U.S. Department of Labor

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

BRB No. 23-0321 BLA

KENNETH F. MANEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AL HAMILTON CONTRACTING COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 05/16/2024
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2022-BLA-05626) rendered on a claim filed on September 20, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with at least thirty-three years of employment in underground coal mines or surface coal mines in conditions substantially similar to those in an underground mine. However, she found Claimant did not establish a totally disabling pulmonary or respiratory impairment and, therefore, could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Because Claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer and its Carrier respond in support of the denial of benefits.[3] The Director, Office of Workers' Compensation Programs (the Director), declined to file a reply 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

[1] Claimant filed one prior claim but withdrew it. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." *See* 20 C.F.R. §725.306(b).

[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. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least thirty-three years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.

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, 361-62 (1965).

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

To invoke the Section 411(c)(4) presumption, 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 or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[5] 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). The ALJ found Claimant failed to establish total disability by any method.[6] 20 C.F.R. §718.204(b)(2); Decision and Order at 16-31.

Claimant contends the ALJ erred in weighing the blood gas study and medical opinion evidence. Claimant's Brief at 6-8.

Blood Gas Studies

The ALJ considered three blood gas studies dated October 7, 2021, February 23, 2022, and August 24, 2022. Decision and Order at 18. The October 7, 2021 study produced

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

[5] 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. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] We affirm, as unchallenged, the ALJ's findings that the pulmonary function studies do not establish total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 16-17, 19.

non-qualifying results at rest and with exercise, while the February 23, 2022 study was non-qualifying at rest and no exercise study was conducted. Director's Exhibits 16 at 7; 26 at 24. The August 24, 2022 study was qualifying at rest and no exercise study was conducted. Employer's Exhibit 1 at 31. The ALJ found that because "there are more non-qualifying [studies] than the one qualifying [study] at rest and the only exercise [study] is also non-qualifying," the preponderance of the blood gas study evidence is non-qualifying. Decision and Order at 18. Thus she found the blood gas study evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 18.

Claimant argues the August 24, 2022 qualifying study is the "most probative" and thus the ALJ erred in finding the blood gas study evidence does not support total disability. Claimant's Brief at 7-8. We disagree.

The ALJ noted that she may give more weight to a more recent qualifying study but permissibly declined to do so in this case. Decision and Order at 18; *see Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992).[7] She further stated exercise blood gas studies may be "afforded more weight as more probative of a claimant's ability to perform coal mine employment requiring physical exertion." Decision and Order at 18; *see Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (ALJ may give greater weight to exercise study results if warranted); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980).

Contrary to Claimant's argument, the ALJ permissibly found the preponderance of the resting blood gas study results are non-qualifying and, considering them alongside the non-qualifying exercise study, permissibly concluded the weight of the blood gas study evidence is non-qualifying.[8] *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d

[7] *See also Greer v. Director, OWCP*, 940 F.2d 88 (4th Cir.1991) (pulmonary function studies conducted two months apart "should be considered contemporaneous" given that pneumoconiosis is "slowly-progressing"); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (affirming ALJ's finding that pulmonary function studies conducted within seven months were "sufficiently contemporaneous").

[8] The Director included a footnote in his letter to the Board that asserted the ALJ improperly relied on *Cline v. Cline Bros. Mining Co.*, BRB No. 05-0247 BLA (Oct. 31, 2005) (unpub.) and *J.C. v. Premier Elkhorn Coal Co.*, BRB No. 07-0636 (Mar. 31, 2008) "for the proposition that a non[-]qualifying exercise study should be given more weight than a qualifying resting study." Director's Non-Participation Letter Dated Sept. 18, 2023. While the ALJ stated exercise studies may be given additional weight, she also based her finding on the preponderance of the studies overall. Decision and Order at 18. Thus any error identified by the Director is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-

Cir. 2002) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Coen*, 7 BLR at 1-31-32 (it is within the ALJ's discretion to find a particular study more probative than another study); Decision and Order at 18. We therefore affirm her finding the blood gas study evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(ii); Decision and Order at 18.

Medical Opinions

The ALJ considered the medical opinions of Drs. Zlupko, Basheda, and Fino. Decision and Order at 19-31. Dr. Zlupko opined Claimant is totally disabled based on the moderate restrictive impairment seen on his pulmonary function studies and resting hypoxemia seen on his blood gas studies. Director's Exhibits 16 at 4; 24; 29. Dr. Fino opined Claimant's pulmonary function studies reveal a reduced diffusion capacity and his blood gas studies show mild hypoxemia at rest, but these impairments are not significant enough to prevent him from performing his usual coal mine employment. Director's Exhibit 26 at 10; Employer's Exhibit 3 at 13-21, 24-25. Dr. Basheda opined Claimant's pulmonary function studies demonstrate a mild restriction and his blood gas studies show he has mild resting hypoxemia, but he is not disabled because his pulmonary function studies are not qualifying and his blood gas studies and pulse oximetry results considered together demonstrate his hypoxemia is not disabling. Employer's Exhibits 1 at 17-20; 4 at 10-15, 17-18.

The ALJ discredited Dr. Zlupko's opinion because he did not demonstrate an accurate understanding of Claimant's exertional requirements or explain his opinion Claimant is disabled despite the non-qualifying pulmonary function and blood gas studies. Decision and Order at 27-28. She found Drs. Fino's and Basheda's opinions that Claimant is not totally disabled are adequately documented and reasoned. *Id.* at 29-31. She thus concluded their opinions are entitled to more weight than Dr. Zlupko's opinion and the medical opinion evidence thus does not support a finding of total disability. *Id.* at 31.

As an initial matter, we affirm, as unchallenged on appeal, the ALJ's finding that Dr. Zlupko's opinion is not reasoned and therefore not credible to support a finding of total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28.

Claimant instead argues the ALJ erred in crediting the opinions of Drs. Basheda and Fino. Claimant's Brief at 8. While Drs. Fino and Basheda agreed with Dr. Zlupko's opinion that Claimant has a restrictive impairment and resting hypoxemia, they did not

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1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

agree that these impairments were totally disabling. Director's Exhibits 16 at 4; 24; 26 at 10; 29; Employer's Exhibits 1 at 17-20; 3 at 13-21, 24-25; 4 at 11-15. Thus, the opinions of Drs. Fino and Basheda alone cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Consequently, and because the ALJ's finding that Dr. Zlupko's opinion is not credible is unchallenged, we need not address Claimant's argument the ALJ erred in crediting the opinions of Drs. Fino and Basheda. *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"); Decision and Order at 31.

We therefore affirm the ALJ's determination that the medical opinion evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(iv). Decision and Order at 31. As Claimant raises no additional arguments, we further affirm the ALJ's finding the evidence when weighed together does not establish total disability, and Claimant cannot invoke the Section 411(c)(4) presumption. *See Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2); Decision and Order at 31.

Finally, because Claimant did not establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge