U.S. Department of Labor

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

BRB No. 23-0344 BLA

CHRISTOPHER S. PREECE Claimant-Respondent v. EAGLE COAL COMPANY and KENTUCKY EMPLOYERS' MUTUAL INSURANCE 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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2020-BLA-06104) rendered on a claim filed on May 14, 2018, 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 had seventeen years of coal mine employment, all of which the ALJ determined was performed underground. He also found Claimant 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); 20 C.F.R. §718.305. The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability.[2] Claimant responds in support of the award of benefits.[3] The Director, Office of Workers' Compensation Programs, declined to file a response brief.

The 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, 361-62 (1965).

[1] Section 411(c)(4) 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 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 seventeen years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[3] The Benefits Review Board dismissed Claimant's cross-appeal at his request. *Preece v. Eagle Coal Co.*, BRB No. 23-0344 BLA-A (Jan. 8, 2024) (Order) (unpub.).

[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 Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 14-15; Director's Exhibit 9 at 2.

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 and comparable gainful work.[5] 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 weight of the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23.

The ALJ considered the medical opinions of Drs. Shah, Cohen, Go, Dahhan, and Rosenberg. Decision and Order at 11-23; Director's Exhibits 20, 29, 33, 34, 39; Claimant's Exhibits 1-3; Employer's Exhibits 1-8. Dr. Shah opined Claimant is totally disabled based on his moderately reduced diffusion capacity and reduced peak oxygen consumption indicated on a cardiopulmonary stress test. Director's Exhibits 20 at 5; 34 at 33-34, 38-39, 54-55, 97; 39 at 5-6; Claimant's Exhibit 1 at 32. Dr. Cohen opined Claimant is totally disabled based on his moderate diffusion impairment and the gas exchange abnormality seen during exercise on a blood gas study.[7] Claimant's Exhibit 2 at 13-16. Dr. Go opined Claimant is totally disabled based on his reduced diffusion capacity and the American Medical Association criteria for pulmonary impairments. Claimant's Exhibit 3 at 7.

[5] We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine work as a foreman required heavy exertion and heavy manual labor. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5.

[6] The ALJ found the pulmonary function and arterial blood gas studies do not support a finding of total disability, 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 5, 8, 10.

[7] Dr. Cohen testified that diffusion testing is very much accepted by the medical community and American Medical Association guidelines for determining the extent of a pulmonary impairment and represents the diffusing ability of the lung more accurately than a resting or submaximal blood gas study result. Claimant's Exhibit 2 at 12, 32-35, 39-40.

Dr. Dahhan noted Claimant's low diffusion capacity but asserted diffusion testing is a non-specific, sensitive test that cannot be used to assess disability by itself, and opined Claimant is not totally disabled. Director's Exhibits 29 at 5; 33 at 9, 12, 17, 20; Employer's Exhibits 1 at 2; 4 at 11, 14, 21-22, 30-33, 40-41; 6 at 5; 8 at 5. Dr. Rosenberg asserted arterial blood gas testing should take precedence over diffusion capacity testing and opined Claimant retains the ability to perform his last coal mining job despite his moderately reduced diffusion capacity. Employer's Exhibits 2 at 7; 5 at 14, 17-18, 38; 7 at 5-6.

The ALJ found Drs. Shah's, Cohen's, and Go's opinions well-documented and reasoned whereas he found Drs. Dahhan's and Rosenberg's opinions are not well-reasoned. Decision and Order at 23. Consequently, he found the weight of the medical opinion evidence supports a finding of total disability. *Id.*; *see* 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the ALJ erred in crediting Drs. Shah's, Cohen's, and Go's opinions because they relied "solely" on diffusion capacity testing and failed to take into consideration Drs. Dahhan's and Rosenberg's opinions that diffusion capacity testing is not a reliable indicator of pulmonary or respiratory disability. Employer's Brief at 10-15 (unpaginated). We disagree.

The regulations specifically provide that a physician may base a reasoned medical judgment of total disability upon "medically acceptable clinical and laboratory diagnostic techniques . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see also Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991) (ALJ erred by discrediting a physician's diagnosis of total disability based on a diffusion capacity test on the basis that diffusion capacity testing is not listed in the regulations). Employer does not argue that a diffusion capacity test is not a medically acceptable clinical or laboratory diagnostic technique.[8] Moreover, total disability may be established with reasoned medical opinion evidence, even "[w]here total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i) [and] (ii) . . . of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) (physician can offer a reasoned medical opinion diagnosing total disability, even though the objective studies are non-qualifying).

In this case, the ALJ rationally found the opinions of Drs. Shah, Cohen, and Go are reasoned and documented to the extent that each physician explained how the testing they relied on supports their diagnoses of a total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th

[8] To the contrary, Employer states the Department of Labor "is currently considering regulations on potentially using diffusion capacity" as part of the diagnostic criteria for total disability. Employer's Brief at 12-13 (unpaginated).

Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 23.

We also see no error in the ALJ's reliance on Dr. Cohen's explanation as to why the diffusion capacity measurements in this case are more reliable than the results of the exercise blood gas studies for determining Claimant's respiratory capacity because the exercise blood gas testing was sub-maximal.[9] *Napier*, 310 F.3d at 713-14; Decision and Order at 20-21. As the ALJ observed, Dr. Cohen explained that arterial blood gas testing measures gas exchange at a specific heart rate or level of exercise and when exercise testing is performed at a sub-maximal level, it does not reflect blood gases while performing heavy manual labor. Decision and Order at 20-21 (quoting Claimant's Exhibit 2 at 12, 16, 36, 39). Thus, he opined that while exercise blood gas testing may be more reliable when performed at maximum capacity, the opposite is true when, as in this case, exercise testing is performed at a sub-maximal level. Claimant's Exhibit 2 at 26.

Contrary to Employer's contentions, the ALJ recognized Drs. Dahhan's and Rosenberg's opinions that exercise arterial blood gas testing should be given greater weight than diffusion capacity testing. Decision and Order at 18-20. But he permissibly rejected their opinions because neither specifically addressed Dr. Cohen's opinion that sub-maximal exercise blood gas testing is less reliable than diffusion capacity testing. *See Napier*, 310 F.3d at 713-14; *Clark*, 12 BLR at 1-155; Decision and Order at 20.

It is the ALJ's function to weigh the evidence, draw appropriate inferences and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012). Employer's arguments are a request to reweigh the evidence, which the Board is not empowered to do.[10] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113

[9] The ALJ found Claimant performed the August 9, 2018 and June 29, 2020 exercise arterial blood gas studies at a sub-maximal level. Decision and Order at 19-21. Employer contends that this finding is contrary to the ALJ's finding that the August 9, 2018 and June 29, 2020 exercise studies are valid because, it asserts, a sub-maximal test is inherently invalid. Employer's Brief at 14-15 (unpaginated) (citing Decision and Order at 20-21). Because Employer cites 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).

[10] Employer contends the ALJ erred because he did not consider whether non-respiratory or pulmonary conditions may have contributed to his impairment or whether elevated carboxyhemoglobin levels may have impacted the diffusion capacity testing results. Employer's Brief at 12-13 (unpaginated). The relevant inquiry at 20 C.F.R.

(1989). Even if the Board would weigh the evidence differently if considered de novo, it must affirm the ALJ's finding if it is supported by substantial evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis"). Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Napier*, 301 F.3d at 713; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 23. We also affirm the ALJ's overall finding that Claimant established a totally disabling respiratory or pulmonary impairment based on the weight of the evidence as a whole, taking into consideration all of the contrary probative evidence under 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order at 23-24. Thus, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b); Decision and Order at 24.

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to rebut the presumption by establishing that Claimant has neither legal nor clinical pneumoconiosis, 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. Decision and Order at 26-29. As Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. 20 C.F.R. §718.305(d)(1); Decision and Order at 29; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

§718.204(b)(2) is whether the miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *see also* 20 C.F.R. §718.204(a) ("If . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.").

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

GREG J. BUZZARD
Administrative Appeals Judge