U.S. Department of Labor

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

BRB No. 21-0327 BLA

GREGORY BRASHEARS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 02/23/2023
	)	
ARCH COAL, INCORPORATED, c/o UNDERWRITERS SAFETY & CLAIMS	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2019-BLA-05209) rendered on a claim filed on June 7, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with a minimum of thirty years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption by establishing total disability. It further contends she erred in finding it did not rebut the presumption.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Benefit 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

To invoke the Section 411(c)(4) presumption, a claimant must establish "a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). 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. 20 C.F.R.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty 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; Hearing Transcript at 7-9.

[3] We will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

§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 the 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 the medical opinion evidence and evidence as a whole.[4] Decision and Order at 24.

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine employment as a general laborer. Decision and Order at 7-8. Based on Claimant's uncontradicted testimony, she determined his usual coal mine work required "regular and sustained heavy and very heavy levels of physical exertion." *Id.* at 8. We affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

The ALJ then considered the medical opinions of Drs. Shah, Alam, Dahhan, and Jarboe. Decision and Order at 13. Drs. Shah and Alam opined Claimant is totally disabled, whereas Dr. Dahhan opined he is not. Director's Exhibits 11, 19, 24; Claimant's Exhibit 4; Employer's Exhibits 1, 3. Dr. Jarboe opined Claimant is not totally disabled from a pulmonary capacity and retains the capacity to perform light to moderate exertion, Employer's Exhibit 2 at 7, but conceded Claimant "does not have the pulmonary functional capacity to do heavy manual labor on a sustained basis." Employer's Exhibit 4 at 4. The ALJ discredited Dr. Alam's opinion as poorly documented because it was based on the qualifying[5] blood-gas study he conducted during his exam and the physician did not review the later, non-qualifying testing. Decision and Order at 23; Director's Exhibits 11, 24. He further found Dr. Dahhan's opinion poorly reasoned. Decision and Order at 23-24. Crediting the opinion of Dr. Shah, as supported by Dr. Jarboe, she found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).

[4] The ALJ found Claimant did not establish total disability based on the pulmonary function tests or arterial blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(i)-(iii); Decision and Order at 11-12.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Employer initially contends the ALJ erred in finding Drs. Jarboe's and Shah's opinions support a finding of total disability. Employer's Brief at 6-10. We disagree.

Employer quotes extensively from Dr. Jarboe's supplemental opinion to assert Dr. Jarboe's opinion does not support the opinion of Dr. Shah. Employer's Brief at 7-9 (quoting Employer's Exhibit 4 at 2-4). As Employer notes, Dr. Jarboe reviewed the testing performed by Drs. Shah and Dahhan, explained why individual objective tests do not demonstrate total disability, and concluded any disabling pulmonary or respiratory impairment is unrelated to coal mine dust exposure. Employer's Brief at 7-9 (quoting Employer's Exhibit 4 at 2-4). However, despite his critiques of Dr. Shah's opinion, the ALJ correctly observed Dr. Jarboe expressly concluded that, although Claimant "retains the pulmonary functional capacity to perform light to moderate exertion," he "does not have the pulmonary functional capacity to do heavy manual labor on a sustained basis." Employer's Exhibit 4 at 4; Decision and Order at 23. The ALJ thus permissibly found Dr. Jarboe's opinion supported a finding that Claimant is totally disabled because he does not retain the pulmonary functional capacity to perform his last coal mining job, which required regular and sustained heavy and very heavy labor. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996); Decision and Order at 8, 23-24.

The ALJ also permissibly credited Dr. Shah's opinion because she described the exertional requirements of Claimant's usual coal mine employment in detail, had an accurate understanding of Claimant's previous coal mining job, most recently evaluated Claimant, and because her opinion that Claimant could not perform the exertional requirements of his last coal mining job is consistent with Dr. Jarboe's conclusion that Claimant cannot perform heavy work.[6] *Napier*, 301 F.3d at 713-14; *Cornett*, 227 F.3d at 578; Decision and Order at 24. As the ALJ observed, Dr. Shah opined Claimant is disabled due to his "reduced ventilatory reserve, gas exchange abnormality, and increased dead space ventilation," Claimant's Exhibit 4 at 7-8, and she explained the reduction in Claimant's maximum oxygen consumption (VO2 max) is inconsistent with the ability to perform heavy to very heavy work. Decision and Order at 22; Claimant's Exhibit 4 at 8.

[6] Contrary to Employer's contention, the ALJ was not required to discredit Dr. Shah's opinion as "hostile" to the disability standards because she relied on non-qualifying objective testing. *See Cornett v. Benham Coal, Inc.*, 337 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of a miner's usual duties); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 7.

Employer further contends the ALJ erred in discrediting Dr. Dahhan's opinion, which it asserts is "well-documented and understandable" and undermines the opinion of Dr. Shah. Employer's Brief at 10. We disagree. Contrary to Employer's contention, the ALJ did not discredit Dr. Dahhan's opinion solely because she found Dr. Dahhan's discussion of Claimant's physiological dead space to tidal volume (VD/VT) ratio "unintelligible" but also because he did not address Dr. Shah's conclusion that Claimant's reduced oxygen uptake demonstrates he does not have the ability to perform heavy manual labor on a sustained basis.[7] Decision and Order at 23. The ALJ thus permissibly discredited Dr. Dahhan's opinion as poorly reasoned. *Napier*, 301 F.3d at 713-14; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Further, Employer's assertion that Dr. Dahhan's opinion is "well-documented and understandable," Employer's Brief at 10, constitutes a request to reweigh the credibility of the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal 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 opinion evidence 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)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305.

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,[8] or that

[7] Thus, even accepting *arguendo* that the ALJ erred in finding Dr. Dahhan's discussion of Claimant's VD/VT ratio unintelligible, any such error would be harmless as Dr. Dahhan did not explain why Claimant can perform his last coal mining job despite his reduced VO2 max. *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); Decision and Order at 23; Employer's Exhibit 4; Employer's Brief at 10.

[8] "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). "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).

"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 Co*., 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, requires Employer to establish 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). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)). The ALJ found Employer failed to establish rebuttal by either method.[9]

Employer relies on the opinions of Drs. Jarboe and Dahhan that Claimant does not have legal pneumoconiosis.[10] Dr. Jarboe opined Claimant has reactive airway disease in the form of asthma as well as hypoxemia, both unrelated to coal mine dust exposure.[11] Dr. Dahhan opined Claimant has moderate obesity and sleep apnea that have not resulted in any pulmonary disability, but that he has at most "transit hypoxemia" and no intrinsic lung disease. Director's Exhibit 19 at 2-3; Employer's Exhibits 1 at 3-4; 3 at 2. The ALJ found neither physician's opinion sufficient to disprove legal pneumoconiosis. Decision and Order at 29-31.

[9] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 27.

[10] The ALJ also considered the opinions of Drs. Alam and Shah that Claimant has legal pneumoconiosis. Decision and Order at 28-29. Because these opinions do not support Employer's burden in rebutting the Section 411(c)(4) presumption, we decline to address Employer's arguments relating to them. *See Larioni*, 6 BLR at 1-1278.

[11] Dr. Jarboe opined Claimant's hypoxemia could be due to hypoxemia or severe coronary artery disease, but that it is unrelated to coal mine dust exposure. Director's Exhibit 18 at 4; Employer's Exhibit 2 at 7.

Employer asserts the ALJ applied an incorrect legal standard because he required Drs. Dahhan and Jarboe to effectively "rule out" coal mine dust exposure to disprove legal pneumoconiosis. Employer's Brief at 11-15. We disagree.

As the ALJ correctly observed, because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 28. She correctly noted this requires Employer to prove Claimant's impairment is not "significantly related to, or substantially aggravated by" dust exposure in coal mine employment. Decision and Order at 28 (citations omitted); *see Young*, 947 F.3d at 405; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); 20 C.F.R. §718.201(a)(2).

Contrary to Employer's argument, the ALJ did not discredit Drs. Dahhan's and Jarboe's opinions based on an incorrect standard. Rather, she permissibly discredited Dr. Dahhan's opinion because he found no respiratory impairment, contrary to her determination that Claimant has a disabling respiratory impairment, and so the doctor could not opine on the cause of an impairment he did not believe Claimant has. *See Napier*, 301 F.3d at 713-14; *Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). She likewise permissibly discredited Dr. Jarboe's opinion because he did not explain why Claimant's history of coal mine dust exposure could not have aggravated his respiratory impairment.[12] *See Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Rowe*, 710 F.2d at 255; 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 30-31. Thus, we affirm the ALJ's conclusion that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 31.

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary 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 permissibly discredited Drs. Jarboe's and Dahhan's opinions on disability causation because they opined Claimant does not have legal pneumoconiosis, contrary to the ALJ's findings. *See Ogle*, 737 F.3d at 1070; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 33. Because Employer does not contest this finding, we affirm it.

[12] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Dahhan and Jarboe, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

See Skrack, 6 BLR at 1-711. Thus, we affirm the ALJ's finding that Employer failed to establish "no part" of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

JONATHAN ROLFE
Administrative Appeals Judge