U.S. Department of Labor

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

BRB No. 22-0407 BLA
and 22-0407 BLA-A

JUANITA CAVENDISH (o/b/o JAMIE K. CAVENDISH) Claimant-Petitioner Cross-Respondent v. LANDMARK CORPORATION and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/11/2023 DECISION and ORDER

Appeal of the Decision and Order of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Advanced Administrative Litigation Clinic, Washington and Lee University School of Law), Lexington, Virginia, for Claimant.

Chris M. Green and Wesley A. Shumway (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

BOGGS and JONES, Administrative Appeals Judges:

Claimant appeals,[1] and Employer and its Carrier cross-appeal, Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Denying Benefits (2019-BLA-06000) rendered on a claim[2] filed on March 6, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found the Miner did not have a totally disabling respiratory or pulmonary impairment.[3] 20 C.F.R. §718.204(b)(2). She therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718. Thus, she denied benefits.

On appeal, Claimant argues the ALJ erred in finding she did not establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief. On cross-appeal, Employer contends the ALJ erred in finding Claimant's usual coal mine

[1] The Miner died on February 20, 2020, while his claim was pending. Decision and Order at 7 n.7. Claimant, his surviving spouse, is pursuing the Miner's claim on his behalf. *Id.*

[2] On March 24, 1998, the district director denied the Miner's prior claim, filed on December 19, 1997, because he failed to establish pneumoconiosis or total disability due to pneumoconiosis. Claimant's Exhibit 20 at 2, 6. The Department of Labor destroyed the records related to that claim on January 1, 2014. Director's Exhibit 2. Although Claimant provided some documents related to the prior claim, the ALJ declined to treat the present claim as a subsequent claim because the records provided did not include the entire case file of the prior claim. Decision and Order at 2.

[3] The ALJ declined to make a finding on the number of years of coal mine employment. Decision and Order at 4. She noted, however, that the Miner's employment history forms and Social Security earnings records "appear to support at minimum at least [fifteen] years of coal mine employment." *Id.* at 4 n.4 (citing Director's Exhibits 5, 15-18).

employment constituted "light work." Neither Claimant nor the Director has filed a response to Employer's cross-appeal.

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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A miner was totally disabled if he had a pulmonary or respiratory impairment which, standing alone, prevented 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 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 the pulmonary function studies, arterial blood gas studies, and medical opinions do not support total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure.[5] 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 33-36.

---

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe* v. *Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 17.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that the pulmonary function and arterial blood gas studies do not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. *See Skrack v. Island*

Before weighing the medical opinions, the ALJ addressed the exertional requirements of the Miner's usual coal mine work as a dozer operator. Decision and Order at 4-5. She considered the Miner's description of his duties on his Description of Coal Mine Work Form CM-913, his statements to physicians, his state workers' compensation claim documents and decision, and Claimant's testimony. *Id.* (citing Director's Exhibits 6; 11 at 15; Claimant's Exhibits 18 at 12-13; 19 at 13-14). In addition, the ALJ took official notice of the fourth edition of the Dictionary of Occupational Titles (DOT) and its description of the exertional requirements of a bulldozer operator and the requirements of light and sedentary work. *Id.* at 5.

The ALJ accurately observed the Form CM-913 states the Miner's work as a dozer operator required him to sit for up to eight hours per day and climb an approximately eight-foot ladder from the ground to the cab door, but that it does not indicate this job "involve[d] significant lifting or carrying." Decision and Order at 4 (citing Director's Exhibit 6 at 1). Claimant testified the Miner's last coal mining job required him to climb into the cab of the bulldozer and, "on occasion[ ]," to replace a battery in the bulldozer. Claimant's Exhibit 19 at 11, 13-14. She further testified the battery weighed seventy-five to one-hundred pounds, per records she had reviewed,[6] and the Miner left coal mining after he injured his back while lifting a battery out of a bulldozer. *Id.* at 13-14. The state workers' compensation case file similarly includes Claimant's testimony that the Miner was injured while helping to lift a battery from a bulldozer. Director's Exhibit 11 at 15.

The ALJ permissibly found the Miner's job as a dozer operator was performed at the light exertional level. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 4. She noted the Miner's description of sitting for eight hours per day with no lifting or carrying requirements most closely matched the DOT's definition of sedentary work but that the required use of a ladder and foot controls was more consistent with light work. Decision and Order at 5. She permissibly discredited Claimant's testimony regarding the lifting and carrying requirements of the Miner's job because it is inconsistent with the Miner's Form CM-913, which does not indicate the Miner's work as a dozer operator involved lifting or carrying any significant weights. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc); Decision and Order at 4; Director's Exhibit 6 at 1. She further observed that, while the state workers' compensation case

---

Creek Coal Co., 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 33-34.

[6] Claimant testified she "saw the report that [the Miner] made to his doctor," but did not specifically identify the report to which she referred. Hearing Transcript at 14.

documents substantiate that the Miner was injured while helping to lift a battery, they contain no documentation as to the weight of that battery. Decision and Order at 4-5; Director's Exhibit 11 at 15. In addition, she compared the DOT's description of the duties of a bulldozer operator[7] with the Miner's description of his work in his Form CM-913, and permissibly found the Miner's job as actually performed did not require all the duties or the exertional requirements as described in the DOT. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012) (it is the duty of the ALJ to make findings of fact and to resolve conflicts in the evidence); Decision and Order at 5.

As the factfinder, an ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony. *See Stallard*, 876 F.3d at 670; *Tackett*, 12 BLR at 1-14 (ALJ has discretion to assess witness credibility and the Board will not disturb his or her findings unless they are inherently unreasonable). While the Board might find differently than the ALJ if it were the factfinder or could conduct a de novo review, our authority is circumscribed by law. 20 C.F.R. §802.301(a); *see Anderson*, 12 BLR at 1-112. Claimant's arguments regarding the exertional requirements of the Miner's last coal mining job are requests to reweigh the evidence, which we are not permitted to do.[8] *See Anderson*, 12 BLR at 1-113; Claimant's Brief at 7-13. We thus affirm the ALJ's finding that the Miner's last coal mining job as a dozer operator required light work.[9] Decision and Order at 5.

[7] The ALJ noted the DOT classifies a bulldozer operator (any industry) as ordinarily performed at the heavy exertional level, but also that the DOT indicates the job ordinarily requires equipment maintenance and fastening of attachments to the lever arm of the bulldozer, neither of which are described in the Miner's Form CM-913 or Claimant's testimony. Decision and Order at 5; Director's Exhibit 6 at 1; Claimant's Exhibit 19 at 11, 13-14.

[8] The ALJ also declined to discredit Claimant's testimony as "hearsay." Decision and Order at 4. As Claimant correctly argues, Claimant's Brief at 11-12, the fact that evidence contains hearsay does not preclude its admission or consideration in an administrative hearing. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609 (4th Cir. 2006); *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). As the ALJ provided other, valid reasons for crediting the Miner's Form CM-913 over Claimant's testimony, however, we need not address this allegation of error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 4-5.

[9] Contrary to Claimant's contention, Dr. Allen's opinion does not indicate the Miner's last coal mining job as a dozer operator required greater exertional capacity than light work. Claimant's Brief at 14-16. As the ALJ observed, the DOT indicates light work

The ALJ next considered the medical opinions of Drs. Allen and Sood that the Miner was totally disabled and the opinions of Drs. Basheda and Spagnolo that he was not. Decision and Order at 35-36; Director's Exhibit 32 at 7; Claimant's Exhibits 4 at 13, 43; 18 at 15, 44; Employer's Exhibits 1 at 12; 2 at 11; 5 at 9, 12; 6 at 27-28, 52-53. The ALJ determined Drs. Allen's and Sood's opinions were neither well-documented nor reasoned, whereas Drs. Basheda's and Spagnolo's opinions were both well-documented and reasoned. Decision and Order at 35. Therefore, crediting Drs. Basheda's and Spagnolo's opinions over those of Drs. Allen and Sood, the ALJ determined the medical opinion evidence weighed against a finding of total disability. *Id.* at 35-36.

Claimant asserts the ALJ erred in discrediting Drs. Allen's and Sood's opinions.[10] Claimant's Brief at 14-18. We disagree.

As the ALJ observed, Dr. Allen opined the Miner was unable to perform his last coal mining job as a dozer operator because he was unable to walk around the worksite or climb in and out of the bulldozer safely for eight to ten hours per day. Decision and Order at 35 (citing Director's Exhibit 32 at 7). The ALJ permissibly discredited her opinion because the record does not support her assertion that the Miner walked "anywhere near" eight to ten hours per day or that he was frequently ascending and descending a ladder into and out of the bulldozer's cab. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (ALJ has exclusive power to make credibility determinations and resolve inconsistencies in evidence); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); Decision and Order at 35.

Dr. Sood opined the Miner would have been unable to perform his last coal mining job if it required the exertional capacity as described by Dr. Allen. He also went on to describe the exertional requirements of the job as reported to him by other dozer operators and opined the Miner would be unable to perform the job as described by other dozer operators. Claimant's Exhibit 18 at 42-44, 84-85. He conceded, however, that the Miner

---

requires "a significant degree" of walking and standing. Decision and Order at 5 n.6. Further, jobs performed at the light exertional level may require even the frequent use of ladders. *See, e.g.*, SSR 85-15, 1985 WL 56857 at *6 (noting construction painter is performed at the light exertional level and requires climbing ladders and scaffolds).

[10] We affirm, as unchallenged, the ALJ's crediting of Drs. Basheda's and Spagnolo's opinions as well-documented and reasoned. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Skrack*, 7 BLR at 1-711; Decision and Order at 35-36.

could perform the job as described on the Form CM-913. *Id.* at 71-77. The ALJ permissibly discredited Dr. Sood's opinion because he relied on generalities gleaned from other dozer operators rather than Claimant's specific situation.[11] *See Looney*, 678 F.3d at 313-14; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 35.

As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and to assign those opinions appropriate weight. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557-58 (4th Cir. 2013); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14. Claimant's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113 (1989). Because the ALJ acted within her discretion in discrediting Drs. Allen's and Sood's opinions, we affirm her finding that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 36.

As Claimant has not established total disability through any of the methods at 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the ALJ's finding that Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2). We thus affirm the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption or establish entitlement to benefits as she failed to establish an essential element of entitlement.[12] *Anderson*, 12 BLR at 1-112.

[11] We further affirm, as unchallenged, the ALJ's discrediting of Drs. Allen's and Sood's opinions because neither physician adequately explained their conclusion that the Miner was totally disabled in light of the non-qualifying pulmonary function and arterial blood gas studies. *See Skrack*, 7 BLR at 1-711; Decision and Order at 35.

[12] As we affirm the ALJ's finding that Claimant failed to establish total disability, a requisite element of entitlement, we need not address Employer's contention on cross-appeal that the ALJ erred in finding the Miner's last coal mining job as a dozer operator required light work, not sedentary work. *Larioni*, 6 BLR at 1-1278; Employer's Consolidated Response Brief and Cross-Appeal at 32.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I agree with the majority's decision to affirm the ALJ's finding that Claimant did not establish the Miner was totally disabled. The crux of Claimant's argument is that, based on her testimony regarding the Miner's occasional lifting of batteries weighing seventy-five to one-hundred pounds, the exertional requirements of his coal mine employment should be considered "heavy," not "light, or at most moderate" as found by the ALJ. Claimant's Brief at 7, 9, 12, 14; Decision and Order at 35. Contrary to Claimant's argument, the ALJ's finding is supported by substantial evidence and therefore must be affirmed. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion") (citations omitted).

As the ALJ permissibly found, Claimant's testimony that the Miner lifted batteries weighing between seventy-five and one-hundred pounds is largely unsupported in the record. Notably, both medical opinions offered in support of Claimant's burden to establish total disability, from Drs. Sood and Allen, contradict Claimant's testimony in that they describe the Miner's work operating a bulldozer as requiring light-to-moderate exertion, not heavy. Director's Exhibit 32 at 1; Claimant's Exhibits 4 at 2; 18 at 39-40, 73, 90. While Dr. Sood opined that lifting bulldozer batteries weighing seventy-five to one-hundred pounds constitutes heavy labor, he did not affirmatively agree with Claimant's testimony as to their actual weight. Claimant's Exhibits 4 at 1, 22; 18 at 44. Rather, his subsequent testimony suggested he believed they in fact weighed less, as he clarified that the light exertion of climbing into a bulldozer would rise to the level of moderate labor

only if the Miner was simultaneously carrying batteries or other equipment. Claimant's Exhibit 18 at 73-74. In other words, when given the opportunity to describe the exertional requirements of carrying batteries while climbing into a bulldozer, Dr. Sood opined that activity required only moderate labor, which he defined as lifting up to fifty pounds. *Id*. at 18, 73-74. Thus, the ALJ's decision to not credit Claimant's testimony regarding the weight requirements of lifting bulldozer batteries is rational and supported by substantial evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (credibility determinations are for the trier-of-fact); *Hicks*, 138 F.3d at 528.

As the majority holds, the ALJ, in turn, permissibly rejected Drs. Allen's and Sood's opinions that the Miner could not perform the light-to-moderate work required of a bulldozer operator because they based their diagnoses on assumed job duties that are not supported by the record. *Supra* at 6-7; Decision and Order at 35. Dr. Allen, for example, based her opinion on an assumption that the Miner had to "walk around the worksite and climb into and out of the vehicle safely for 8-10 hours." Director's Exhibit 32 at 4. Meanwhile, Dr. Sood relied on job duties from other bulldozer operators he examined who were required, among other things, to shovel mud and rocks when the bulldozer got stuck, perform maintenance, and use "every muscle in [their bodies] to hold on to the levers" when "going up and down various grades." Claimant's Exhibit 18 at 84-85. By comparison, the Miner's Description of Coal Mine Work (Form CM-913) describes the job as requiring him to climb eight feet into the bulldozer and sit up to eight hours per day, and Claimant testified the most difficult part of his job, apart from carrying batteries, was climbing into the bulldozer, with no mention of the other duties Drs. Allen and Sood described.[13] Director's Exhibit 6; Claimant's Exhibit 19 at 13. As it is rational and supported by substantial evidence, the ALJ's finding that Drs. Allen's and Sood's total

[13] As noted, Dr. Sood opined the job Claimant described as the second-most-demanding part of the Miner's job—climbing into the bulldozer—required only light exertion or, at most moderate, if done while carrying a battery or other equipment. Claimant's Exhibit 18 at 73-74. Thus, even accepting that the Miner performed moderate labor, there remains a disconnect between Claimant's testimony and the additional job duties Dr. Sood identified of shoveling mud and rocks, performing maintenance, and maneuvering up and down slopes in a manner that requires use of every muscle in the body.

disability opinions are based on inaccurate job duties and thus not credible must be affirmed. *Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 528.

I therefore concur in the majority's decision to affirm the denial of benefits.

GREG J. BUZZARD
Administrative Appeals Judge