U.S. Department of Labor

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

BRB No. 21-0186 BLA

JERRY L. BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 5/16/2022
Employer-Petitioner	)	
	)	
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 Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order Awarding Benefits (2019-BLA-05439) rendered on a claim filed on January 11, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least fifteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore 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 challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding Claimant established total disability and thus invoked the presumption. It also argues 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 Programs, has filed a response, urging rejection of Employer's constitutional argument.

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 (1965).

Constitutionality of the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act

[1] Section 411(c)(4) provides a rebuttable presumption 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 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 5.

[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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

(ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 4-6. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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 and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). 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 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). In this case, the ALJ found Claimant established total disability based on the medical opinion evidence and the evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 5-12.

Employer argues that, in weighing the medical opinion evidence, the ALJ improperly required it to disprove total disability instead of requiring Claimant to establish this element of entitlement.[5] Employer's Brief at 9-10. We reject this argument.

The ALJ weighed the medical opinions of Drs. Nader and Green that Claimant is totally disabled by a respiratory or pulmonary impairment and the opinions of Drs. McSharry and Sargent that he is not. Decision and Order at 6-11; Director's Exhibits 11, 16, 18; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 4. He found the opinions of Drs. Green and Nader "well-reasoned and well-supported" and the contrary opinions of Drs. McSharry and Sargent unpersuasive. Decision and Order at 10-12. He thus assigned

[4] The ALJ found Claimant did not establish total disability based on the pulmonary function or arterial blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 5-6.

[5] We reject Employer's argument that remand is necessary because the ALJ rendered findings on total disability and legal pneumoconiosis within the same section of his Decision and Order. Employer's Brief at 6-7, 20. Because we can discern what the ALJ did and why he did it with respect to each of these elements, the duty of explanation is satisfied, notwithstanding the ALJ's combined analysis. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999).

"greater evidentiary weight" to the opinions of Drs. Nader and Green. *Id.* As the ALJ found Claimant established "by a preponderance of the evidence . . . that he has a totally disabling respiratory or pulmonary impairment," he properly placed the burden of proof on Claimant to establish this element. *Id.*; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993).

Employer next argues the ALJ did not explain his basis for crediting the opinions of Drs. Nader and Green and, therefore, his credibility findings fail to satisfy the explanatory requirements of the Administrative Procedure Act.[6] Employer's Brief at 15-17. We also reject this argument.

Dr. Nader recorded that Claimant experiences "shortness of breath mainly with exertion" and has a history of chronic cough and wheezing. Director's Exhibit 11 at 2-4. In addition, he noted Claimant's usual coal mine employment working in the preparation plant required him to lift "50-100 pounds at any given time during a work-day." *Id.* He interpreted a June 14, 2017 qualifying[7] arterial blood gas study as consistent with hypoxemia based on a resting pO2 value of fifty-nine and pCO2 value of thirty-five, followed by a repeat blood gas study revealing a pO2 of sixty-three and pCO2 of thirty-six. *Id.* He concluded Claimant is totally disabled because he cannot "perform the previous exercise requirement" of his coal mine employment due to his hypoxemia. *Id.* Furthermore, he stated Claimant's "history of wheezing, dry cough, and shortness of breath with minimal exertion [limits] his daily living activities and [makes] Claimant unable to perform his daily tasks," further supporting a total disability diagnosis. *Id.* After reviewing Dr. McSharry's contrary opinion, including his April 2, 2018 non-qualifying blood gas study, Dr. Nader reiterated that Claimant is totally disabled. Director's Exhibit 18.

Dr. Green noted Claimant has become "[i]ncapacitated by shortness of breath when carrying a single piece of tin from the carport to the front of his house - a distance of about [ten to fifteen] feet" and "would have to stop and rest in order to complete walking a level [one hundred] yards." Claimant's Exhibit 1 at 2. He recorded Claimant has had "mid-

[6] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[7] A "qualifying" pulmonary function study or blood gas study yields values 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 yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

sternal chest discomfort with exertion" in addition to the shortness of breath. *Id.* Like Dr. Nader, Dr. Green recorded Claimant's usual coal mine employment required him to lift "50-100 pounds at any given time" and characterized this job as requiring heavy labor. *Id.* at 1. Although an April 16, 2019 blood gas study that Dr. Green conducted did not produce qualifying values for total disability, he opined the study still evidences "hypoxemia and impaired gas exchange" because the study's resting pCO2 value of forty-five and pO2 value of sixty-five are "abnormal" and there is no improvement in the pO2 value after exercise. *Id.* at 2-3. He indicated the reduced diffusing capacity testing further "suggests that there is impaired gas exchange." *Id.* He concluded Claimant is totally disabled by his "impairment in gas exchange," which "is a reason to avoid heavy exertion as would be required in his last coal mine job." *Id.* After reviewing the results of a June 10, 2019 non-qualifying blood gas study, he again opined Claimant is totally disabled by hypoxemia. Claimant's Exhibit 2.

In weighing the opinions of Drs. Nader and Green, the ALJ fully summarized their rationales for diagnosing total disability, including their respective interpretations of arterial blood gas testing and discussions of Claimant's shortness of breath with exertion. Decision and Order at 6-8. He also found both doctors explained how Claimant's respiratory impairment would prevent him from performing the exertional requirements of his usual coal mine employment. *Id.* at 10. Furthermore, he recognized both doctors reiterated their opinions that Claimant is totally disabled after reviewing additional objective testing, including non-qualifying blood gas tests. *Id.* at 6-8. As the ALJ fully explained his basis for finding the opinions of Drs. Nader and Green "well-reasoned and well-supported," Decision and Order at 10, and that finding is supported by substantial evidence, we affirm the ALJ's crediting of their opinions. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (explaining that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) ("If a reviewing court can discern what the ALJ did and why he did it, the duty of explanation is satisfied.").

Employer next argues the ALJ erred in rejecting the contrary opinions of Drs. McSharry and Sargent because it contends he substituted his opinion for those of the medical experts. Employer's Brief at 7-9, 13-14. This argument has no merit.

Dr. McSharry opined Claimant is not totally disabled because the April 2, 2018 pulmonary function and arterial blood gas studies he conducted as part of his examination are non-qualifying under the regulations. Director's Exhibit 16. He acknowledged a June 14, 2017 blood gas study that Dr. Nader conducted produced qualifying results, but he noted subsequent studies produced non-qualifying results. *Id.* Thus he concluded the qualifying results may have been due to a "transient phenomenon such as atelectasis of the lungs" that is no longer present. *Id.* at 2. He issued a supplemental report after reviewing the blood gas testing that Drs. Green and Sargent conducted and opined these studies

demonstrate "hypoxemia at rest" but are still non-qualifying. Employer's Exhibit 4 at 2-3. He reiterated his opinion that Claimant is not totally disabled because the pulmonary function and arterial blood gas studies are "fairly normal other than for minimal hypoxemia for age." *Id*.

Dr. Sargent also opined Claimant is not totally disabled because the March 10, 2020 pulmonary function and arterial blood gas studies he conducted are non-qualifying. Employer's Exhibit 1. He noted, however, the resting blood gas study shows "mild hypoxemia with borderline hypercarbia" and characterized its results as "near normal." *Id*. at 1. In addition, he reviewed the blood gas studies that Drs. Nader and Green conducted. *Id*. at 2-3. Although the June 14, 2017 blood gas study that Dr. Nader conducted produced qualifying results, Dr. Sargent noted subsequent testing produced non-qualifying results. *Id*. Thus he opined Claimant is not totally disabled because "there is no evidence of a consistent gas exchange abnormality in the record that would indicate [Claimant] has a disabling gas exchange abnormality." *Id*. He concluded the "waxing and waning [of] arterial blood gas abnormalities" indicated Claimant's "respiratory function is normal or nearly normal." *Id*.

The ALJ correctly found both doctors opined Claimant is not totally disabled because his pulmonary function and arterial blood gas studies are non-qualifying, but they both acknowledged Claimant's blood gas testing demonstrates hypoxemia. Decision and Order at 10-11; Director's Exhibit 16; Employer's Exhibit 1. A physician may conclude, however, that a miner is totally disabled even if the objective studies are non-qualifying. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); 20 C.F.R. §718.204(b)(2)(iv). Contrary to Employer's argument, the ALJ permissibly discredited the opinions of Drs. McSharry and Sargent because they did not "discuss the demands of Claimant's usual coal-mine employment, and [did] not directly consider whether his pulmonary or respiratory impairment would prevent him from meeting those demands."[8] Decision and Order at 11; *see 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 required and relate them to the miner's impairment);

[8] Because the ALJ provided a valid reason for discrediting the opinions of Drs. McSharry and Sargent, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 7-9, 13-14.

Walker v. Director, OWCP, 927 F.2d 181, 184-85 (4th Cir. 1991); Employer's Exhibits 1, 4.

Thus, we affirm the ALJ's determination that Claimant established total disability based on the medical opinion evidence and the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 5-12. We therefore affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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[9] or "no part of [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 did not establish rebuttal by either method.

Employer argues the ALJ erred in finding it failed to rebut the presumed existence of legal pneumoconiosis. Employer's Brief at 15-18. This argument has no merit.

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

Both Dr. McSharry and Dr. Sargent opined Claimant does not have legal pneumoconiosis because his pulmonary function and arterial blood gas studies are non-qualifying. Director's Exhibit 16; Employer's Exhibit 1. As discussed above, however, Claimant established a totally disabling respiratory impairment in the form of hypoxemia demonstrated by blood gas testing, and both physicians acknowledged mild hypoxemia

[9] 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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Clinical 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).

evidenced by non-qualifying blood gas testing. *Id*. Although both doctors opined the presence of hypoxemia is consistent with someone of Claimant's age, neither physician opined Claimant's hypoxemia is not significantly related to, or substantially aggravated by, coal mine dust exposure. *Id*. Thus the ALJ rationally found their opinions "incomplete and unpersuasive," and insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 11-12; *see W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

We thus affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's conclusion that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).[10]

The ALJ also found Employer did not rebut the presumption by establishing "no part of [Claimant'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); *see* Decision and Order at 12. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to prove no part of Claimant's total disability was caused by legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 12.

[10] Employer argues the ALJ erred in failing to render any findings on the issue of clinical pneumoconiosis. Employer's Brief at 16. We see no reason why this failure requires remand. Clinical pneumoconiosis and legal pneumoconiosis are distinct diseases, and the absence of clinical pneumoconiosis does not preclude the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1), (2); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995); *Barber v. U.S. Steel Mining Co.*, 43 F.3d 899, 901 (4th Cir. 1995). Thus the ALJ's failure to render a finding on the issue of clinical pneumoconiosis is harmless because Employer did not rebut legal pneumoconiosis and thus cannot establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge