U.S. Department of Labor

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

BRB No. 23-0207 BLA

BOBBY D. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 05/08/2024
	)	
SUNCOKE ENERGY, INCORPORATED	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2021-BLA-05039) rendered on a claim filed on July 15, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 15.71 years of underground coal mine employment and found he established 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,[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 invoked the Section 411(c)(4) presumption.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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.[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).

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

To invoke the Section 411(c)(4) presumption, a 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying

[1] 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. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 15.71 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[3] 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; Hearing Tr. at 12.

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 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). 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 studies, medical opinions, and evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 8, 12-13.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated March 12, 2019, October 21, 2019, and February 28, 2020. Decision and Order at 5-8. The March 12, 2019 study produced qualifying results without the administration of a bronchodilator. Director's Exhibit 21 at 2-4 (unpaginated). The October 21, 2019 study produced qualifying results before the administration of a bronchodilator and non-qualifying results after the administration of a bronchodilator. Director's Exhibit 13 at 9 (unpaginated). The February 28, 2020 study produced non-qualifying results before and after the administration of a bronchodilator. Director's Exhibit 24 at 6 (unpaginated).

The ALJ found all the pulmonary function studies valid and reliable. Decision and Order at 5-7. He also found the qualifying pre-bronchodilator results of the October 21, 2019 study entitled to more weight than the non-qualifying post-bronchodilator results of the study. *Id*. at 7-8 n.12 (citing 45 Fed. Reg. 13, 678, 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.")). Concluding that two studies support a finding

[4] A "qualifying" pulmonary function study or arterial blood gas study yields results 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 yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies, or evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 4, 8.

of total disability and one study does not, the ALJ determined the preponderance of the pulmonary function study evidence supports a finding of total disability. *Id*. at 8.

As the ALJ's finding that the March 12, 2019 pulmonary function study supports a finding of total disability is unchallenged, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

Employer argues the ALJ erred in discrediting Dr. Vuskovich's opinion that the October 21, 2019 study is invalid. Employer's Brief at 7-12. We disagree.

When considering pulmonary function study evidence, an ALJ must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ, as the fact-finder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). "In the absence of evidence to the contrary, compliance with the [regulatory quality standards] shall be presumed." 20 C.F.R. §718.103(c). Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The ALJ considered Dr. Vuskovich's opinion that the October 21, 2019 study is invalid because Claimant's "respiratory rate and tidal volume were not sufficient to generate valid MVV results." Decision and Order at 6; *see* Employer's Exhibit 1 at 4. However, the ALJ noted in contrast that the technician who administered the study observed "Claimant put forth good effort and cooperation" and "his ability to understand and follow instructions was good." Decision and Order at 6; *see* Director's Exhibit 13 at 9. In addition, the ALJ noted "the MVV portion of the test report indicates that ATS [American Thoracic Society] criteria was (sic) met." Decision and Order at 6; *see* Director's Exhibit 13 at 15.

Contrary to Employer's assertion, the ALJ permissibly found Dr. Vuskovich's opinion unpersuasive because the doctor "did not adequately explain what data or calculus allowed him" to assess Claimant's performance on the test. Decision and Order at 7; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5,

1-7 (1985). Thus, we affirm the ALJ's finding that the study is valid and reliable.[6] 20 C.F.R. §718.103(c); *Vivian*, 7 BLR at 1-361; Decision and Order at 8.

We also reject Employer's argument that the ALJ erred in not giving greater weight to the February 28, 2020 pulmonary function study because it is "the most recent pulmonary evidence." Employer's Brief at 12. Contrary to Employer's assertion, the ALJ was not required to credit the February 28, 2020 non-qualifying pulmonary function study over the prior qualifying pulmonary function studies. The Board has held it is irrational to credit evidence solely because of recency where the miner's condition has improved. *See Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA, 22-0024 BLA-A, slip op. at 7-13 (Nov. 17, 2023) (ALJ erred by crediting "solely on the basis of recency" a blood gas study purporting to show the miner's condition improved); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) ("A bare appeal to recency" in evaluating medical opinions "is an abdication of rational decision-making.").

Thus, we reject Employer's argument that the ALJ should have found the February 28, 2020 study more probative based only on its recency where it indicates Claimant's condition improved, and was conducted only four months after the qualifying October 21, 2019 study. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJ permissibly found "sufficiently contemporaneous" pulmonary function tests conducted within a seven month period established disability where two of three most recent studies were qualifying); *Greer v. Director, OWCP*, 940 F.2d 88, 90 (4th Cir.1991) (pulmonary function studies conducted two months apart "should be considered contemporaneous" given that pneumoconiosis is "slowly-progressing"); Decision and Order at 7-8.

Because substantial evidence supports it, we affirm the ALJ's finding that the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 8.

[6] Employer also argues the ALJ erred in discrediting Dr. Vuskovich's opinion that the non-qualifying results of the February 28, 2020 pulmonary function study are invalid. Employer's Brief at 7-10, 12. Because the ALJ found Claimant established total disability based on the March 12, 2019 and October 21, 2019 studies – and concluding that the non-qualifying results of the February 28, 2020 study are invalid would not undermine that finding – we need not address Employer's assertion regarding the ALJ's weighing of Dr. Vuskovich's validity opinion. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Medical Opinions

The ALJ next considered the medical opinions of Drs. Vuskovich and Tuteur.[7] Decision and Order at 9-12. They opined Claimant is not totally disabled from a pulmonary or respiratory impairment. Employer's Exhibits 1 at 9-10; 2 at 4. The ALJ found their opinions unpersuasive because they are "inconsistent" with the weight of "the pulmonary function test evidence." Decision and Order at 11-12. He also found their opinions "poorly" reasoned as they did not "explain how Claimant could return" to his last coal mine job involving moderate to heavy manual labor in light of his respiratory impairment. *Id.* Further, he found Dr. Vuskovich's opinion unpersuasive because the doctor concluded the October 21, 2019 pulmonary function study is invalid, contrary to the ALJ's finding that the study is valid. *Id.* at 11.

In challenging the ALJ's rationale for discrediting the opinions of Drs. Vuskovich and Tuteur, Employer reiterates its argument that the ALJ erred in finding the October 21, 2019 pulmonary function study valid. Employer's Brief at 14-16. Since we have rejected Employer's argument with respect to the validity of the pulmonary function tests, we reject Employer's contentions and affirm the ALJ's discrediting of Drs. Vuskovich's and Tuteur's opinions. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Knizner*, 8 BLR at 1-7.

Because there is no credited evidence undermining the pulmonary function study evidence, we also affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2) (qualifying pulmonary function studies "shall establish" total disability "[i]n the absence of contrary probative evidence"); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 12-13. Therefore, we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305; Decision and Order at 13.

[7] The ALJ also considered Dr. Harris's opinion that Claimant is totally disabled from a pulmonary or respiratory impairment. Director's Exhibits 13, 19. He found Dr. Harris's opinion well-reasoned and documented and entitled to probative weight. Decision and Order at 10. Because we affirm the ALJ's finding that Claimant established total disability through the pulmonary function testing at 20 C.F.R. §718.204(b)(2)(i), and the contrary opinions of Drs. Vuskovich and Tuteur do not undermine the pulmonary function study evidence, we need not address Employer's argument that the ALJ erred in considering Dr. Harris's opinion, as any error the ALJ made in finding total disability established through the doctor's opinion would be harmless. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 4-6, 13-16.

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,[8] or that "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 failed to establish rebuttal by either method.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the 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. §§718.305(d)(1)(i)(B), 718.201(a)(1).

We affirm the ALJ's finding that Employer failed to disprove clinical pneumoconiosis as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 15-16. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[9] *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

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

[8] "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). The definition includes "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).

[9] Because Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we need not address its assertion of error with respect to the ALJ's legal pneumoconiosis finding. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 16.

pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 18. Because Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, we affirm his determination that Employer failed to establish no part of Claimant's respiratory or pulmonary disability was due to clinical pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Skrack*, 6 BLR at 1-711; Decision and Order at 18. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits. 20 C.F.R. §718.305(d)(1)(ii).

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

GREG J. BUZZARD
Administrative Appeals Judge