U.S. Department of Labor

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

BRB No. 21-0321 BLA

RICHARD S. BURKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY	)	
	)	
and	)	
	)	
MURRAY ENERGY CORPORATION	)	DATE ISSUED: 02/24/2023
	)	
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 Monica Markley, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits (2018-BLA-06079) on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case involves a subsequent claim filed on May 17, 2016.[1]

The ALJ credited Claimant with 18.24 years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding total disability established and the Section 411(c)(4) presumption invoked. Employer also argues the ALJ erred in finding it did not rebut the presumption.[3] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging rejection of Employer's constitutional argument. On the merits, he urges affirmance of the ALJ's decision to credit a June 2016 pulmonary function study as evidence of total disability.

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[1] Claimant's previous claim, filed on July 26, 2001, was denied by ALJ Pamela Lakes Wood on September 29, 2006, for failing to establish any element of entitlement. Director's Exhibit 1; Decision and Order at 2.

[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 of 18.24 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 4-6. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[5] 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 total disability based on the pulmonary function study evidence, medical opinion evidence,

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[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14.

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

and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 25-36.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies dated April 28, 2016, June 20, 2016, September 6, 2017, June 21, 2018, and April 25, 2019. Decision and Order at 10-11, 25-30; Director's Exhibits 18, 21-22; Claimant's Exhibit 3; Employer's Exhibit 1. All of the studies produced qualifying results; however, the ALJ found only the June 20, 2016 pulmonary function study to be valid.[7] Decision and Order at 27-29. Based on the valid, qualifying pulmonary function study, the ALJ found the pulmonary function study evidence established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 30.

Employer contends the ALJ erred in determining the June 20, 2016 study was valid and thus could establish total disability. Employer's Brief at 6-8. We disagree.

When addressing a pulmonary function study developed in connection with a claim, an ALJ must determine whether it is in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. 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 also* 20 C.F.R. Part 718, Appendix B. If a study 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 factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *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 suspect or unreliable).

The ALJ considered the evidence regarding the validity and reliability of the June 20, 2016 study. The technician who conducted the study indicated Claimant put forth good effort and cooperation and that American Thoracic Society reproducibility criteria were met. Director's Exhibit 18. Dr. Ajjarapu signed the study, affirming it was "conducted

[6] The ALJ found the arterial blood gas study evidence does not establish 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 24-25.

[7] The parties do not challenge the ALJ's findings regarding the remaining pulmonary function studies. Decision and Order at 26-30.

and reported in compliance with the specifications and instructions provided by the Department of Labor." Decision and Order 27; Director's Exhibit 18. The report of the study also indicated that the variation between the two largest FEV1 values was three percent. Decision and Order 27; Director's Exhibit 18. Dr. Gaziano reviewed the June 20, 2016 study for validation purposes and indicated the "[v]ents are acceptable." Decision and Order at 27; Director's Exhibit 19.

Drs. Dahhan and Sargent, however, questioned the validity of the study. Director's Exhibit 22; Employer's Exhibits 1, 5, 6. Dr. Dahhan opined the study was invalid because Claimant did not completely empty his lungs, hesitated excessively, and did not give consistent effort. Employer's Exhibit 5 at 14. Dr. Sargent indicated the study was invalid because Claimant did not give "maximal effort." Employer's Exhibit 6 at 16. The ALJ found Dr. Sargent's opinion poorly reasoned and documented as he did not reference anything specific in the spirometric tracings to support it.[8] Decision and Order at 28. She found that while Dr. Dahhan provided bases for his opinion, he did not explain how the alleged noncompliance with the quality standards rendered the test unreliable. *Id.* Thus, the ALJ found their opinions outweighed by Dr. Ajjarapu's certification, Dr. Gaziano's validation, and the administering technician's notes. *Id.*

Employer asserts the ALJ erred by requiring Dr. Dahhan to explain why the flaws he identified were not due to Claimant's lung condition. Employer's Brief at 6-7. However, as noted above and as the Director points out, the ALJ also rejected Dr. Dahhan's opinion because he failed to explain how those flaws rendered the test unreliable to support a finding of total disability. Decision and Order at 28; Director's Response at 2 (unpaginated). Employer does not challenge this finding; thus, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Orek*, 10 BLR at 1-53-1-55; *Vivian*, 7 BLR at 1-361.

Employer also argues the ALJ erred in according greater weight to Dr. Ajjarapu's validity opinion when there is no evidence she "personally witnessed" the study, and it asserts Dr. Gaziano's "checkmark validation" does not lend persuasive weight to her opinion. Employer's Brief at 9-10. The ALJ permissibly credited the first-hand observation of the administering technician and Dr. Ajjarapu's attestation that the study was conducted in conformance with Department of Labor criteria, along with the opinion

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[8] Employer does not challenge the ALJ's finding that Dr. Sargent's opinion regarding the validity of the June 20, 2016 pulmonary function study was poorly reasoned; thus, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 28; Employer's Exhibit at 1, 6.

of Dr. Gaziano, over Drs. Dahhan's and Sargent's opinions.[9] *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (ALJ may rely on the opinion of the physician who actually administered the ventilatory study over those who reviewed the results); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231 (6th Cir. 1994). Thus, we affirm the ALJ's determination that the qualifying June 20, 2016 pulmonary function study is valid.

As Employer does not raise any additional errors regarding the weighing of the pulmonary function studies, we also affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 30.

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Ajjarapu, Dahhan, and Sargent. 20 C.F.R. §718.204(b)(2)(iv). Dr. Ajjarapu opined Claimant has a totally disabling impairment, while Drs. Dahhan and Sargent opined he does not. Director's Exhibits 18, 22, 27; Employer's Exhibits 1, 5-6. The ALJ credited Dr. Ajjarapu's opinion as well-reasoned, well-documented, and supported by the pulmonary function study evidence. Decision and Order at 28-29. Conversely, she discredited the opinions of Drs. Dahhan and Sargent because they failed to adequately consider the qualifying pulmonary function study or explain how they could opine no disabling impairment was present when they believed all the pulmonary function studies were invalid. *Id.* at 31. Consequently, she found the medical opinion evidence supports a finding of total disability. *Id.* at 30.

Employer contends the ALJ erred in her weighing of the medical opinion evidence. We disagree.

First, Employer argues the ALJ erred in crediting Dr. Ajjarapu's opinion, as it is based on her assumption that the pulmonary function study evidence is valid. Employer's Brief at 11. Because we affirmed the ALJ's determination that the June 20, 2016 study is valid and qualifying, we reject Employer's contention. The ALJ permissibly found Dr. Ajjarapu's opinion well-documented and well-reasoned, as it is supported by the June 20, 2016 pulmonary function study, the only valid study of record, which reflected "severe" impairment, and her understanding of the exertional requirements of Claimant's usual coal

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[9] Moreover, contrary to Employer's suggestion, the ALJ did not rely solely on Dr. Gaziano's "checkmark validation" to outweigh the contrary reports, but rather found his validation, along with the technician's notes and Dr. Ajjarapu's certification, constitutes substantial evidence outweighing the contrary reports. Decision and Order at 28-29; Employer's Brief at 10.

mine employment.[10] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (it is within the purview of the ALJ to weigh the evidence, draw inferences, and determine credibility); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 31.

Employer also argues the ALJ erroneously conflated Drs. Sargent's and Dahhan's opinions regarding the presence of pneumoconiosis with whether Claimant is totally disabled. Employer's Brief at 11-12. While the ALJ noted Drs. Sargent and Dahhan did not diagnose either clinical or legal pneumoconiosis in her discussion of their opinions regarding total disability, the ALJ's findings regarding total disability were not dependent on her pneumoconiosis findings. Rather, she independently found the physicians' total disability opinions unpersuasive given their view that none of the pulmonary function studies could be relied upon, contrary to her finding that the June 20, 2016 study is valid and supports a finding of total disability. Decision and Order at 31-35. Moreover, contrary to Employer's argument, the ALJ permissibly found Dr. Dahhan's opinion unreasoned because it was contrary to the weight of the pulmonary function study evidence.

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 31. We further affirm the ALJ's finding that Claimant is totally disabled based on her weighing of all the evidence together, and thus Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 35.

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,[11] or that "no part

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[10] Employer also argues the ALJ erred in crediting Dr. Ajjarapu on the basis of Claimant's respiratory symptoms; however, the ALJ specifically credited her disability opinion as supported by her valid objective testing. Employer's Brief at 11; Decision and Order at 31. Further, as the ALJ provided valid reasons for crediting Dr. Ajjarapu's opinion on total disability, we need not address Employer's additional assertion that the ALJ improperly relied on her findings regarding pneumoconiosis to find Claimant totally disabled. *See Larioni v. Director, OWCP,* 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 31; Employer's Brief at 11-12.

[11] "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). This definition

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 rebut the presumption by either method. Decision and Order at 41, 45-46.

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). The United States Court of Appeals for the Sixth Circuit holds that this standard requires Employer to show Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young,* 947 F.3d 399, 405 (6th Cir. 2020). The "in part" standard is met if Employer establishes coal mine dust exposure "had at most only a *de minimis* effect on [Claimant's] lung impairment." *Id.* at 407.

Employer relied on the opinions of Drs. Sargent and Dahhan to establish Claimant does not have legal pneumoconiosis.[12] Director's Exhibit 22; Employer's Exhibits 1, 5-6. The ALJ observed that in excluding a diagnosis of legal pneumoconiosis, Drs. Dahhan and Sargent relied primarily on their view that none of Claimant's most recent pulmonary function studies could be relied upon to diagnose an impairment, whether obstructive or restrictive. Decision and Order at 42-43. She also found they did not adequately explain why Claimant's well-documented respiratory symptoms could not be related in part to coal mine dust exposure. *Id.* at 42-44. Thus, she found Employer did not disprove legal pneumoconiosis. *Id.* at 44.

Employer asserts that since the ALJ erred in her consideration of the pulmonary function study evidence, her findings regarding Drs. Dahhan's and Sargent's opinions on the issue of legal pneumoconiosis are flawed. Employer's Brief at 14. However, as we

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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).

[12] The ALJ also considered Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis in the form of chronic bronchitis; however, her opinion does not support Employer's burden of rebuttal. Director's Exhibit 18; Decision and Order at 44.

have affirmed the ALJ's findings that the June 20, 2016 study is valid and demonstrates severe impairment, she permissibly found their opinions undermined based on their belief that the pulmonary function studies are invalid and thus that no chronic respiratory abnormality can be verified.[13] Decision and Order at 41-42; Director's Exhibit 22; Employer's Exhibits 1, 5-6. Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to disprove Claimant has legal pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(i); *Young*, 947 F.3d at 407; *Napier*, 301 F.3d at 713-14; Decision and Order at 44.

Disability Causation

The ALJ also found Employer failed to establish that "no part" of Claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis, as their opinions regarding the presence of pneumoconiosis were contrary to her findings. Decision and Order at 45-46; 20 C.F.R. §718.305(d)(1)(ii); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013).

Employer alleges no specific error with regard to the ALJ's findings on disability causation, other than its arguments that it disproved legal pneumoconiosis, which we have rejected. We therefore affirm the ALJ's finding that Employer failed to prove that no part of Claimant's total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 46.

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[13] We note Dr. Sargent indicated he could not "rule out" a restrictive impairment of "some severity." Employer's Exhibit 1 at 1.

[14] 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). Therefore, we need not address its arguments that the ALJ erred in finding it did not disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 13.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge