U.S. Department of Labor

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

BRB No. 23-0156 BLA

BRIAN K. PERKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH FORK COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH/AIG	)	DATE ISSUED: 05/29/2024
	)	
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 of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, 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) Jason A. Golden's Decision and Order Awarding Benefits (2021-BLA-05032) rendered on a claim filed on August 28, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has twenty-three years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment, thereby invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 20 C.F.R. §718.204(b)(2). Further, the ALJ found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed 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.[4] 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] Claimant previously filed a claim that he later withdrew. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[2] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

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

[4] 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*

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

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work.[5] *See* 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 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 established total disability based on the medical opinion evidence and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16.

The ALJ considered the medical opinions of Drs. Alam, Go, Rosenberg, and Tuteur. Decision and Order at 8-15. Dr. Alam opined Claimant is totally disabled based on the qualifying November 20, 2019 pulmonary function study,[7] which showed moderate airflow obstruction. Director's Exhibit 19 at 4-5. Dr. Go opined Claimant is totally disabled from performing heavy labor based on his diffusion capacity results, which Dr. Go interpreted as demonstrating a "class 3" pulmonary impairment under American Medical Association criteria. Claimant's Exhibit 1 at 4-5. Dr. Rosenberg opined Claimant has moderate airflow obstruction and moderately reduced diffusing capacity. Employer's Exhibit 2 at 3-4. While initially indicating Claimant is not totally disabled from a pulmonary perspective,

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

[5] The ALJ found Claimant's usual coal mine employment as a continuous miner operator required heavy manual labor and a significant amount of physical exertion. Decision and Order at 8. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[6] 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 4-6.

[7] 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).

Dr. Rosenberg concluded "he does not meet qualifying levels set by [the Department of Labor (DOL)] but is disabled from a pulmonary perspective." *Id.* at 4. Dr. Tuteur opined Claimant is not totally disabled solely from a pulmonary perspective. Employer's Exhibit 3 at 4-5. Crediting the opinion of Dr. Go over those of Drs. Alam, Rosenberg, and Tuteur,[8] the ALJ found the medical opinion evidence establishes Claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order at 15-16.

Employer argues the ALJ erred in crediting Dr. Go's opinion to find total disability. Specifically, it contends Dr. Go relied solely on Claimant's January 21, 2021 diffusion capacity study to diagnose total disability but the regulations do not provide diffusion capacity as a basis to establish total disability. Employer's Brief at 10-12. It also contends the ALJ failed to adequately consider Dr. Tuteur's explanation that the diffusion capacity study was unreliable. *Id.* at 12-14. We disagree.

Even if total disability cannot be established by qualifying objective testing, it "may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents" him from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (explaining a claimant can establish total disability despite non-qualifying objective tests). In addition, contrary to Employer's contention, a physician's opinion that a claimant is disabled due to a reduced diffusing capacity may constitute a valid basis for an ALJ's finding of total disability under the Act.[9] *See Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991).

[8] The ALJ accorded Dr. Alam's opinion "little weight" because he was unaware of the non-qualifying objective studies. Decision and Order at 8. The ALJ further accorded no weight to Dr. Rosenberg's opinion, finding it ambiguous and insufficiently reasoned and documented. *Id.* at 9. We affirm the ALJ's discrediting of these opinions as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[9] Employer argues there is an open comment on a proposed regulation regarding the acceptance of diffusion capacity studies and that the "ALJ's reliance solely on [diffusion capacity] testing during a period of active rulemaking would violate the concept of regulations, Preamble, and operation of [DOL] rulemaking procedure." Employer's Brief at 11. Because Employer cites to nothing in support of its assertion, we decline to address its argument as inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

As the ALJ noted, Dr. Go acknowledged the pulmonary function studies and arterial blood gas studies were non-qualifying. Decision and Order at 11; Claimant's Exhibit 1. He nonetheless concluded Claimant is unable to perform his usual coal mine work, or any coal mining work, given the diffusion capacity study results,[10] and explained why the diffusion capacity study reflected an impairment; thus, the ALJ permissibly found Dr. Go's opinion well-reasoned and well-documented. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-12; Claimant's Exhibits 1, 4.

Moreover, we reject Employer's argument that the ALJ disregarded Dr. Tuteur's explanation that the diffusion capacity study was "questionable" because it did not consider Claimant's actual carboxyhemoglobin level of 2.8 percent, and erroneously placed the burden of proof on Employer.[11] Employer's Brief at 12-14. The ALJ noted that Dr. Rosenberg, who conducted the relevant diffusion capacity testing, included Claimant's carboxyhemoglobin level of 2.8 percent in his report and summary of the objective studies, and further indicated the diffusion capacity was moderately reduced. Decision and Order at 14; Employer's Exhibit 2. Thus, the ALJ found Dr. Rosenberg was aware of Claimant's actual carboxyhemoglobin level and would not have noted a reduction in the diffusion capacity if he believed the study was incorrect or unreliable.[12] Decision and Order at 14. Finally, the ALJ found Dr. Tuteur's contention that he was aware of the process of the clinic where the diffusion capacity testing was conducted -- that the clinic administers the diffusion capacity test prior to obtaining the carboxyhemoglobin measurement, thus making it likely the study relied on the incorrect value -- was belied by the fact that the

[10] The ALJ found Dr. Go's understanding of the exertional requirements of Claimant's usual coal mine work consistent with his own. Decision and Order at 11. We affirm this finding as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[11] Dr. Tuteur opined that the diffusion capacity results are likely falsely low because they were calculated by using the presumed carboxyhemoglobin level of one percent rather than Claimant's actual carboxyhemoglobin level of 2.8 percent. Employer's Exhibit 4 at 18-19.

[12] As the ALJ noted, Dr. Go also indicated that the carboxyhemoglobin level on the January 21, 2021 diffusion capacity testing was 2.8 percent and "therefore the diffusion capacity measurement is an accurate representation of [Claimant's] true diffusion capacity." Decision and Order at 11; Claimant's Exhibit 4 at 5.

carboxyhemoglobin testing was obtained before the diffusion capacity test. Decision and Order at 14; Employer's Exhibits 2; 4 at 30-31.

Therefore, contrary to Employer's assertion, the ALJ did not place the burden of proof on Employer, but rather he acted within his discretion in rejecting Dr. Tuteur's opinion as unreasoned and unsupported by the record. *See Crisp*, 866 F.2d at 185; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (ALJ is not required to accept the opinion of any medical expert). We thus affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).

As Employer raises no further challenge to the ALJ's finding that Claimant established total disability, we affirm, as supported by substantial evidence, the ALJ's findings that Claimant established total disability and therefore invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §§718.204(b), 718.305; *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 16. Additionally, because Employer does not challenge the ALJ's finding it failed to rebut the Section 411(c)(4) presumption, we affirm that determination. *See* 20 C.F.R. §718.305(d); *Skrack*, 6 BLR at 1-711; Decision and Order at 21.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge