U.S. Department of Labor

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

BRB No. 23-0383 BLA

DENNIS J. THOMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PANTHER CREEK MINING	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 06/20/2024
	)	
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 Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Dennis J. Thompson, Beckley, West Virginia.

Anne Rife (Midkiff, Muncie & Ross, P.C.), Bristol, Tennessee, for Employer and its Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Denying Benefits (2022-BLA-05791) rendered on a claim filed on December 23, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and therefore 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); *see* 20 C.F.R. §718.304. She credited Claimant with twenty-four years of qualifying coal mine employment based on the parties' stipulation but found Claimant did not have a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found 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), or establish entitlement to benefits under 20 C.F.R. Part 718. Thus, she denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

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, 1-86 (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).

[1] On Claimant's behalf, Vickie Combs, a lay representative with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Combs is not representing Claimant in this appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] We affirm the ALJ's finding that the parties' stipulation to twenty-four years of qualifying coal mine employment is supported by the record as this determination, which is not adverse to Claimant, is unchallenged on appeal. 20 C.F.R. §718.204(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West

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 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); *see* 20 C.F.R. §718.304. The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-rays insufficient to support a finding of complicated pneumoconiosis and no physician diagnosed the disease in medical opinions.[4] 20 C.F.R. §718.304(a)-(c); Decision and Order at 14-20.

X-ray Evidence at 20 C.F.R. §718.304(a)

The ALJ considered five readings of two chest x-rays dated March 9, 2022 and January 23, 2023. Decision and Order at 7-8, 15-18; Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 1, 5, 9. The ALJ observed Drs. Tarver, Adcock, and DePonte are dually qualified as Board-certified radiologists and B readers, while Dr. Forehand is a B reader only. Decision and Order at 16-17. Drs. Tarver, Adcock, and Forehand each read the March 9, 2022 x-ray as positive for simple pneumoconiosis only. Director's Exhibit 12; Employer's Exhibits 1, 5. Dr. DePonte read the January 23, 2023 x-ray as positive for complicated pneumoconiosis, category A, while Dr. Adcock read it as positive for simple pneumoconiosis only. Claimant's Exhibit 1; Employer's Exhibit 9.

The ALJ found the March 9, 2022 x-ray does not support a finding of complicated pneumoconiosis. Decision and Order at 17. She found the January 23, 2023 x-ray in equipoise as to the presence of complicated pneumoconiosis because Drs. DePonte and

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Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 3; Hearing Tr. at 10.

[4] Because there is no biopsy or autopsy evidence of record, Claimant cannot establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

Adcock are both dually-qualified radiologists.[5] *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 843 (6th Cir. 2016); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014), Decision and Order at 18. Having found one x-ray positive for simple pneumoconiosis only and another in equipoise, the ALJ permissibly found the preponderance of the x-ray evidence does not support a finding of complicated pneumoconiosis.[6] 20 C.F.R. §718.304(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 18. As it is rational and supported by substantial evidence, we affirm the ALJ's determination that the x-ray evidence does not establish complicated pneumoconiosis.

[5] Dr. Lundberg reviewed the March 9, 2022 x-ray film for quality only. Director's Exhibit 14. He rated its quality a "3" due to underexposure. *Id.* Observing that one of the three interpreting physicians also found the quality of the x-ray suboptimal, rating it a "2," the ALJ accorded this x-ray "some, but not significant, weight." Decision and Order at 17. Relatedly, she gave the January 23, 2023 x-ray "some, but not significant weight" because the two interpreting physicians rated its quality as "2." *Id.* at 18. We note, under International Labour Organization standards, a quality rating of "2" means the x-ray is "Acceptable, *with no technical defect likely to impair classification of the radiograph for pneumoconiosis*," while a "3" means the x-ray is "Acceptable, with some technical defect *but still adequate for classification purposes*." 20 C.F.R. §718.102 (standards for x-rays), *incorporating by reference Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses*, Revised edition 2011 (ILO Guidelines) (emphasis added). Because no physician interpreted the March 9, 2022 x-ray as positive for complicated pneumoconiosis, and the ALJ permissibly found the January 23, 2023 x-ray in equipoise for the disease, they do not support Claimant's burden of proof to invoke the Section 411(c)(3) presumption. Therefore any error in giving these x-rays diminished weight is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[6] The ALJ acknowledged the record contains x-ray interpretations associated with Claimant's West Virginia state black lung claims. Decision and Order at 8. The record contains West Virginia Occupational Pneumoconiosis Board Findings dated June 18, 2013, October 13, 2016, and May 28, 2020, which include narrative interpretations of x-rays associated with Claimant's state occupational pneumoconiosis claims. Director's Exhibit 7 at 3, 11, 85. The record also contains a March 8, 2016 x-ray interpretation by Dr. Afzal Ahmed of the x-ray film seemingly associated with Claimant's 2016 state claim. *Id.* at 48. The ALJ considered this evidence and noted none of the readers found large opacities consistent with complicated pneumoconiosis. Decision and Order at 8; Director's Exhibit 7 at 3, 11, 48, 85.

Medical Opinions at 20 C.F.R. §718.304(c)

The ALJ considered the opinions of Drs. Forehand and Broudy. Dr. Forehand did not render an opinion regarding the presence or absence of complicated pneumoconiosis. Director's Exhibit 12. Dr. Broudy opined Claimant does not suffer from the disease. Employer's Exhibit 7 at 2. As the ALJ properly found the medical opinion evidence does not support a finding of complicated pneumoconiosis, we affirm her determination. *See Adkins*, 958 F.2d at 52; Decision and Order at 19-20.

As the record is devoid of any other evidence relevant to the presence of complicated pneumoconiosis, progressive massive fibrosis, or massive lesions, we affirm the ALJ's finding that Claimant failed to establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *see Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 256; *Melnick*, 16 BLR at 1-33-34. Thus, we affirm her finding that Claimant did not invoke the irrebuttable presumption at Section 411(c)(3).

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

Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.305. 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. §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 determined the pulmonary function studies, arterial blood gas studies, and medical opinions do not support a finding of total disability. Decision and Order at 21-23.

Pulmonary Function Studies

The record contains six pulmonary function studies[7] dated March 9, 2002, February 3, 2023, June 18, 2013, October 13, 2016, October 6, 2016, and May 28, 2020.[8] Director's Exhibits 7, 12; Employer's Exhibit 10. The ALJ did not include the October 6, 2016 study in her summary of the evidence and therefore considered only five of the six pulmonary function studies. Decision and Order at 10-11. She accurately noted these five tests all produced non-qualifying results,[9] and thus found the pulmonary function study evidence does not establish total respiratory disability. Decision and Order at 9-10, 22.

While the ALJ failed to consider the October 6, 2016 study, it too is non-qualifying and further supports the ALJ's overall finding that the pulmonary function study evidence does not support a finding of total disability. Thus, her failure to consider this study is harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because none of the pulmonary function studies yielded qualifying values, we affirm the ALJ's determination they do not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 22.

[7] The studies consist of one affirmatively designated pulmonary function study dated March 9, 2002, one study in the treatment records dated February 3, 2023, and four studies associated with Claimant's West Virginia state black lung claims dated June 18, 2013, October 13, 2016, October 6, 2016, and May 28, 2020. Director's Exhibits 7, 12; Employer's Exhibit 10.

[8] The ALJ resolved the height discrepancy recorded on the pulmonary function studies, finding the preponderant evidence shows Claimant's height is 70 inches. She therefore applied the closest greater table height of 70.1 inches to assess whether the studies qualify for total disability. *See Carpenter v. GMS Mine & Repair Maint. Inc.*, BLR , BRB No. 22-0100 BLA, slip op. at 4-5 (Sept. 6, 2023); Decision and Order at 9-10.

[9] A "qualifying" pulmonary function study yields values equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" pulmonary function study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i).

Arterial Blood Gas Studies

The ALJ next properly determined that the one arterial blood gas study of record, dated March 9, 2022, produced non-qualifying values.[10] Director's Exhibit 12. Thus we affirm her determination that the arterial blood gas study evidence does not support a total disability finding. 20 C.F.R. §718.204(b)(2)(ii); *see Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 11, 22.

Cor Pulmonale

The ALJ accurately noted there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 22. We therefore affirm her finding that the evidence does not support total disability under this subsection. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 22.

Medical Opinions

The ALJ considered the medical opinions of Drs. Forehand and Broudy, who each described the results of Claimant's objective testing as normal and opined he does not have a totally disabling respiratory impairment. Director's Exhibit 12; Employer's Exhibit 7. Thus, the ALJ properly determined the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc); Decision and Order at 12-13, 22-23. Because this determination is supported by substantial evidence, we affirm it.

We also affirm, as supported by substantial evidence, the ALJ's finding that the weight of the evidence, like and unlike, fails to establish total respiratory or pulmonary disability. *See Rafferty*, 9 BLR at 1-232; *Fields*, 10 BLR at 1-21; Decision and Order at 23. As Claimant did not prove he is totally disabled, an essential element of entitlement under both Section 411(c)(4) of the Act and 20 C.F.R. Part 718, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[10] A "qualifying" blood gas study yields values equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" blood gas study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(ii).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge