Exhibit 6 at 3. In regard to the June 18, 2019 study, he stated it was not valid because of a suboptimal rate of 68 breaths per minute. *Id*. at 4. Dr. Jarboe therefore concluded that the August 15, 2016 and June 18, 2019 studies cannot be used to assess total disability.

Although the ALJ did not specifically discuss Dr. Jarboe's statements regarding Claimant's respiratory rate in performing the August 15, 2016 and June 18, 2019 studies, we consider the error harmless. *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). In the absence of evidence to the contrary, pulmonary function studies are presumed to be in compliance with the quality standards and therefore valid. 20 C.F.R. §718.103(c). Dr. Jarboe gave no explanation how a "suboptimal respiratory rate" relates to the quality standards that the Department of Labor (DOL) adopted for determining the validity of a test. Employer's Exhibit 6 at 3. This lack of explanation renders Dr. Jarboe's opinion not well-reasoned.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Moreover, Dr. Ajjarapu reported Claimant's cooperation and ability to understand and follow directions in performing the August 15, 2016 study were "good," and Dr. Gaziano validated the study. Director's Exhibits 13 at 13-16; 16. The technician reported "[g]reat" patient effort and cooperation on the June 18, 2019 pulmonary function study. Claimant's Exhibit 5 at 1.

We therefore affirm the ALJ's finding that Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i).

[6] Employer states that "application of the quality standards from Appendix B to [20 C.F.R.] Part 718 supports Dr. Jarboe's explanation as only MVV maneuvers which demonstrate consistent effort for at least 12 seconds shall be considered acceptable." Employer's Brief at 8, *citing* 20 C.F.R. Part 718, Appendix B. However, Dr. Jarboe did not discuss the duration of the MVV maneuvers. Employer's Exhibits 4, 6. Further, it is unclear from Dr. Jarboe's reports whether Claimant's "sub-optimal" respiratory rate was effort-related, his normal respiratory rate, or the result of other factors. *Id*. However, we note nothing in the quality standards requires an optimal respiratory rate for a pulmonary function study to be deemed valid. 20 C.F.R. §718.103(b)(5).

Medical Opinions and Evidence as a Whole

The ALJ considered three medical opinions. Decision and Order at 6-7. Dr. Ajjarapu conducted the DOL complete pulmonary evaluation on August 15, 2016, and opined Claimant has a severe, totally disabling respiratory impairment based on the pulmonary function study she obtained. Director's Exhibits 13 at 7; 22 at 2. Dr. Dahhan examined Claimant on March 15, 2017, and opined there is no evidence of total pulmonary disability because all of the objective studies were non-qualifying. Director's Exhibit 19 at 4; Employer's Exhibit 5 at 2-3. Dr. Jarboe prepared a review of the medical records and pulmonary function study evidence. He opined Claimant's pulmonary function studies showed a mild to moderate restrictive ventilatory defect, but refused to credit the them because, as discussed above, he considered the MVV values invalid. He therefore opined Claimant retained the respiratory ability to return to his last coal mine work. Employer's Exhibits 4; 6 at 7-8.

The ALJ gave greatest weight to Dr. Ajjarapu's opinion because she found it reasoned and supported by the objective evidence of record. Decision and Order at 7. Considering the totality of the evidence, the ALJ concluded Claimant established total disability based on the pulmonary function studies and medical opinions. *Id*.

Employer argues that because the ALJ erred in weighing the pulmonary function studies, she also erred in crediting Dr. Ajjarapu's opinion. Employer's Brief at 8-9. Having rejected Employer's contentions that the qualifying pulmonary function studies are invalid, we affirm the ALJ's reliance on Dr. Ajjarapu's opinion and her finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). We further affirm, as supported by substantial evidence, the ALJ's finding that Claimant has a totally disabling respiratory impairment based on the evidence as a whole and thus invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[7] or that "no

[7] "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 that is 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

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.[8]

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).

Employer relies on the medical opinions of Drs. Dahhan and Jarboe. It challenges the ALJ's determination that their opinions lack credibility and asserts she did not explain her findings in accordance with the Administrative Procedure Act (APA).[9] Employer's Brief at 10. Employer also contends the ALJ conflated the standards for rebutting legal pneumoconiosis and disability causation. *Id.* Employer's arguments are without merit.

The ALJ properly considered whether Employer's experts affirmatively established Claimant does not have a respiratory or pulmonary impairment significantly related to, or substantially aggravated by, coal mine dust exposure. She observed correctly that Dr. Dahhan opined Claimant does not have legal pneumoconiosis because there were "insufficient objective findings to indicate any functional pulmonary impairment and/or disability." Director's Exhibit 19 at 2; *see* Employer's Exhibit 5. However, the regulatory definition of legal pneumoconiosis includes "*any* chronic lung disease or impairment" arising out of coal mine employment and thus does not require a functional impairment or disability. 20 C.F.R. §718.201(a)(2) (emphasis added); Decision and Order at 10. The ALJ permissibly found Dr. Dahhan's opinion on legal pneumoconiosis unpersuasive because his statement that Claimant's impairment is not functional "does not preclude the

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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).

[8] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 9.

[9] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

presence of any [coal mine dust-related] impairment at all."[10] *See* 20 C.F.R. §718.201(a)(2); *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); Decision and Order at 10; Director's Exhibit 19 at 2; Employer's Exhibit 5.

Dr. Jarboe opined Claimant's restrictive impairment does not constitute legal pneumoconiosis based, in part, on the lack of x-ray evidence for clinical pneumoconiosis or "definite evidence of a fibrotic reaction to coal mine dust in the lung parenchyma." Employer's Exhibit 6 at 6-7. The ALJ correctly noted, however, that the presence of clinical pneumoconiosis is not a prerequisite for diagnosing legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 11; Employer's Exhibit 6 at 6-7. Moreover, Dr. Jarboe opined Claimant does not have legal pneumoconiosis because he does not have an obstructive impairment, yet Dr. Jarboe diagnosed Claimant with chronic bronchitis, which is an obstructive disease. 20 C.F.R. §718.201(a)(2) (definition of legal pneumoconiosis encompasses "any chronic lung disease or impairment" including "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment"); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (chronic obstructive pulmonary disease includes chronic bronchitis, emphysema and asthma); Decision and Order at 11; Employer's Exhibit 6 at 6-7. The ALJ permissibly found Dr. Jarboe's opinion lacked adequate explanation and is not well-reasoned. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 11; Employer's Exhibit 6 at 6-7. We therefore affirm the ALJ's determination that Employer failed to disprove legal pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

To disprove disability causation, Employer must establish "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). The ALJ found Employer's experts did not rule out Claimant's coal mine dust exposure as a significant contributing factor in his lung disease or impairment. Decision and Order at 12. Although Employer correctly

[10] Moreover, contrary to Dr. Dahhan's assessment that Claimant has no functional impairment or disability, the ALJ found him totally disabled.

[11] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i) (A), (B).

contends the ALJ misstated the legal standard,[12] it fails to show why this error matters. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278. The ALJ did not reject Employer's experts' opinions based on application of an incorrect standard; she found they lack credibility on disability causation for the same reasons she found their opinions unpersuasive on legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505-06 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 12. Having affirmed the ALJ's findings on legal pneumoconiosis, and because Employer raises no other arguments, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12. We therefore affirm the award of benefits.

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 evidence the ALJ credits 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 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The ALJ found the record does not contain any medical evidence establishing when Claimant became totally disabled due to pneumoconiosis and awarded benefits commencing July 2016, the month the claim was filed. Decision and Order at 13. Employer argues Claimant is not entitled to benefits prior to Dr. Dahhan's March 15, 2017 "uncontradicted" evaluation indicating Claimant was not totally disabled at that time. Employer's Brief at 11-12. Employer's argument is unpersuasive as the ALJ did not credit Dr. Dahhan's March 15, 2017 opinion or any evidence that Claimant was not totally disabled due to pneumoconiosis subsequent to the filing date of his claim. Rather, the ALJ credited Dr. Ajjarapu's August 15, 2016 medical opinion and objective testing in finding total disability due to pneumoconiosis. Decision and Order at 7. The onset date is not established by the first medical evidence of record indicating total disability, as such

[12] *But see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013) (In considering rebuttal of the Section 411(c)(4) presumption, "[t]he ALJ did not err by collapsing the two-step causal chain - that coal mine employment caused pneumoconiosis which in turn caused total disability - into a single question: did the miner's disability arise out of his coal mine employment?").

medical evidence only shows Claimant became totally disabled at an earlier time. *See Owens*, 14 BLR at 1-50; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). Since the medical evidence does not reflect the date Claimant became totally disabled due to pneumoconiosis, benefits are payable from the month in which he filed his claim. 20 C.F.R. §725.503(b). Therefore, we affirm the ALJ's conclusion that benefits commence July 2016. *Owens*, 14 BLR at 1-49; Decision and Order at 13.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge