U.S. Department of Labor

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

BRB No. 23-0461 BLA

DENNIS J. DELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TENNCO ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 06/26/2024
	)	
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 in a Subsequent Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits in a Subsequent Claim (2020-BLA-06077) 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 May 25, 2018.[1]

The ALJ found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked 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] and therefore established a change in the applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and therefore awarded benefits.[4]

[1] Claimant filed a prior claim on August 6, 2015, which the district director denied on September 30, 2016, for failure to establish total disability. Prior Claim Director's Exhibits 1, 17.

[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. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

[3] When 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 "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(d); *see 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 Claimant failed to establish total disability in his prior claim, he had to submit new evidence establishing this element to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 3.

[4] The ALJ also found Claimant did not establish he has complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to

On appeal, Employer argues the ALJ erred by allowing Claimant to submit x-ray evidence before the ALJ that was not submitted to the district director. Employer also argues the ALJ erred in finding Claimant established total disability and thereby erred in finding Claimant invoked the Section 411(c)(4) presumption.[5] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, 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.[6] 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).

Evidentiary Challenge

Employer challenges the ALJ's admission of the x-ray readings at Claimant's Exhibits 1 and 4 because they were not first submitted to the district director. Employer's Brief at 20-23. Claimant's Exhibits 1 and 4 include Dr. DePonte's readings of the February 3, 2021 and March 31, 2021 x-rays, respectively, which she interpreted as positive for both simple and complicated pneumoconiosis.

Claimant submitted the x-ray readings at Claimant's Exhibits 1 and 4 to the ALJ and all the parties on March 1, 2021, and April 15, 2021, respectively. Hearing Transcript at 7. Employer objected to Claimant's submissions because they were not first submitted to the district director, asserting that Claimant "may not now change its previously submitted, and relied upon evidence to new evidence at the [Office of Administrative Law Judges (OALJ)] level . . . ." October 15, 2021 Employer's Objection to Claimant's Evidence. At the November 10, 2021 hearing, the ALJ overruled Employer's renewed objection to Claimant's x-ray submissions. Hearing Transcript at 7-8. The ALJ, however,

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pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304; Decision and Order at 9.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4 n.13.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

admitted Employer's Exhibit 9 to rebut Claimant's Exhibits 1 and 4. He also accepted Employer's stipulation that Claimant has simple pneumoconiosis. *Id*. at 8-13.

Contrary to Employer's argument, medical evidence that was not submitted to the district director may be received in evidence, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing. 20 C.F.R. §725.456(b)(2). Unlike liability evidence, which cannot be admitted at the OALJ level in the absence of extraordinary circumstances if it is not first submitted to the district director, medical evidence may be offered either at the district director or OALJ levels. *See Marfork Coal Co. v. Weis*, 251 Fed. App'x 229, 234 (4th Cir. Oct. 18, 2007) (unpub.); *compare* 20 C.F.R. §725.456(b)(1) *with* 20 C.F.R. §725.456(b)(2) (distinguishing between medical evidence and liability evidence in the admission of evidence before the ALJ).

Claimant's counsel asserts she submitted Claimant's Exhibits 1 and 4 to all parties at least twenty days before the hearing, and Employer does not dispute it timely received those exhibits. Decision and Order at 2 n.5; Hearing Transcript at 7. Nor does it allege it was denied an opportunity to respond to Claimant's evidence. Employer's Exhibit 9. Because we discern no error in the ALJ's evidentiary ruling, we affirm the ALJ's admission of Dr. DePonte's x-ray readings.[7]

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

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, Claimant must establish he has 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] 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or

[7] Moreover, Employer concedes that its evidentiary challenge "may be a moot point" given its stipulation that Claimant suffers from simple clinical pneumoconiosis and the ALJ's determination that Claimant does not have complicated pneumoconiosis. *See* Decision and Order at 9; Employer's Brief at 20; Employer's Post-hearing Brief at 23. Employer therefore fails to explain how the evidentiary "error to which [it] points could have made any difference" to the outcome of this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[8] The ALJ found Claimant's usual coal mine work as a shuttle car operator and roof bolter required heavy manual labor because Claimant had to lift fifty to eighty pounds. Decision and Order at 10.

arterial blood gas studies,[9] 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).

Employer challenges the ALJ's finding that Claimant established total disability based on the medical opinion evidence and evidence as a whole.[10] Employer's Brief at 23-30; Decision and Order at 9-11.

Medical Opinions

The ALJ credited the opinions of Drs. Nader and Rajbhandari that Claimant has a totally disabling respiratory or pulmonary impairment over the contrary opinions of Drs. Dahhan and Tuteur. Decision and Order at 9-11; Director's Exhibits 13, 22; Claimant's Exhibits 1, 4; Employer's Exhibits 5-7.

Employer first asserts Drs. Nadar's and Rajbhandari's opinions are not credible because they relied on non-qualifying objective studies and a misdiagnosis of complicated pneumoconiosis to conclude Claimant is totally disabled. Employer's Brief at 26-28. We disagree.

Contrary to Employer's argument, a physician can diagnose a miner as totally disabled despite non-qualifying objective testing. 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997). As the ALJ noted, Dr. Nader opined Claimant's pulmonary function studies showed a significant pulmonary impairment which, when considered along with Claimant's symptoms of wheezing, would preclude him from performing his usual coal mine work. Claimant's Exhibit 4 at 1, 4. Similarly, Dr. Rajbhandari opined that Claimant would be

[9] 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 exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The ALJ found Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas studies, and that there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 9.

unable to perform his usual coal mine job that required lifting fifty to eighty pounds based on Claimant's mild obstruction with air trapping and his moderate to severely reduced diffusing capacity. Claimant's Exhibit 1 at 1, 3.

The ALJ also considered the physicians' diagnoses of complicated pneumoconiosis but permissibly found Drs. Nader's and Rajbhandari's total disability opinions well-reasoned and documented because they "fully explained and discussed Claimant's symptoms and objective findings in relation to the exertional requirements of his last [coal mine job]." *See Rowe*, 710 F.2d at 255; Decision and Order at 10-11. We therefore affirm the ALJ's conclusion that the opinions of Drs. Nader and Rajbhandari support a finding that Claimant is totally disabled.

With respect to Drs. Dahhan's and Tuteur's opinions, Employer argues the ALJ erred in finding they did not adequately address the exertional requirements of Claimant's usual coal mine employment. Employer's Brief at 28-30. Employer points out that both physicians summarized Claimant's job duties in their reports, Dr. Dahhan specifically noted Claimant has no exercise-induced hypoxemia to preclude heavy manual labor, and Dr. Tuteur likewise opined Claimant has no impairment of gas exchange during exercise from which to conclude Claimant could not perform his usual coal mine work. Employer's Brief at 30.

Despite Employer's contentions, blood gas studies, on which Employer bases its argument, measure different types of impairment than pulmonary function studies, on which Drs. Nader and Rajbhandari based their credited opinions. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Here, the ALJ permissibly gave less weight to Dr. Dahhan's opinion because, unlike Dr. Rajbhandari, he did not discuss whether Claimant's reduced diffusion capacity and air trapping seen on the pulmonary function testing Dr. Rajbhandari conducted would prevent Claimant from performing his usual coal mine work. *See Rowe*, 710 F.2d at 255, Decision and Order at 10-11; Director's Exhibit 22 at 2-3; Employer's Exhibit 7 at 2-4.

The ALJ also permissibly found Dr. Tuteur's opinion less persuasive because he diagnosed a mild to moderate obstructive impairment but did not discuss that impairment in relation to whether Claimant could perform heavy labor required in his job. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts the duties required and relate them to the miner's impairment); *Rowe*, 710 F.2d at 255; Decision and Order at 11; Employer's Exhibits 5 at 3-4; 6 at 4-5. We therefore affirm the ALJ's discrediting of Drs. Dahhan's and Tuteur's opinions.

Employer's arguments are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp 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); Decision and Order at 11. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and established a change in the applicable condition of entitlement. 20 C.F.R. §§718.305, 725.309(c); Decision and Order at 11. Further, we affirm, as unchallenged on appeal, the ALJ's findings that Employer did not rebut the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-18.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge