U.S. Department of Labor

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

BRB No. 24-0071 BLA

ROGER MOSLEY Claimant-Respondent v. ROCKSPRING DEVELOPMENT, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))))))))))))))))	**NOT-PUBLISHED** DATE ISSUED: 09/13/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2022-BLA-05105) rendered on a claim filed on December

10, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 34.81 years of underground coal mine employment and 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 established a totally disabling respiratory or pulmonary impairment and thus invoked the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response 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 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based upon pulmonary

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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(b).

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 34.81 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[3] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1998) (en banc); Hearing Tr. at 19.

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).

The ALJ found Claimant established total disability based upon the pulmonary function studies, the medical opinions and the evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 24.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated February 8, 2021, June 30, 2021, February 15, 2022, and March 9, 2022. Decision and Order at 9-10, 21-22. The February 8, 2021, February 15, 2022, and March 9, 2022 studies produced qualifying values[5] both before and after the administration of bronchodilators. Director's Exhibit 11; Claimant's Exhibits 2, 3. The June 30, 2021 study produced qualifying values before the administration of bronchodilators and non-qualifying values after the administration of bronchodilators. Employer's Exhibit 1. The ALJ weighed the studies together and found they support a finding of total disability. Decision and Order at 22.

Employer argues the ALJ erred in failing to explain how he resolved the conflict in the results produced by the June 30, 2021 pulmonary function study. Employer's Brief at 30. We disagree. Contrary to Employer's argument, the ALJ permissibly found the qualifying pre-bronchodilator results of the June 30, 2021 study entitled to more weight than the non-qualifying post-bronchodilator results of the study as "the relevant question is whether Claimant can perform his last coal mine job, [and] not whether [he] can perform his duties while medicated." Decision and Order at 22; *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("the use of a bronchodilator [during pulmonary function testing] does not provide an adequate assessment of disability"). He thus permissibly found all the

[4] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 21-22.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

pulmonary function studies support a finding of total disability.[6] *See Milburn Colliery Co. v. Hicks*, 138 F.3 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 22.

As it is supported by substantial evidence, we affirm his finding that the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 22.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Werchowski, Gaziano, Zaldivar, and Basheda. Decision and Order at 22-24. Drs. Werchowski and Gaziano opined Claimant is totally disabled, while Drs. Zaldivar and Basheda opined he is not. Director's Exhibit 11; Claimant's Exhibits 2, 3; Employer's Exhibits 1-4. The ALJ found Dr. Werchowski's opinion reasoned, documented, and entitled to great weight. Decision and Order at 23-24. Further, he found Drs. Gaziano's, Basheda's, and Zaldivar's opinions not reasoned and entitled to little weight. *Id.* He thus found the medical opinion evidence supports a finding of total disability based on Dr. Werchowski's opinion. *Id.* at 24.

Employer argues the ALJ erred in discrediting Drs. Zaldivar's and Basheda's opinions as equivocal because they "readily admitted" Claimant does not possess the respiratory functional capacity to perform his last coal mine work based on "the last pulmonary function study."[7] Employer's Brief at 26-30. Specifically, it asserts the ALJ selectively analyzed their opinions "by failing to acknowledge the physicians' testimony regarding the state of the Claimant's respiratory impairment as of the date of [his] last evaluation." *Id.* We disagree.

Dr. Zaldivar diagnosed Claimant with asthma and opined his condition is totally disabling, but stated he would be able to return to very heavy manual labor if his asthma were more aggressively treated. Employer's Exhibits 1 at 5-6; 3 at 53-55, 65-67. Similarly, Dr. Basheda diagnosed Claimant with asthma causing a severe and totally disabling obstructive pulmonary defect, but suggested it is possible that his obstruction would be reversible with more aggressive asthma treatment. Employer's Exhibits 2 at 13-14; 4 at 19-21.

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[6] Employer does not challenge the validity, or qualifying pre-bronchodilator results, of the pulmonary function studies.

[7] We affirm, as unchallenged, the ALJ's finding that Dr. Gaziano's diagnosis of total disability is not reasoned. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24.

The ALJ noted Drs. Zaldivar and Basheda indicated Claimant is currently disabled but could return to his coal mine employment with additional treatment for his asthma. Decision and Order at 24. He also noted that while the doctors opined Claimant would not be totally disabled if he were provided additional treatment for his asthma, three of the four pulmonary function studies administered to him after the administration of bronchodilators produced qualifying results. *Id.* He thus permissibly found their opinions not supported by the qualifying results of the post-bronchodilator pulmonary function study evidence. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986) (ALJ may properly assign greater weight to a medical opinion that is better supported by the objective medical evidence of record); Decision and Order at 24. Further, he permissibly found their opinions equivocal. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999) (weight to give the testimony of an uncertain witness is a question for the trier of fact); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (ALJ permissibly considered the equivocal nature of a physician's opinion).

We also reject Employer's argument that the ALJ erred in crediting Dr. Werchowski's opinion because the doctor did not address whether Claimant had an acute illness that affected the results of the March 9, 2022 pulmonary function study.[8] Employer's Brief at 29-30. Dr. Werchowski diagnosed Claimant with disabling chronic obstructive pulmonary disease (COPD) based on the qualifying results of the February 8, 2021 and March 9, 2022 pulmonary function studies. Director's Exhibit 11 at 8; Claimant's Exhibit 3 at 8. He opined the studies demonstrated severe obstruction with partial response to bronchodilators, consistent with COPD. *Id.* He also concluded the March 9, 2022 study showed air trapping and emphysema. *Id.* Contrary to Employer's argument, the ALJ permissibly found Dr. Werchowski's opinion well-reasoned and documented because it is based on the February 8, 2021 and March 9, 2022 studies. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 23. As discussed, Employer does not challenge the validity of the pulmonary function studies that the ALJ found supported a finding of total disability.

We further reject Employer's argument that the ALJ erred in crediting Dr. Werchowski's opinion because the doctor did not address the non-qualifying arterial blood gas studies. Employer's Brief at 30. Contrary to Employer's argument, Dr. Werchowski acknowledged the non-qualifying results of the February 8, 2021 and March 9, 2022

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[8] Employer notes Dr. Werchowski reported that Claimant stated he was recently "put on a tapering dose of steroids" and Drs. Zaldivar and Basheda stated the use of these steroids indicate he was acutely ill when Dr. Werchowski conducted the March 9, 2022 pulmonary function study. Employer's Brief at 29-30; Claimant's Exhibit 3 at 7 (unpaginated).

arterial blood gas studies but opined Claimant is disabled from an obstructive impairment based on the qualifying results of the February 8, 2021 and March 9, 2022 pulmonary function studies. Director's Exhibit 11 at 8; Claimant's Exhibit 3 at 8. Because the non-qualifying arterial blood gas studies do not necessarily undermine the qualifying pulmonary function studies, we see no error in the ALJ's finding that Dr. Werchowski's opinion is reasoned and documented. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984) (because arterial blood gas studies and pulmonary function studies measure different types of impairment, results of arterial blood gas studies are not called into question by contemporaneous pulmonary function testing); Decision and Order at 24.

As Employer raises no further argument, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 24. Further, we affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole,[9] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[10] or that "no

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[9] We reject Employer's argument that the ALJ erred in failing to explain why he credited the qualifying pulmonary function studies over the non-qualifying arterial blood gas studies in finding Claimant established total disability. Employer's Brief at 30. Qualifying pulmonary function study evidence establishes total disability in the absence of contrary probative evidence. 20 C.F.R. §718.204(b)(2)(i). Further, pulmonary function studies measure a different type of impairment than arterial blood gas studies; thus, non-qualifying studies in one category do not serve as contrary probative evidence weighing against qualifying studies in the other. *See Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

[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

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.[11]

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

The ALJ considered the medical opinions of Drs. Zaldivar and Basheda that Claimant does not have legal pneumoconiosis but asthma unrelated to coal mine dust exposure.[12] Decision and Order at 31-33. He found their opinions unpersuasive and thus insufficient to rebut the presumption of legal pneumoconiosis. *Id.* at 33.

We reject Employer's argument that the ALJ provided invalid reasons for finding Drs. Zaldivar's and Basheda's opinions not credible. Employer's Brief at 8-20.

Dr. Zaldivar diagnosed Claimant with asthma based on his wheezing and opined the pulmonary function studies demonstrated obstructive impairment with air trapping, normal diffusion capacity, and positive response to bronchodilators. Employer's Exhibit 1 at 3-5. He excluded coal mine dust-associated emphysema as the cause of Claimant's obstruction because the condition would not respond to bronchodilators and there was little, if any, dust deposition in Claimant's lungs based on the lack of x-ray identification of pneumoconiosis. *Id.* at 4-5. Further, he excluded coal mine dust exposure as a cause or contributing factor to Claimant's obstruction because there would be "an inhalational injury" in the form of an accident or "something that looked like occupational asthma."

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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).

[11] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 33.

[12] Because Drs. Gaziano's and Werchowski's opinions that Claimant has legal pneumoconiosis do not aid Employer in rebutting the Section 411(c)(4) presumption, we decline to address Employer's arguments regarding the ALJ's weighing of their opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 20-24.

Employer's Exhibit 3 at 57-59. Finding evidence of Claimant's allergic reactions but "no evidence of any inhalational injuries of any kind," Dr. Zaldivar opined Claimant does not have legal pneumoconiosis. *Id.* at 59-60.

Further, Dr. Basheda diagnosed Claimant with asthma based on the obstruction with bronchodilator response, air trapping, increased diffusion seen on pulmonary function studies, and wheezing on chest examination. Employer's Exhibit 2 at 9. He opined coal mine dust-induced disease is not present as it would result in permanent obstruction that does not respond to medication like bronchodilators. Employer's Exhibits 2 at 10-12; 4 at 17-18. In addition, Dr. Basheda excluded Claimant's coal mine dust exposure as a cause or contributing factor to his asthma because his symptoms would have resolved after he left the mines and they would have rendered him unable to work during his tenure. Employer's Exhibits 2 at 12; 4 at 10-12.

The ALJ stated Drs. Zaldivar's and Basheda's opinions that Claimant has asthma were "likely correct" given their considerations of his symptoms and medical history. Decision and Order at 33. However, he permissibly found their opinions unpersuasive because neither physician adequately explained why Claimant's coal mine dust exposure did not substantially aggravate his asthma or otherwise significantly contribute to his obstructive pulmonary impairment. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 33.

Because the ALJ permissibly discredited the only medical opinions supportive of Employer's burden on rebuttal,[13] we affirm his finding that it did not disprove the existence of legal pneumoconiosis.[14] Employer's failure to disprove legal pneumoconiosis precludes

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[13] Because the ALJ provided valid bases for discrediting Drs. Zaldivar's and Basheda's opinions, we decline to address Employer's remaining arguments concerning the weight he afforded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 9-14, 17-20.

[14] We also reject Employer's argument that the ALJ erred in discrediting Claimant's treatment records. Employer's Brief at 23. The ALJ noted Claimant's treatment records contain Nurse Kirk's assessment that he has asthma. Decision and Order at 18-19. He also noted that while Claimant's treatment records identified Nurse Kirk as a "Board-certified Family Nurse Practitioner," the record does not contain her qualifications. Decision and Order at 33. He thus permissibly found Claimant's treatment records entitled to little weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 33. Further, Employer has not explained how Claimant's treatment records could support a finding of rebuttal as

a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "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). He rationally discredited the opinions of Drs. Zaldivar and Basheda on disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 35. Further, he permissibly found their opinions on disability causation unpersuasive because they rendered equivocal opinions on the issue of total disability. *See Mays*, 176 F.3d at 764; *Justice*, 11 BLR at 1-94.

As it is supported by substantial evidence,[15] we affirm the ALJ's finding that Employer failed to establish no part of Claimant's total disability is due to pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

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they do not address the cause of his asthma. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[15] Employer additionally argues the ALJ erred in crediting Dr. Gaziano's opinion that Claimant's pneumoconiosis contributed to his total disability. Employer's Brief at 24-26. Because Dr. Gaziano's opinion cannot aid Employer in rebutting the Section 411(c)(4) presumption, we decline to address its argument. *See Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge