U.S. Department of Labor

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

BRB No. 23-0427 BLA

ROY R. ALLEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRASURE CREEK MINING, LLC, d/b/a TRINITY COAL COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 07/22/2024
	)	
Employer/Carrier-Respondents	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

Denise Hall Scarberry (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Denying Benefits (2022-BLA-05057) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on February 21, 2020.[1]

The ALJ found Claimant did not establish 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); 20 C.F.R. §718.304. Additionally, he credited Claimant with thirty-nine years of coal mine employment but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus Claimant did 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),[2] or establish a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.305, 725.309(c). Because Claimant failed to establish an essential element of entitlement, the ALJ denied benefits.

[1] Claimant filed one prior claim. The district director denied it on April 18, 2016, because he failed to establish total disability. 20 C.F.R. §718.204(b)(2); Living Miner's Claim 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); 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's prior claim for failure to establish total disability, he had to submit new evidence establishing that element in order to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

On appeal, Claimant argues the ALJ erred in finding he did not establish complicated pneumoconiosis in order to invoke the Section 411(c)(3) presumption. He further asserts the ALJ erred in finding he failed to establish total disability and thereby invoke the Section 411(c)(4) presumption. Employer and its Carrier (Employer) respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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.[5] 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 (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).

Invocation of the Section 411(c)(3) Presumption: Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), 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 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 20 C.F.R. §718.304. In determining

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-nine years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3; Hearing Tr. at 13-14.

[5] 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, 2-202 (1989) (en banc); Director's Exhibits 3, 7, 10, 11; Hearing Tr. at 30.

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, 1-33 (1991) (en banc).

The ALJ found the x-rays, computed tomography (CT) scan evidence, and medical opinions are insufficient to support complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); Decision and Order at 5-15. Weighing the evidence together, he found Claimant failed to establish complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 15.

Claimant argues the ALJ erred in weighing the CT scans. Claimant's Brief at 1-3 (unpaginated). He does not challenge the ALJ's findings that the x-rays and medical opinions do not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c); Decision and Order at 7, 10-15. Thus we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ evaluated CT scans dated February 9, 2015, August 24, 2020 and December 11, 2020. Decision and Order at 7-9; Director's Exhibits 20, 24, 25, 27; Claimant's Exhibit 4; Employer's Exhibit 1. He found the physicians who read the February 9, 2015 and December 11, 2020 CT scans did not diagnose complicated pneumoconiosis. Decision and Order at 8-9. Thus he found these CT scans do not support the existence of the disease. *Id*. As Claimant does not challenge these findings, we affirm them. *Skrack*, 6 BLR at 1-711.

The ALJ next considered the interpretations of the August 24, 2020 CT scan rendered by Drs. Crum, Simone, and Zambos. Director's Exhibits 24, 25; Employer's Exhibit 1.

Dr. Crum identified "multiple areas of coalescence within both upper [lung] lobes." Director's Exhibit 25 at 3. In addition, he stated there is a 1.74 centimeter large opacity in the upper right lobe and a 1.2 centimeter large opacity in the right middle lung. *Id*. He opined the opacities are consistent with Category A complicated pneumoconiosis "in the setting of small opacities as well as coalescence." *Id.* Dr. Crum drafted a supplemental report and stated the CT scan shows a large opacity in the upper right lobe that is greater than one centimeter. Director's Exhibit 27 at 2. *Id.* He reiterated Claimant has complicated pneumoconiosis. *Id.*

Dr. Simone identified "scattered calcified granulomas" and "calcified splenic granulomas" in Claimant's lungs. Employer's Exhibit 1. He stated the largest nodule measures nine millimeters. *Id*. While acknowledging the presence of non-calcified nodules on the CT scan that could be due to coal workers' pneumoconiosis, he explained "the presence of calcified splenic granuloma" indicate Claimant was exposed "to

granulomatous disease, such as histoplasmosis." *Id*. Thus he excluded complicated pneumoconiosis. *Id*.

Dr. Zambos, Claimant's treating physician, also read the August 24, 2020 CT scan. He identified "innumerable small pulmonary nodules throughout each lung, primarily [in the] upper lobes" and stated the largest nodule in the right upper lobe in the perihilar region" measures ten millimeters. Director's Exhibit 24 at 4. Specifically, he diagnosed "chronic nodular interstitial pattern of lung disease" and "partially calcified mediastinal, hilar, and subcarinal nodes." Director's Exhibit 24 at 4. He stated the CT scan should be correlated with Claimant's work-related history, and "silicosis/pneumoconiosis" should be considered. *Id*.

The ALJ found Drs. Crum and Simone are equally qualified as both are dually-qualified B readers and Board-certified radiologists. Decision and Order at 6-7, 9-10. He found no basis to credit Dr. Crum's reading over that of Dr. Simone. *Id*. Rather, he noted Dr. Crum is in the minority as to the presence of opacities measuring greater than one centimeter on the CT scan.[6] *Id*. The ALJ acknowledged that Dr. Crum's measurement of larger opacities could be attributed to his opinion that there is a coalescence of smaller opacities, but the ALJ found Dr. Crum did not adequately explain this aspect of his opinion. *Id*. Thus the ALJ concluded that "[w]ithout any explanation which would [support] why [Dr. Crum] noted large opacities which two other readers did not, with at least one having credentials equal to his own," there is no basis to find "Dr. Crum's reading is entitled to the greater weight." *Id*.

Claimant argues Dr. Crum's CT scan reading is more detailed and comprehensive than the contrary readings from Drs. Simone and Zambos. Claimant's Brief at 1-3 (unpaginated). This argument amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As it is supported by substantial evidence, we affirm the ALJ's finding that the CT scan evidence does not support complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 9, 15. We further affirm the ALJ's finding that the evidence as a whole does not establish complicated pneumoconiosis. 20 C.F.R. §718.304; *Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 15.

[6] The ALJ found Dr. Zambos made "no finding of complicated pneumoconiosis" and thus his reading does not support the existence of the disease. Decision and Order at 8. This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). 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.[7] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[8] 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 did not establish total disability by any method. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 16-17.

Claimant argues the ALJ erred in weighing the medical opinions. Claimant's Brief at 4-6. He does not challenge the ALJ's findings that the pulmonary function studies and arterial blood gas studies do not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 16-18. Thus we affirm them. *Skrack*, 6 BLR at 1-711.

The ALJ considered the medical opinions of Drs. Dahhan, Forehand, Jarboe, and Sikder. Decision and Order at 18-23. Drs. Dahhan, Forehand, and Jarboe opined Claimant is not totally disabled based on the pulmonary function and arterial blood gas study results, and determined he retains the pulmonary capacity to perform the exertional requirements of his usual coal mine employment. Director's Exhibits 16, 31, 34; Employer's Exhibits 2, 4. Dr. Sikder opined Claimant has a totally disabling respiratory or pulmonary impairment based on his reduced diffusion capacity on pulmonary function testing.

[7] The ALJ found Claimant's usual coal mine employment as a drill and dozer operator required him to lift five to seventy-five pounds in "recurrent bouts" and thus required "bouts of heavy manual labor." Decision and Order at 16. This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711.

[8] 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).

Director's Exhibit 26; Claimant's Exhibits 3, 6; Employer's Exhibit 9. She explained Claimant's diffusion capacity is impaired because Claimant's last pulmonary function test diffusion is "as low as 52" and thus "the capacity of the oxygen to get into the blood is severely impair[ed]." Employer's Exhibit 9 at 17. Thus she determined Claimant is totally disabled based on the reduced diffusion capacity alone. *Id.* at 17.

The ALJ discredited Dr. Sikder's opinion because there is no basis in the record in this case to find diffusion capacity testing is medically acceptable or reliable for diagnosing total disability. Decision and Order at 20-23. He also found Dr. Sikder did not have an accurate understanding of the exertional requirements of Claimant's usual coal mine employment. *Id*. at 22-23. Therefore, he found Dr. Sikder's opinion, the only opinion supportive of Claimant's burden, not credible. *Id* at 23. Thus, he concluded Claimant did not establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Claimant argues the ALJ erred in finding Dr. Sikder did not have an accurate understanding of the exertional requirements of Claimant's usual coal mine employment. Claimant's Brief at 4-6 (unpaginated). However, Claimant does not challenge the ALJ's alternative finding that Dr. Sikder's opinion is not credible because there is no basis in the record in this case to find diffusion capacity testing is medically acceptable or reliable for diagnosing total disability. Thus we affirm this credibility finding as unchallenged. *Skrack*, 6 BLR at 1-711.

As the ALJ set forth a reason for discrediting Dr. Sikder's opinion and we affirm that reason, we need not address Claimant's argument that the ALJ erred in discrediting the opinion based on her knowledge of the exertional requirements of Claimant's usual coal mine employment. Claimant's Brief at 4-6 (unpaginated); *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Because there is no other medical opinion supportive of Claimant's burden, we affirm the ALJ's finding that the medical opinion evidence does not support total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 23. We further affirm his finding that the evidence overall does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 23. Because Claimant failed to establish total disability, an essential element of entitlement, we affirm the denial of benefits. *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge