U.S. Department of Labor

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

BRB No. 21-0320 BLA

BURLIN OWENS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 10/25/2022
Self-Insured 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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

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

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2017-BLA-05757) rendered on a subsequent claim filed on January 28, 2016,[1] 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 qualifying coal mine employment, based on the parties' stipulation, and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 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 argues the ALJ erred in finding Claimant established total disability. Claimant responds in support of the award of benefits. The Director, Office of

[1] This is Claimant's fifth claim. Claimant withdrew his third and fourth claims. Director's Exhibit 2. Withdrawn claims are considered not to have been filed. *See* 20 C.F.R. §725.306(b). The district director denied Claimant's second claim, filed on January 5, 2009, because he failed to establish a totally disabling pulmonary or respiratory impairment. Director's Exhibit 2.

[2] 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 that "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(c); *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 did not establish total disability in his prior claim, he had to submit evidence establishing that element to obtain review of the merits of his current claim. *See id.;* Director's Exhibit 2.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's total disability is due to pneumoconiosis if he had 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.

Workers' Compensation Programs (the Director), has filed a limited 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.[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).

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 (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 or comparable gainful work. 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 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

[4] 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 29; Director's Exhibits 5, 7.

no "contrary probative evidence." 20 C.F.R. §718.204(b)(2). The ALJ found Claimant established total disability based on the medical opinion evidence.[5]

Before weighing the medical opinions at 20 C.F.R. §718.718.204(b)(2)(iv), the ALJ addressed the exertional requirements of Claimant's usual coal mine work as a continuous miner operator. Decision and Order at 4-5. He considered Claimant's testimony that, as part of his duties, he was required to carry and move equipment by hand weighing fifty to one-hundred pounds daily, as well as his statements to physicians concerning the requirements of his work. *Id.*, *citing* Hearing Transcript at 17-24; Director's Exhibits 12, 15, 59; Claimant's Exhibit 2. Taking official notice of the *Dictionary of Occupational Titles*,[6] the ALJ found the job duties Claimant described required "manual labor at the medium to heavy level."[7] *Id.*

The ALJ considered the medical opinions of Drs. Shamma-Othman, Green, and Raj that Claimant is totally disabled and the opinions of Drs. McSharry and Sargent that he is not. Decision and Order at 10-12, 19-21; Director's Exhibits 12, 15-16; Claimant's Exhibits 1-2, 7; Employer's Exhibits 7, 9. Crediting the opinions of Drs. Shamma-Othman, Green and Raj over those of Drs. McSharry and Sargent, the ALJ found the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 23.

Employer contends the ALJ erred in crediting the opinions of Drs. Shamma-Othman, Green and Raj and failed to adequately explain the basis for his findings. Employer's Brief at 7-9. We disagree.

---

[5] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 18.

[6] The ALJ noted the *Dictionary of Occupational Titles* describes the job of a continuous miner operator as performing "medium work" requiring lifting and carrying twenty to fifty pounds occasionally and ten to twenty-five pounds frequently. Decision and Order at 4. He further noted the *Dictionary of Occupational Titles* indicates heavy work requires exerting fifty to one-hundred pounds of force occasionally and twenty-five to fifty pounds of force frequently. Decision and Order at 5.

[7] We affirm as unchallenged the ALJ's finding that Claimant's usual coal mine work as a continuous miner operator required medium-to-heavy manual labor. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

Dr. Shamma-Othman conducted two blood gas studies on March 30, 2016. Director's Exhibit 15 at 5-6. The first study produced qualifying values,[8] which she opined were "confirmed on repeat" by a subsequent study conducted minutes later.[9] *Id.* at 6. She opined these studies demonstrate Claimant is totally disabled due to "severe hypoxemia" and that he cannot perform his last coal mine job. Furthermore, she opined Claimant's "symptoms of chronic cough, wheezing, shortness of breath, and mucus production contribute to his pulmonary disability." Director's Exhibit 15 at 7. In addition, she later reviewed the non-qualifying August 10, 2016 blood gas study, which Dr. McSharry conducted, and opined it did not change her opinion that Claimant is totally disabled due to severe hypoxemia. Director's Exhibit 16.

Dr. Green conducted a non-qualifying blood gas study on July 26, 2017. Claimant's Exhibit 1 at 3-4. Indicating the results of this study were not significantly different from those of Dr. Shamma-Othman's March 30, 2016 study, he opined the blood gas studies produced "consistent and persistent findings" of resting hypoxemia and that Claimant is unable to perform the exertional demands of his last coal mining job. *Id.*

Dr. Raj diagnosed Claimant with "severe hypoxemia" based on his non-qualifying blood gas study of September 19, 2017. Claimant's Exhibit 2 at 3. Comparing the results of this study with the March 30, 2016 and July 26, 2017 studies, he opined the blood gas studies have "shown consistent results of hypoxemia." *Id.* at 4. He also opined the September 19, 2017 pulmonary function testing demonstrates Claimant has a "moderate obstructive defect" that contributes to his total disability,[10] and noted Claimant reported getting short of breath after taking one flight of stairs. Claimant's Exhibit 2 at 4. Thus, he opined Claimant has a totally disabling pulmonary impairment and is unable to perform the exertional requirements of his last coal mine employment. *Id.*

[8] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[9] The first study produced qualifying values with a pO2 of 57, and the second produced non-qualifying values with a pO2 of 62. Director's Exhibit 15 at 6. Though the second study was non-qualifying, Dr. Shamma-Othman noted the pO2 on the second study demonstrated a "less than [five] points difference" in Claimant's oxygenation and was consistent with "severe hypoxemia on room air." *Id.*

[10] The ALJ found the September 19, 2017 pulmonary function study invalid. Decision and Order at 17.

Employer contends the ALJ erred in crediting Drs. Shamma-Othman's, Green's and Raj's opinions because they rely on non-qualifying blood gas studies. Employer's Brief at 8-11. We disagree.

As the ALJ observed, the regulations provide that despite non-qualifying pulmonary function studies or blood gas studies, total disability may be established if a physician, exercising reasoned medical judgment based on medically acceptable diagnostic techniques, concludes the miner's respiratory or pulmonary condition prevented him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Thus, a physician may offer a reasoned medical opinion diagnosing total disability even though 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, 587 (6th Cir. 2000); Decision and Order at 19. Here, the ALJ acknowledged the underlying objective studies are non-qualifying but permissibly found Drs. Shamma-Othman's, Green's and Raj's opinions well-reasoned because they explained that the hypoxemia demonstrated by the blood gas studies prevents Claimant from performing his last coal mining job.[11] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Scott,* 60 F.3d at 1142.

Employer next argues the ALJ erred in crediting the opinions of Drs. Shamma-Othman, Raj and Green because they relied on Claimant's reported symptoms and invalid pulmonary function testing to diagnose a totally disabling pulmonary impairment. Employer's Brief at 8, 12. We disagree. The ALJ did not credit these opinions based on Claimant's symptoms alone or their consistency with the pulmonary function study evidence. Rather, he permissibly found them well-reasoned and documented because they are based on and consistent with Claimant's hypoxemia as demonstrated by his arterial blood gas testing and because each doctor had an accurate understanding of the exertional requirements of Claimant's last coal mine job. *See Looney*, 678 F.3d at 310, 316-17; *Mays*,

[11] We reject Employer's assertion that the ALJ should have found the opinions of Drs. Shamma-Othman, Green and Raj undermined by Dr. McSharry's opinion that because Claimant's oxygenation improved somewhat between blood gas studies his hypoxemia is not caused by pneumoconiosis. Employer's Brief at 11-12; Employer's Exhibit 9 at 38. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant's respiratory or pulmonary impairment precludes the performance of his usual coal mine work. 20 C.F.R. §718.204(b)(1). The cause of that pulmonary impairment is a separate inquiry, which is addressed at 20 C.F.R. §718.204(c) or in consideration of whether Employer can rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1)(ii).

176 F.3d 753, 756 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); Decision and Order at 19-20.

Employer also contends the ALJ erred in finding the preponderance of the medical opinions establish total disability because he did not consider Dr. McSharry's opinion that Claimant "does not have a disability range blood gas result" and otherwise erred in discrediting his opinion that Claimant could perform his last coal mine job.[12] Employer's Brief at 10-13 (quoting Employer's Exhibit 9 at 29).

Contrary to Employer's argument, the ALJ considered Dr. McSharry's opinion and, noting Dr. McSharry conceded the July 3, 2018 blood gas study demonstrated hypoxemia, permissibly found it not well-reasoned because he did not explain why that hypoxemia would not prevent Claimant from performing his last coal mine job. *See Looney*, 678 F.3d at 310, 316-17; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 21; Employer's Exhibit 9 at 37. He further rejected Dr. Sargent's opinion because he found the physician had an inaccurate understanding of the exertional requirements of Claimant's last coal mining job. *Id.* at 23. Because Employer has not identified any error in these findings, we affirm the ALJ's rationales for discrediting Dr. Sargent's opinion.[13] *See Looney*, 678 F.3d at 310, 316-17; *Akers*, 131 F.3d at 441; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer's arguments amount to a request to 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 the ALJ sufficiently explained his credibility determinations in

[12] Employer further contends the ALJ did not consider Dr. McSharry's explanation that the hypoxemia demonstrated on Claimant's blood gas testing was "related to his hyperventilation while performing the exam." Employer's Brief at 11. However, Dr. McSharry discussed hyperventilation only in the context of the exercise study Claimant performed on August 10, 2016, whereas Drs. Shamma-Othman, Green and Raj diagnosed hypoxemia based on studies performed at rest. Director's Exhibit 15 at 5-6; Claimant's Exhibits 1 at 4; 2 at 3-4. Likewise, Drs. McSharry and Sargent acknowledged the July 3, 2018 blood gas study, also conducted at rest, demonstrated hypoxemia. Employer's Exhibits 7 at 1; 9 at 29.

[13] Because the ALJ provided valid reasons for discrediting Dr. Sargent's opinion, we need not address Employer's additional arguments regarding the weight the ALJ assigned it. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 13.

accordance with the Administrative Procedure Act (APA),[14] and his findings are supported by substantial evidence, we affirm his conclusion 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); *see Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why he did it); Decision and Order at 23. We therefore affirm his determination that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §§718.305, 725.309; Decision and Order at 13. As Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 30.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[14] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include a statement of "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).