U.S. Department of Labor

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

BRB No. 23-0398 BLA

DANIEL L. HINDERLITER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITE COUNTY COAL, LLC	)	
	)	
and	)	DATE ISSUED: 06/26/2024
	)	
ALLIANCE RESOURCE PARTNERS	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2020-BLA-05715) rendered on a claim filed on February 2, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

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

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus erred in finding he invoked the Section 411(c)(4) presumption. It further contends the ALJ erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation, declined to file a response brief.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is 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 Claimant established seventeen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[3] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 8.

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 or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[4] 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 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the pulmonary function study and medical opinion evidence.[5] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 15-16.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated February 7, 2006, March 8, 2016, November 28, 2016, and January 15, 2020.[6] Decision and Order at 6-10. The February 7, 2006 study was non-qualifying pre-bronchodilator and did not include post-

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

[5] The ALJ found the blood gas studies do 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 5, 11.

[6] The ALJ correctly noted the pulmonary function studies reported varying heights for Claimant falling between seventy and seventy-two inches, and permissibly calculated an average height of seventy-one inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 6 n.41. He then properly used the closest greater table height set forth at Appendix B of 20 C.F.R. Part 718 of 71.3 inches for determining whether the studies are qualifying. *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 6 n.41.

bronchodilator testing. Employer's Exhibit 10 at 415. The March 8, 2016 study yielded qualifying results before and after bronchodilator. Director's Exhibit 10 at 33. The November 28, 2016 study produced non-qualifying pre-bronchodilator results but qualifying post-bronchodilator results. Director's Exhibit 22 at 7. Finally, the January 15, 2020 study produced non-qualifying results before and after bronchodilator. Employer's Exhibit 7 at 50.

The ALJ found the February 7, 2006 and March 8, 2016 studies are valid while the November 28, 2016 and January 15, 2020 studies are invalid. Decision and Order at 7-9. He further found the qualifying March 8, 2016 study is more probative than the non-qualifying February 7, 2006 study as it is significantly more recent, and thus the valid pulmonary function study evidence supports a finding of total disability. *Id.* at 9-10.

Employer argues the ALJ erred in finding the March 8, 2016 study is qualifying because he did not consider Dr. Selby's opinion that its results are non-qualifying if the appropriate values for Claimant's age at the time of the study are used.[7] Employer's Brief at 6-7. We disagree.

The tables at Appendix B of 20 C.F.R. Part 718 set forth the qualifying values for pulmonary function studies based on the miner's height and age up to seventy-one years old. The ALJ correctly observed that pulmonary function studies performed on a miner over the age of seventy-one must be treated as qualifying if the values are qualifying for a seventy-one-year-old, but the party opposing entitlement may offer evidence that the studies do not indicate disability for a miner over seventy-one. *See K.J.M* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008); Decision and Order at 9-10 n.66.

Dr. Selby opined lung function continues to decline with age and so applying the qualifying values for a seventy-one-year-old to a seventy-seven-year-old, Claimant's age at the time of the March 8, 2016 study, is "ill advised and blatantly wrong." Employer's Exhibits 7 at 43; 8 at 14-15. He opined that using the "correct tables," the study is not qualifying and listed the values he considered appropriate. Employer's Exhibit 7 at 41, 43-

[7] Employer also argues the ALJ should have found the November 28, 2016 and January 15, 2020 studies are non-qualifying based on Claimant's age. Employer's Brief at 6-7. However, the ALJ did find the January 15, 2020 study is non-qualifying. Decision and Order at 7. Further, he found both studies are invalid and that finding is unchallenged. *See Skrack*, 6 BLR at 1-711; Decision and Order at 8-9. As the ALJ did not assign controlling weight to either study, Employer has not explained how the error it alleges would make a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

44. The ALJ permissibly found his opinion unpersuasive because the doctor did not explain how he determined what the age-appropriate qualifying values are. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *Meade*, 24 BLR at 1-47; Decision and Order at 9-10 n.66. As it is supported by substantial evidence, we affirm the ALJ's finding that the March 8, 2016 pulmonary function study is qualifying.[8]

As Employer raises no additional challenges regarding the pulmonary function study evidence, and because it is supported by substantial evidence, we affirm the ALJ's finding that the March 8, 2016 study is entitled to probative weight, *see Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1139 (7th Cir. 1988) (ALJ may accord greater weight to more recent evidence consistent with the view that pneumoconiosis is a progressive disease); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) ("later test or exam" is a "more reliable indicator of [a] miner's condition than an earlier one" where a "miner's condition has worsened" given the progressive nature of pneumoconiosis); *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 7-11 (Nov. 17, 2023), and the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10.

Medical Opinions

The ALJ considered the opinions of Drs. Istanbouly, Selby, and Tuteur. Decision and Order at 11-15. Dr. Istanbouly opined Claimant is totally disabled based on the March 8, 2016 pulmonary function study. Director's Exhibits 10 at 5-6; 16 at 2. Drs. Selby and Tuteur opined Claimant is not totally disabled because the pulmonary function and blood gas studies are not qualifying. Employer's Exhibits 4-8. The ALJ found the opinions of Drs. Selby and Tuteur unpersuasive because they are not adequately explained and because the objective testing does not support their opinions. Decision and Order at 13-15. He further determined Dr. Istanbouly's opinion is reasoned and documented and entitled to probative weight. *Id.* at 12. He thus concluded the medical opinion evidence supports a finding of total disability. *Id.* at 16.

[8] To the extent Employer argues the ALJ erred in not considering Dr. Tuteur's opinion, we disagree. Employer's Brief at 6-7. Dr. Tuteur opined that the March 8, 2016 study's qualifying values should be adjusted because Claimant was over the age of seventy-one when the study was administered, and that an FEV1 value below 1.9 would be considered disabling. Employer's Exhibit 6 at 20. He also opined Claimant's pre- and post-bronchodilator results were below that value and acknowledged that if the study is valid, it shows disability. *Id.* at 22. Because Dr. Tuteur's opinion supports the ALJ's finding that the March 8, 2016 study is qualifying, we reject Employer's argument.

We affirm, as unchallenged, the ALJ's finding that Dr. Istanbouly's opinion is reasoned and documented. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16.

Employer argues the ALJ erred in discrediting the opinions of Drs. Selby and Tuteur. Employer's Brief at 4-8. We disagree.

Drs. Selby and Tuteur opined the March 8, 2016, November 28, 2016, and January 15, 2020 pulmonary function studies are invalid and non-qualifying, and show Claimant's minimum level of lung function is above disability levels.[9] Employer's Exhibits 4 at 4-5; 6 at 18-23; 7 at 3; 8 at 16-18. The ALJ permissibly discredited their opinions because they assumed the qualifying March 8, 2016 study is invalid, contrary to his finding that it is valid and entitled to controlling weight. *Amax Coal Co. v. Burns*, 855 F.2d at 501; Decision and Order at 13-14.

Further, the ALJ discredited their opinions because they relied on invalid objective testing to opine Claimant is not totally disabled. Employer's Exhibits 6 at 18; 7 at 3; 8 at 17-18. The regulations state that "no results of a pulmonary function study shall constitute evidence of the *presence or absence* of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with" the regulatory quality standards. 20 C.F.R. §718.103(c) (emphasis added); 20 C.F.R. Part 718, Appendix B. Thus substantial evidence supports the ALJ's discrediting of their opinions on this basis. *See Burns*, 855 F.2d at 501; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); 20 C.F.R. §718.103(c); Decision and Order at 13-15.

As it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12-16. We therefore affirm the ALJ's finding the evidence, when weighed together, establishes total disability and that Claimant therefore invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305; Decision and Order at 15-16.

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,[10] or "no part of

[9] We note Dr. Tuteur actually opined the March 8, 2016 study is invalid, but if it were valid it would be qualifying. Employer's Exhibit 6 at 22.

[10] "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

[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.[11] Decision and Order at 25.

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Selby and Tuteur that Claimant does not have legal pneumoconiosis. Decision and Order at 19-24. Dr. Selby opined Claimant's mild obstruction was not caused by coal mine dust exposure because it has multiple other causes including, primarily, smoking, asthma, and bronchiectasis. Employer's Exhibits 7 at 3-4, 42; 8 at 19-22. Dr. Tuteur opined Claimant's chronic obstructive pulmonary disease (COPD) is due to smoking, chronic upper gastrointestinal difficulties, and bronchiectasis, but not the inhalation of coal mine dust. Employer's Exhibits 4 at 5; 5 at 3; 6 at 10-11, 25-31. The ALJ found their opinions not reasoned or documented and thus insufficient to rebut the presumption of pneumoconiosis. Decision and Order at 21-24.

Employer contends the ALJ erred in discrediting Dr. Selby's opinion. Employer's Brief at 10-11. We disagree.

Dr. Selby attributed Claimant's "airflow obstruction and lung destruction" and shortness of breath on exertion to smoking, secondary tobacco smoke inhalation, bronchiectasis, obesity, generalized weakness from age, and prostate cancer. Employer's Exhibits 7 at 3-4; 8 at 20-21. He opined these conditions explain Claimant's obstruction and thus coal mine dust exposure is an "exceedingly, exceedingly unlikely" cause. Employer's Exhibit 8 at 21. The ALJ permissibly found Dr. Selby's opinion not persuasive because, while he addressed other possible causes for Claimant's obstruction, he did not adequately explain why coal mine dust exposure also did not cause or aggravate Claimant's

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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).

[11] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 19.

obstruction. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008) (ALJ permissibly gave less weight to physician's report that listed diagnoses but does not explain why they were caused by smoking and not coal mine dust exposure); Decision and Order at 23.

In addition, Dr. Selby opined Claimant does not have legal pneumoconiosis because his x-rays were not positive for pneumoconiosis so "there [is] not any evidence that coal mine dust did anything to hurt his gas exchange, his ability to work, from a respiratory standpoint." Employer's Exhibit 8 at 21-22. The ALJ permissibly found this explanation inconsistent with the regulations that legal pneumoconiosis can exist in the absence of positive x-ray evidence.[12] 20 C.F.R. §718.202(a)(4), (b); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); Decision and Order at 23.

Employer also contends the ALJ erred in discrediting Dr. Tuteur's opinion. Employer's Brief at 13.

Dr. Tuteur acknowledged coal mine dust exposure could have caused Claimant's COPD but discussed several scientific studies that he opined demonstrate smoking is more harmful and is thus the far more likely cause of Claimant's COPD. Employer Exhibits 5 at 3-5; 6 at 28-30. Contrary to Employer's contention, the ALJ permissibly found Dr. Tuteur's opinion not reasoned because it is based on statistical generalities and does not adequately explain why Claimant's seventeen years of coal mine dust exposure could not have contributed to or aggravated his COPD. *See Beeler*, 521 F.3d at 726; *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 21.

Employer also generally contends the opinions of Drs. Selby and Tuteur are reasoned and documented, and support its contention by summarizing their opinions at length. Employer's Brief at 11-21. Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Finally, we reject Employer's assertion that the ALJ applied an incorrect standard when considering Claimant's treatment records and finding that they include a diagnosis of legal pneumoconiosis "in opposition to the Employer's rebuttal of legal

[12] Because the ALJ provided valid reasons for discrediting Dr. Selby's opinion on legal pneumoconiosis, we need not address Employer's remaining arguments regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 10-11.

pneumoconiosis." Employer's Brief at 9, 21-22. The ALJ noted the treatment records contain diagnoses of COPD, wheezing, chronic cough, dyspnea, and bronchitic cough, but do not contain an opinion these conditions are not legal pneumoconiosis. Decision and Order at 24, *citing* Employer's Exhibits 9, 10. He thus rationally concluded they do not aid Employer in rebutting the presumption. *See Stalcup*, 477 F.3d at 484; Decision and Order at 24.

Because the ALJ acted within his discretion in discrediting the opinions of Drs. Selby and Tuteur, the only opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer did not disprove the existence of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 24. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 24.

Disability Causation

The ALJ next considered whether Employer rebutted the Section 411(c)(4) presumption by showing "no part of the miner's 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)(ii); Decision and Order at 24-25. The ALJ rationally discredited the disability causation opinions of Drs. Selby and Tuteur because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 24-25. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's total disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge