U.S. Department of Labor

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

BRB No. 23-0389 BLA

LLOYD C. LUCAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
S T & T LEASING, INCORPORATED	)	
	)	**NOT-PUBLISHED**
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 09/12/2024
	)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C.,

for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2020-BLA-05696) rendered on a claim filed on February 20, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 41.87 years of underground or substantially similar surface coal mine employment and found he has 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 is totally disabled and thus invoked the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a response, urging rejection of Employer's arguments on total disability.[2]

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] Section 411(c)(4) 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 Claimant established 41.87 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-11.

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, 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.[4] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies 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 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 arterial blood gas studies, medical opinions, and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(ii), (iv); Decision and Order at 17-36.

[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); Hearing Transcript at 35; Director's Exhibit 4.

[4] The ALJ found Claimant's usual coal mine employment as a welder and pipefitter required heavy labor. Decision and Order at 11-12. This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711.

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

[6] The ALJ found the pulmonary function studies do not establish total disability, and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 15-17.

Blood Gas Studies

The ALJ considered three blood gas studies conducted on April 4, 2019, December 13, 2019, and September 24, 2020. Decision and Order at 18-19. The April 4, 2019 and December 13, 2019 studies produced non-qualifying results at rest and during exercise. Director's Exhibits 15 at 23, 23 at 9. The September 24, 2020 study produced qualifying values at rest and did not include exercise testing. Employer's Exhibit 2 at 22. The ALJ found the qualifying September 24, 2020 study valid[7] and entitled to greater weight based on its recency. Decision and Order at 18-19. Thus, he found the blood gas study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 19.

Employer asserts the ALJ erred in finding the September 24, 2020 blood gas study valid and reliable. It contends Claimant performed the study during an acute respiratory illness, contrary to the regulations. Employer's Brief at 5-10 (unpaginated). The Director argues that any error is harmless because Employer does not identify any acute respiratory illness Claimant suffered during or just before taking the study. Director's Brief at 2. We agree with the Director's contention.

Appendix C to 20 C.F.R. Part 718 provides that arterial blood gas studies "must not be performed during or soon after an acute respiratory or cardiac illness." Employer relies on the opinions of Drs. Jarboe and Dahhan that Claimant performed the September 24, 2020 blood gas study in "an unstable state" or during an "acute episode of bronchospasm," respectively, as evidence that the study was performed during an acute respiratory illness. Employer's Brief at 6-9 (unpaginated).

Considering the September 24, 2020 blood gas study, Dr. Jarboe acknowledged it is qualifying for total disability and he diagnosed Claimant with severe resting hypoxemia. Employer's Exhibit 2 at 5. He attributed the qualifying values to Claimant's "severe symptoms of bronchial asthma." *Id.* at 8. In relevant part, Dr. Jarboe testified that, during the study, Claimant had intense wheezing and severe coughing "that was intractable."

[7] When considering arterial blood gas studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.105(c); 20 C.F.R. Part 718, Appendix C; *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).

Employer's Exhibit 4 at 21. He stated these asthmatic symptoms are associated with hypoxemia, which happens because of "severe ventilation perfusion abnormalities." *Id.* He concluded the study cannot be relied upon to establish a disabling impairment. *Id.*

Dr. Dahhan acknowledged the September 24, 2020 blood gas study would be qualifying if it was representative of Claimant's chronic steady state. Employer's Exhibit 6 at 12. However, he opined the test was not representative because Claimant was having an acute episode of bronchospasm. *Id.* at 13. While Dr. Dahhan noted he did not know the cause of the bronchospasms, he stated they were the cause of the hypoxemia demonstrated on Claimant's test. *Id.*

Employer argues the ALJ erred in finding the study reliable. It asserts he should have credited Drs. Dahhan's and Jarboe's opinions to find the study invalid.[8] Decision and Order at 19. However, we agree with the Director's argument that Dr. Jarboe's opinion is insufficient to invalidate the study because he did not opine Claimant suffered from an acute respiratory illness, but rather symptoms of a chronic disease. Director's Brief at 2. Dr. Dahhan's opinion suffers from a similar defect. Employer's Exhibit 6 at 12-13.

By Dr. Jarboe's own admission, Claimant's hypoxemia is an exacerbation of his bronchial asthma. Employer's Exhibit 4 at 21. Specifically, Dr. Jarboe stated that Claimant's hypoxemia and resulting blood gas study values are characteristics of, and caused by, his chronic disease. Employer's Exhibit 2 at 5-6. In other words, according to Dr. Jarboe, Claimant's "intense wheezing" and "intractable coughing" exhibited during testing represent "severe symptoms" of his chronic asthma. *Id.*; *see* Employer's Exhibit 4. Dr. Dahhan, relying on Dr. Jarboe's description of the testing, opined Claimant's hypoxemia on the study was due to "an acute episode of bronchospasm . . . where his lungs were getting tight," but Dr. Dahhan did not know "what brought it on." Employer's Exhibit 6 at 13. Thus, contrary to Employer's contention, rather than identifying an acute respiratory illness,[9] Dr. Dahhan's opinion, like Dr. Jarboe's, describes symptoms of Claimant's diagnosed chronic disease. As neither physician identified an "acute

[8] Although the ALJ did not render a specific credibility finding regarding Dr. Dahhan's validity opinion, and apparently required Dr. Jarboe to provide a non-respiratory cause for the qualifying results, we conclude, for the reasons discussed herein, that the ALJ's analysis amounts to, at most, harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 18-19.

[9] Unrelated to Claimant's condition, Dr. Jarboe generally identified pneumonia as an example of the type of "acute respiratory illness" that would render a blood gas study invalid under the Appendix C criteria. Employer's Exhibit 4 at 20-21.

respiratory or cardiac illness" from which Claimant was suffering at the time of or shortly before the September 24, 2020 blood gas study, their opinions are insufficient to find the study invalid. Appendix C to 20 C.F.R. Part 718.

As it is supported by substantial evidence, we affirm the ALJ's determination that the September 24, 2020 blood gas study is valid. Decision and Order at 19. As Employer raises no other arguments with respect to the blood gas study evidence, we affirm the ALJ's finding that the weight of that evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 19.

Medical Opinions

The ALJ next considered Dr. Green's opinion that Claimant is totally disabled, and the contrary opinions of Drs. Jarboe and Dahhan. Decision and Order at 19-33; Director's Exhibits 15, 17, 19, 23, 63; Employer's Exhibits 2, 4, 6. The ALJ found Dr. Green's opinion well-reasoned and documented, and the opinions of Drs. Jarboe and Dahhan unpersuasive. Decision and Order at 34-35. Weighing the evidence together, the ALJ found the medical opinions support a finding of total disability. *Id.* at 35.

Employer does not challenge the ALJ's crediting of Dr. Green's opinion that Claimant is totally disabled; thus we affirm this determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 34.

Employer generally argues the ALJ erred in discrediting the opinions of Drs. Jarboe and Dahhan. Employer's Brief at 10-14 (unpaginated). We disagree.

Dr. Jarboe acknowledged the September 24, 2020 blood gas study is qualifying and opined Claimant had a low pO2. Employer's Exhibit 2 at 8. He attributed this fall in oxygen tension to Claimant's bronchial asthma. *Id.* Nevertheless, he discounted the effects Claimant's asthma would have on his ability to perform his last coal mine job because "[o]ne would anticipate improvement of [Claimant's] asthmatic syndrome and pulmonary function if he could stop smoking cigarettes and continue aggressive treatment for asthma." *Id.* He concluded Claimant is not totally disabled. *Id.*; Employer's Exhibit 4 at 21-22.

Dr. Dahhan opined Claimant has an obstructive ventilatory impairment based on his December 13, 2019 pulmonary function study. Director's Exhibit 23 at 5. He noted Claimant's results from this study showed a "very significant" response to bronchodilator medication. *Id.* at 10. Specifically, Dr. Dahhan testified that, of the spirometry he reviewed, this was the only valid pulmonary function study. *See* Employer's Exhibit 6 at 11. He opined, based in part on the results of "the valid spirometry available in the record," Claimant would be able to perform his last coal mine job. *Id.* at 16.

Contrary to Employer's assertions, Dr. Jarboe explicitly qualified his opinion based on the hypothetical effects treatment may have on Claimant's asthma, and Dr. Dahhan's opinion regarding whether Claimant could perform his coal mine work is based on a pulmonary function study showing marked improvement in respiratory function after the administration of bronchodilator medication. Employer's Brief at 10-14 (unpaginated); Employer's Exhibits 2 at 8, 6 at 16. Thus, the ALJ permissibly found their opinions unpersuasive because the relevant inquiry is whether Claimant can perform his usual coal mine employment and not whether he can perform his usual coal mine employment while on medication. 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 35 (quotation omitted). Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Thus, we affirm the ALJ's determination 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); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 35-36. We therefore affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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,[10] or "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 did not establish rebuttal by either method.

[10] "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).

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

The ALJ considered the opinions of Drs. Jarboe and Dahhan that Claimant does not have legal pneumoconiosis. Decision and Order at 42-45. Dr. Jarboe opined Claimant does not have legal pneumoconiosis but has bronchial asthma unrelated to coal mine dust exposure. Employer's Exhibits 2 at 6-7, 4 at 14-15. Dr. Dahhan opined Claimant does not have legal pneumoconiosis, in part, because his obstructive respiratory impairment is partially reversible after the administration of bronchodilators on pulmonary function testing which, he opined, is not consistent with airway obstruction caused by the inhalation of coal dust. Director's Exhibit 23 at 5; Employer's Exhibit 6 at 15-16. The ALJ found both doctors' opinions not well-reasoned and insufficient to satisfy Employer's burden of proof. Decision and Order at 43-45.

Employer does not allege specific error in the ALJ's discrediting the opinions of Drs. Jarboe and Dahhan on the issue of legal pneumoconiosis. Employer's Brief at 5-14 (unpaginated). Thus, we affirm the ALJ's credibility findings. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983); Decision and Order at 42-45.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 45. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 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 pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 45. Because Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, we affirm his finding that Employer failed to establish no part of Claimant's respiratory or pulmonary disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 45. We therefore affirm his finding that Employer did not rebut the Section

411(c)(4) presumption and the award of benefits. Accordingly, the ALJ's Decision and Order Awarding Benefits in an Initial Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge