U.S. Department of Labor

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

BRB No. 23-0247 BLA

TERRY B. FEE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY INCORPORATED	)	
	)	
	)	DATE ISSUED: 07/23/2024
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Terry B. Fee, Pennington Gap, Virginia.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Denying Benefits (2020-BLA-05487) rendered on a claim filed on March 8, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ accepted the parties' stipulation that Claimant has twenty-seven years of coal mine employment. On the merits, the ALJ found Claimant failed to establish he has complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. He further found Claimant failed to establish a totally disabling pulmonary or respiratory impairment and thus could not invoke 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), or establish a necessary element of entitlement under 20 C.F.R. Part 718. Thus, he denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are 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).

To be entitled to benefits under the Act, Claimant must establish disease (he has pneumoconiosis); disease causation (it arose out of coal mine employment); disability (he

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on Claimant's behalf, that the Benefits Review Board review the ALJ's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed a prior claim in 2010 but withdrew it. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." *See* 20 C.F.R. §725.306(b).

[3] The Board 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 41 at 11, 26.

has 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 a claimant in establishing these elements when certain conditions are met, but failure to establish any element 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).

Invocation of the Section 411(c)(3) Presumption

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

The ALJ found that none of the evidence of record supports a finding of complicated pneumoconiosis.[4] 20 C.F.R. §718.304(a),(c); Decision and Order at 6-14.

Chest X-rays – 20 C.F.R. §718.304(a)

The record contains eight readings of three chest x-rays dated December 21, 2018, May 7, 2019, and August 13, 2019. Decision and Order at 7-8. All the physicians noted changes consistent with simple pneumoconiosis on each x-ray but disagreed as to the presence of complicated pneumoconiosis. *Id.* Dr. DePonte read the December 21, 2018 x-ray as positive for complicated pneumoconiosis, with a Category A opacity, while Drs. Seaman and Meyer read it as negative for complicated pneumoconiosis. Director's Exhibits 17, 21; Employer's Exhibit 10. Dr. DePonte also read the May 7, 2019 x-ray as positive for complicated pneumoconiosis, with a Category A opacity in the form of a pseudoplaque, while Drs. Meyer and Crum did not find complicated pneumoconiosis. Director's Exhibits 15, 20; Claimant's Exhibit 3. Finally, Dr. DePonte read the August 13,

[4] There is no pathology evidence of record. 20 C.F.R. §718.304(b); Decision and Order at 6.

2019 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Kendall read it as negative. Director's Exhibit 20.

Initially, the ALJ noted all the physicians are dually qualified as B readers and board-certified radiologists; thus, he accorded their readings equal weight. Decision and Order at 8. In weighing the readings, he found the readings of the December 21, 2018 and May 7, 2019 x-rays in equipoise regarding complicated pneumoconiosis, meaning they do not establish either "the presence or absence" of the disease. *Id.* The ALJ also found the August 13, 2019 x-ray unrebutted and thus negative for complicated pneumoconiosis. *Id.* at 8-9. Weighing the evidence together, he found the x-ray evidence is negative for complicated pneumoconiosis. *Id.* at 9.

As Employer acknowledges, the ALJ failed to consider Dr. DePonte's rebuttal reading of the August 13, 2019 x-ray, which the doctor read as positive for complicated pneumoconiosis with a Category A large opacity.[5] Claimant's Exhibit 1; Employer's Response at 5. However, given the ALJ's finding that all the physicians' readings are entitled to equal weight based on their "comparable credentials and dual certifications," consideration of Dr. DePonte's reading as countering Dr. Kendall's would render the readings of the August 13, 2019 x-ray in equipoise on the issue of complicated pneumoconiosis. Thus, it still would not meet Claimant's burden of proof. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994) (evidence in equipoise does not carry the burden of proof).

Moreover, as discussed below, the ALJ found the computed tomography (CT) scan evidence negative for complicated pneumoconiosis and that, even assuming the readings of the December 21, 2018 and May 7, 2019 x-rays were positive for complicated pneumoconiosis, he would still find the x-ray evidence outweighed by the negative CT scan evidence.[6] Decision and Order at 14 n.66. Thus, we find the ALJ's error in failing to

[5] The ALJ indicated Claimant did not submit a rebuttal reading of the August 13, 2019 x-ray, Decision and Order at 9 n.38; however, the record shows Claimant submitted Dr. DePonte's reading of the x-ray in rebuttal and it was admitted into the record at the hearing. *See* Claimant's Evidence Summary Form; Hearing Transcript at 7; Claimant's Exhibit 1.

[6] The ALJ stated he would give greater weight to the CT scan evidence than the x-ray evidence based on Dr. Meyer's uncontradicted statement that a CT scan is "more sensitive than chest x-ray for detection and characterization of pulmonary parenchymal abnormalities." Decision and Order at 14 n.66; Employer's Exhibit 6.

address Dr. DePonte's reading of the August 13, 2019 x-ray to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

CT Scan Evidence – 20 C.F.R. §718.304(c)

The ALJ next considered Dr. Meyer's interpretation of the September 4, 2019 CT scan. Decision and Order at 9-10. Dr. Meyer diagnosed simple pneumoconiosis but identified no large opacities consistent with complicated pneumoconiosis. Employer's Exhibit 6.

The ALJ first properly found the CT scan is medically acceptable and relevant under the regulations, as Dr. Meyer indicated that CT scans are useful in diagnosing pneumoconiosis. *See* 20 C.F.R. §718.107(b); Decision and Order at 9. Noting Dr. Meyer's credentials as a B reader and board-certified radiologist, the ALJ found his reading was unrebutted and consistent with Claimant's treating physician's interpretation of the CT scan.[7] The ALJ thus found the CT scan evidence negative for complicated pneumoconiosis. Decision and Order at 10; *see* 20 C.F.R. §718.304(c). As the ALJ's findings are supported by substantial evidence, they are affirmed. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005).

Medical Opinion Evidence – 20 C.F.R. §718.304(c)

The ALJ also considered Drs. Harris's, Tuteur's, and Vuskovich's medical opinions. *See* 20 C.F.R. §718.304(c); Decision and Order at 9-12. Dr. Harris opined Claimant has complicated pneumoconiosis, while Drs. Tuteur and Vuskovich opined he does not. Decision and Order at 11-12; Director's Exhibits 15, 19; Employer's Exhibits 1, 2, 7. The ALJ noted that Dr. Harris's opinion is the only one to support Claimant's burden of proof. Decision and Order at 11. He further rationally found Dr. Harris's diagnosis undermined as based predominantly on Dr. DePonte's positive interpretation of the May 7, 2019 x-ray and contrary to the ALJ's finding that the readings of that x-ray are in equipoise. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Anderson*, 12 BLR at 1-113 (mere restatement of an x-ray reading is not a reasoned medical opinion); Decision and Order at 11-12. The ALJ further found Dr. Harris was unaware of the contemporaneous CT scan readings which the ALJ found negative for the disease; thus, within his discretion, the ALJ found Dr. Harris did not have a complete picture of Claimant's condition. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (medical

[7] Dr. Ellis interpreted the September 4, 2019 CT scan in the course of treating Claimant, determining the findings were "consistent with history of coal worker's pneumoconiosis," but there was "[n]o evidence of progressive massive fibrosis." Employer's Exhibit 4 at 1.

opinion may be rejected if a physician does not have a complete picture of the miner's health); Decision and Order at 12.

Thus, the ALJ permissibly accorded Dr. Harris's opinion no weight and found Claimant failed to establish complicated pneumoconiosis based on the medical opinion evidence. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 11-12.

Claimant's Treatment Records

Finally, the ALJ addressed Claimant's treatment records. Decision and Order at 12-12-14. He indicated the only treatment notes that address complicated pneumoconiosis reference Dr. DePonte's readings of the December 21, 2018 and May 7, 2019 x-rays; however, he explained that even if the records were interpreted as diagnosing complicated pneumoconiosis, he gave them no weight as contrary to his finding that the readings of those x-rays were in equipoise. *Id.* at 13. Thus, the ALJ permissibly found Claimant's treatment records do not establish the presence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(c); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (ALJ may discount medical opinions contradicted or unsupported by the underlying objective evidence); Decision and Order at 14.

Therefore, the ALJ found none of the evidence supports a diagnosis of complicated pneumoconiosis. Decision and Order at 14. Further, when weighing the evidence together he provided greatest weight to the negative CT scan reading, crediting Dr. Meyer's explanation that a CT scan is "more sensitive than chest x-ray for detection and characterization of pulmonary parenchymal abnormalities." Decision and Order at 14 n.66; Employer's Exhibit 6. As the ALJ's findings are supported by substantial evidence, we affirm his finding that Claimant failed to establish the presence of complicated pneumoconiosis. *Id.* at 14; *Martin*, 400 F.3d at 305.

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.[8] *See* 20 C.F.R.

[8] A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). The ALJ correctly observed Claimant indicated on his application for benefits that his last coal mine job required him to lift twenty to fifty pounds multiple times per day and carry fifty pounds multiple times per day. Decision and Order

§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 failed to establish total disability by any method.[9] 20 C.F.R. §718.204(b)(2); Decision and Order at 21.

The ALJ considered two pulmonary function studies and two arterial blood gas studies Drs. Harris and Tuteur administered on May 7, 2019 and August 13, 2019, respectively. Decision and Order at 15; Director's Exhibits 15, 19. The ALJ correctly found all the pulmonary function and arterial blood gas studies non-qualifying[10] and thus permissibly found they do not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 15-16.

The ALJ also considered whether Claimant's treatment records are probative of total disability. As the ALJ noted, the treatment records do not specifically discuss whether Claimant is disabled from performing his usual coal mine work, with a recent record noting Claimant "does not really report much in the way of any functional limitations." Decision and Order at 17; Claimant's Exhibit 4 at 1-2. The ALJ further noted that, although Claimant reported shortness of breath, coughing, and wheezing on his treatment visits, the physical examinations conducted during the visits revealed consistently "normal" results

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at 4; Director's Exhibit 5. The ALJ further noted Claimant provided similar explanations regarding his last coal mining work in his deposition and hearing testimony and to his examining physicians. Decision and Order at 4; Hearing Transcript at 11-12, 17-18; Director's Exhibits 15, 19, 41: Employer's Exhibit 1. As it supported by substantial evidence, we affirm the ALJ's finding that Claimant's usual coal mine employment required medium to heavy exertion. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 4.

[9] The ALJ correctly found there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 16.

[10] A "qualifying" pulmonary function study or blood gas study yields results 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 results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

including normal breathing and respiratory rate. Decision and Order at 17; Claimant's Exhibits 4-6; Employer's Exhibit 4. In addition, the ALJ noted that while Claimant testified he uses oxygen at night, his treatment records do not support this statement. Decision and Order at 17; Claimant's Exhibit 4, 5; Employer's Exhibit 4.

Thus, the ALJ concluded there was nothing in the treatment records from which he could reasonably infer that Claimant is unable to perform his usual coal mine work. Decision and Order at 18. As it is supported by substantial evidence, we affirm the ALJ's determination that the treatment records do not support a finding of total disability. *See Martin*, 400 F.3d at 305; Decision and Order at 18.

The ALJ next considered the medical opinions of Drs. Harris, Tuteur, and Vuskovich. Decision and Order at 18-21. Dr. Harris opined Claimant is totally disabled from a respiratory impairment, while Drs. Tuteur and Vuskovich opined he is not. Director's Exhibits 15, 19; Employer's Exhibits 1, 2. In support of his opinion, Dr. Harris identified Claimant's respiratory symptoms, "markedly reduced lung function" based on the May 7, 2019 pulmonary function studies, and a chest x-ray showing progressive massive fibrosis. Director's Exhibit 15 at 8-9. The ALJ found Dr. Harris's opinion not well-reasoned and Drs. Tuteur's and Vuskovich's opinions better supported by the evidence. Thus, he concluded the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21.

The ALJ acknowledged that non-qualifying objective studies do not preclude a physician from credibly diagnosing total disability; however, he found Dr. Harris did not adequately explain why the evidence establishes Claimant is totally disabled in this case. Decision and Order at 19. Specifically, the ALJ found Dr. Harris failed to explain why the FEV1 and FVC values on the May 7, 2019 pulmonary function studies were "markedly" reduced and indicate total disability given their non-qualifying values and the doctor's earlier statement that the results were only "suggestive" of restriction. Decision and Order at 19; Director's Exhibit 15. As it is within the purview of the ALJ to weigh the evidence, draw inferences, and determine credibility, we affirm the ALJ's finding that Dr. Harris inadequately explained his opinion. *Napier*, 301 F.3d at 713-14; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

Moreover, the ALJ permissibly discredited Dr. Harris's total disability opinion for relying in part on an x-ray reading of complicated pneumoconiosis that "meets the federal standards to be considered totally disabled," as it is contrary to the ALJ's finding Claimant did not establish the disease. *See Akers*, 131 F.3d at 441; Decision and Order at 19-20; Director's Exhibit 15. Finally, the ALJ permissibly discredited Dr. Harris's opinion because he did not consider the additional objective studies, which were non-qualifying, or

Claimant's treatment records showing "lack of respiratory deficits" on examination. *See Stark*, 9 BLR at 1-37; Decision and Order at 20.

The ALJ thus was within his discretion to accord Dr. Harris's opinion no weight. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 18. We thus affirm the ALJ's finding that medical opinion evidence does not support a finding of total disability.[11] 20 C.F.R. 204(b)(2)(iv); Decision and Order at 21.

We therefore further affirm the ALJ's finding that Claimant did not meet his burden of proof to establish he is totally disabled based on a weighing of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see* Decision and Order at 21. As Claimant did not establish total disability, a required element of entitlement, we affirm the ALJ's denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; Decision and Order at 22.

[11] The ALJ found Drs. Tuteur's and Vuskovich's opinions that Claimant can perform his usual coal mine employment to be better supported than that of Dr. Harris; however, the ALJ indicated that even if their opinions were given no weight, he would still find the medical opinion evidence insufficient to support total disability. Decision and Order at 21.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge