U.S. Department of Labor

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

BRB No. 23-0219 BLA

RONALD W. JONES Claimant-Respondent v. WINDSOR COAL COMPANY and CONSOL ENERGY, INCORPORATED, c/o CHARLES TAYOR, TPA Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/30/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, District Chief Administrative Law Judge, United States Department of Labor.

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

Toni J. Williams (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2022-BLA-05558) rendered on a claim filed on August 5, 2021,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of 18.5 years of coal mine employment and found that it was all underground. The ALJ further found that Claimant suffers from a totally disabling respiratory or pulmonary impairment and therefore invoked 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). Finally, the ALJ determined that Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established he is totally disabled and therefore erred in finding he invoked the Section 411(c)(4) presumption. Employer further asserts the ALJ erred in finding that it failed to rebut the presumption.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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, 362 (1965).

[1] Claimant filed two prior claims, both of which he withdrew. Director's Exhibit 49. 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 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.

[3] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant has 18.5 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.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Decision and Order at 7.

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.[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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 concluded that total disability was established by the exercise blood gas studies and the evidence as a whole.[6] Decision and Order at 24, 27.

The ALJ considered two blood gas studies conducted on August 12, 2021, and September 1, 2022. Director's Exhibit 14; Employer's Exhibit 1. The August 12, 2021 study from Dr. Feicht was non-qualifying[7] at rest but qualifying with exercise. Director's Exhibit 14. The September 1, 2022 study from Dr. Basheda was non-qualifying at rest, and no exercise study was conducted. Employer's Exhibit 1. The ALJ found that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii) based upon the qualifying exercise blood gas study. Decision and Order at 24.

Contrary to Employer's arguments, the ALJ was not required to accord greater weight to the September 1, 2022 study because it is the most recent study. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *see also Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49 (2023); *Smith v. Kelly's Creek Res.*, 26 BLR 1-15, 1-28 (2023); Employer's Brief at 14. Rather, the ALJ permissibly found the August 12, 2021 exercise study to be most indicative of Claimant's ability to perform his usual coal mine employment, which required heavy labor. *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (exercise blood gas study may be given more weight than resting blood gas studies); Decision and Order at 24;

[5] Prior to making a determination of total disability, the ALJ found Claimant's usual coal mine employment was as a foreman, which required heavy labor. Decision and Order at 24. We affirm this finding as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[6] The ALJ found that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii), (iv). Decision and Order at 23, 24, 26.

[7] A "qualifying" blood gas study yields results that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

Employer's Brief at 13-14. As the only exercise blood gas study of record is qualifying, we affirm as supported by substantial evidence the ALJ's determination that the blood gas studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 24.

The ALJ next considered the opinions of Drs. Feicht and Basheda. Dr. Feicht, who conducted the Department of Labor-sponsored complete pulmonary evaluation of Claimant on August 12, 2021, opined Claimant is totally disabled based on his mild obstruction indicated on a pulmonary function study, borderline resting blood gas study values, and abnormal exercise study. Director's Exhibit 14. Dr. Basheda, who examined Claimant on September 1, 2022, opined Claimant is not totally disabled based on the results of the testing he conducted. Employer's Exhibits 1, 6. The ALJ found neither physician's opinion was well-reasoned[8] and therefore accorded them no weight. Decision and Order at 26.

Employer contends the ALJ failed to adequately consider Dr. Basheda's full opinion and therefore erred in not crediting it. Employer's Brief at 14-16. We disagree.

Based on his examination of Claimant, Dr. Basheda opined Claimant has a mild pulmonary impairment on his pulmonary function study and did not demonstrate clinically significant oxygen desaturation on his pulse oximetry test. Employer's Exhibit 1 at 26-27. He therefore concluded Claimant is not disabled. *Id.* At deposition, Dr. Basheda was asked to "square" his conclusion with the other blood gas studies and pulse oximetry testing he reviewed. Employer's Exhibit 6 at 16. Despite having previously acknowledged in his initial report that Claimant's August 12, 2021 exercise blood gas study was qualifying for total disability, Dr. Basheda now responded that he did not "see any evidence of any oxygenation abnormalities" when reviewing the blood gas study results and the resting pulse oximetry in the medical reports. *Id.* at 17. He thus reiterated he did not believe Claimant is totally disabled. *Id.*

In analyzing Dr. Basheda's opinion, the ALJ noted that he cited to the pulmonary function testing and arterial blood gases he administered to support his opinion that Claimant is not disabled. Decision and Order at 26. However, the ALJ found his opinion contrary to the ALJ's finding that the overall weight of the blood gas study evidence demonstrates that Claimant is totally disabled. *Id.* Moreover, Dr. Basheda administered only resting arterial blood gases that were non-qualifying but did not administer a blood gas study with exercise. Employer's Exhibit 1. The ALJ found Dr. Basheda's opinion

[8] Although Dr. Feicht reviewed Claimant's CM-913 Description of Coal Mine Work form, in which he stated he worked as a foreman, the ALJ found Dr. Feicht did not adequately address the exertional requirements of Claimant's job as a foreman or his ability to perform that work. Decision and Order at 26; Director's Exhibit 16.

undermined by his reliance on allegedly normal blood gas study results, given the ALJ's finding that the qualifying August 12, 2021 exercise blood gas study is most indicative of Claimant's ability to perform his usual coal mine employment and demonstrates that Claimant is totally disabled.[9] Decision and Order at 26; *Coen*, 7 BLR at 1-31-32.

As discussed above, we have affirmed the ALJ's finding that the August 12, 2021 exercise blood gas study, and the blood gas studies as a whole, support a finding of total disability. Thus, the ALJ permissibly found Dr. Basheda's opinion not well-reasoned, as it was contrary to and undermined by the ALJ's blood gas study findings. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 26. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Employer's

[9] The regulations require that when a resting arterial blood gas study is performed and is non-qualifying, the physician must offer the miner an exercise study unless medically contradicted. 20 C.F.R. §718.105(b). The record does not reflect that Dr. Basheda offered the required exercise testing in addition to performing the ambulatory pulse oximetry test. He only stated that "[p]ulse oximetry has become the standard of care in respiratory medicine in assessing oxygenation," it correlates well with blood gas studies, and he "personally [doesn't] have a problem doing just pulse oximetry." Employer's Exhibit 1 at 26. We disagree with our dissenting colleague that Dr. Basheda's statements about pulse oximetry testing establish error in the ALJ's rejection of the physician's opinion. As the ALJ found, Dr. Basheda based his diagnosis of no total disability, in part, on Claimant's allegedly normal, non-qualifying blood gas study values. Decision and Order at 26; Employer's Exhibits 1, 6. Although Dr. Basheda initially acknowledged that Claimant's *exercise* values were in fact qualifying for total disability, he later testified that upon review of the blood gas testing results, he "[did] not see any evidence of any oxygenation abnormalities in the record." Employer's Exhibit 6 at 16-17. The ALJ thus permissibly found Dr. Basheda's opinion undermined by, and contrary to, the ALJ's finding that Claimant's exercise blood gas testing is the most probative of his ability to perform his usual coal mine work and establishes total disability based on the blood gas studies overall at 20 C.F.R. §718.204(b)(2)(ii). *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 26. Although Dr. Basheda generally identified an "advantage" in utilizing pulse oximetry testing – the ability to continuously monitor oxygenation during exercise – he did not state that blood gas testing in general, or the credited August 12, 2021 exercise study in particular, are unreliable indicators of total disability. Employer's Exhibit 6 at 25-26. We note, moreover, that at one point Dr. Basheda described circumstances in which blood gas testing can provide "additional" and "important" information over pulse oximetry testing. *Id.*

arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Weighing the evidence as a whole, the ALJ found the blood gas study evidence establishes total disability. Decision and Order at 27. Contrary to Employer's arguments, the ALJ did not fail to properly consider the contrary evidence in this case. Employer's Brief at 16-17. 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). As the ALJ permissibly discredited Dr. Basheda's opinion that Claimant is not disabled, and there is no other credited evidence undermining the blood gas study evidence which the ALJ determined supports a finding of total disability, we affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole.[10] 20 C.F.R. §718.204(b)(2) (qualifying blood gas studies "shall establish" total disability "[i]n the absence of contrary probative evidence"); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 27. Consequently, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 27.

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,[11] 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 rebut the presumption by either method.

[10] Moreover, because arterial blood gas studies and pulmonary function studies measure different types of impairment, the results of pulmonary function studies do not call into question blood gas testing. *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

[11] "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).

Legal Pneumoconiosis

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); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinion of Dr. Basheda to rebut the existence of legal pneumoconiosis. Dr. Basheda diagnosed Claimant with a mild obstruction on his pulmonary function study, which he attributed to asthma with a possible contribution from smoking. Employer's Exhibit 1 at 24. He opined Claimant's mild obstruction was unrelated to coal mine dust exposure as he left coal mining three decades earlier and asthma due to coal mine dust exposure ceases with the end of that exposure. Employer's Exhibit 1 at 24; Employer's Exhibit 6 at 19-20. Further, he clarified that Claimant cannot have legal pneumoconiosis as "you would need some impairment or some abnormalities in a pulmonary function testing that would lead to an impairment or progressive massive fibrosis radiographically." Employer's Exhibit 6 at 23.

The ALJ permissibly found Dr. Basheda's rationale for excluding coal dust as a cause or contributor to Claimant's obstruction unpersuasive as it was based, in part, on a premise inconsistent with the regulations, which recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[12] 20 C.F.R. §718.201(c)(1); *see* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 19. Further, the ALJ permissibly found Dr. Basheda did not adequately explain how he determined that Claimant's coal mine dust exposure played no role in the development of his chronic obstructive pulmonary disease and it was due solely to asthma and smoking. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-

[12] Dr. Basheda opined that asthma due to coal dust exposure develops when "someone goes into a toxic environment," but that the symptom will go away after they are removed from that environment. Employer's Exhibit 6 at 19-20. He reasoned that, because Claimant left the mines in 1993, his symptoms should have stopped, and he would not have continued to have asthma for decades later. *Id.*

17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); Decision and Order at 19.

As the trier-of-fact, the ALJ has the discretion to assess the credibility of the medical opinions and to assign them weight; the Board may not reweigh the evidence or substitute its own inferences on appeal. *Compton*, 211 F.3d at 207-08; *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the ALJ permissibly discredited the only opinion supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his finding Employer failed to disprove legal pneumoconiosis. *See Owens*, 724 F.3d at 558; *Clark*, 12 BLR at 1-155; Decision and Order at 19.

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. §718.201(a)(1).

The ALJ considered eight interpretations of two x-rays conducted on August 12, 2021, and September 1, 2022. Decision and Order at 13. The ALJ accurately noted that all the interpretating physicians are dually-qualified as B readers and Board-certified radiologists. *Id.* The August 12, 2021 x-ray was read as positive for pneumoconiosis by Drs. Lahm, Crum, and DePonte, and as negative for the disease by Dr. Meyer. Director's Exhibits 14, 17, 18; Claimant's Exhibit 1. The September 1, 2022 x-ray was read as positive for pneumoconiosis by Dr. Crum and as negative for the disease by Drs. Meyer, Seaman, and Ropp. Claimant's Exhibit 2; Employer's Exhibits 3, 4, 12. According equal weight to all the dually-qualified readers, the ALJ found the August 12, 2021 x-ray to be positive for pneumoconiosis and the September 1, 2022 x-ray to be negative for the disease based upon a preponderance of the readings. Decision and Order at 13-14. Thus, the ALJ found the x-ray evidence as a whole is in equipoise and therefore does not rebut a finding of clinical pneumoconiosis. *Id.* at 14.

The ALJ further considered Dr. Basheda's medical opinion that Claimant does not have clinical pneumoconiosis. Decision and Order at 18. He discredited the physician's opinion as he relied upon multiple x-ray readings not in the record, and he relied upon his belief that the August 12, 2021 x-ray is negative for the disease, contrary to the ALJ's finding that the x-ray is positive. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004); Decision and Order at 18.

Employer does not challenge any of the ALJ's credibility determinations. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Rather, Employer contends

that, because the x-ray evidence is in equipoise, there is no finding of clinical pneumoconiosis to rebut and thus the ALJ erred in finding it did not rebut the presumption. Employer's Brief at 17. Contrary to Employer's arguments, Claimant is not required to establish he has clinical pneumoconiosis; rather, Employer must affirmatively establish that Claimant does not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) ("Once the presumption is invoked, there is no need for the claimant to prove the existence of pneumoconiosis . . . ."). Therefore, we affirm the ALJ's determination that Employer did not rebut the existence of clinical pneumoconiosis. Decision and Order at 18.

Disability Causation

The ALJ next considered whether Employer established that "no part of the [M]iner'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). The ALJ permissibly found Dr. Basheda's opinion entitled to little weight because he failed to diagnose total disability, legal pneumoconiosis, and clinical pneumoconiosis, contrary to the ALJ's findings. *See Epling*, 783 F.3d at 505; Decision and Order at 28. Therefore, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 28. We therefore affirm the award of benefits.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues that the ALJ did not err in finding the arterial blood gas studies support total disability. However, I disagree that the ALJ did not err in his consideration of Dr. Basheda's opinion that Claimant is not totally disabled and would remand for reconsideration of the medical opinion evidence and the evidence as a whole at 20 C.F.R. §718.204(b)(2).

The ALJ discredited Dr. Basheda's opinion that Claimant is not totally disabled because he cited to the pulmonary function testing and arterial blood gasses to support his

total disability conclusion, while the ALJ found the blood gas study evidence established total disability. Decision and Order at 26. However, the ALJ did not address Dr. Basheda's opinion that Claimant is not totally disabled because his pulse oximetry, which he opined was superior to arterial blood gas studies because it is a continuous test, "demonstrated no clinically significant exercise-induced oxygen desaturation," and that Claimant's condition had resolved as of the time of his examination. Employer's Exhibits 1 at 26-27; 6 at 17, 25. Because the ALJ did not consider Dr. Basheda's opinion in its entirety, I would vacate his finding that it is entitled to little weight. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJs have a duty to consider all relevant evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for their decisions); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Consequently, I would remand for reconsideration of Dr. Basheda's medical opinion as to total disability and whether the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2).

JUDITH S. BOGGS
Administrative Appeals Judge