U.S. Department of Labor

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

BRB No. 22-0529 BLA

MATTHEW E. ROSZAK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL PENNSYLVANIA COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY INCORPORATED c/o SMART CASUALTY CLAIMS SERVICES	)	DATE ISSUED: 12/04/2023
	)	
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2022-BLA-05104) rendered on a claim filed on July 17, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with nine years and 1.25 months of coal mine employment and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the existence of legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b), (c). Thus, he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established the existence of legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Claimant responds in support of the award. 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.[2] 30 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman, & Grylls Assocs., Inc.*, 280 U.S. 359 (1965).

[1] 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.

[2] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 5.

Smoking History

Employer argues the ALJ erred in finding Claimant has only a 7.5-pack-year smoking history. Employer's Brief at 19-20. It asserts the ALJ failed to adequately consider Claimant's treatment records indicating a "smoking history of 28 years with up to 2.5 packs per day." *Id.* We disagree.

The length and extent of Claimant's smoking history is a factual determination committed to the ALJ's discretion, as is the credibility of witnesses and the weight to be accorded hearing testimony. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985).

The ALJ considered the varying smoking histories reported in Claimant's hearing testimony, Claimant's treatment records, and Drs. Jin's and Basheda's medical reports. Decision and Order at 6-7. He found Claimant's testimony that he does not currently smoke, but previously smoked about five cigarettes per day when he worked in the mines from about 1978 to 1984, supports a finding of a quarter-pack per day smoking history. *Id.* at 6. In addition, he found Dr. Jin's records indicating Claimant smoked a quarter-pack of cigarettes per day from 1971 to 1999 equates to a seven-pack-year smoking history,[3] and Dr. Basheda's notation that Claimant smoked a quarter-pack of cigarettes every three weeks from age thirty until his sixties represents about "(1/20 of a pack) for about [thirty] years," which equates to "a 1.5 pack year smoking history." *Id.* Finally, he found Claimant's treatment records reported "inconsistent smoking histories which are not specific in regard to the number of years or rate of smoking" and thus are entitled to less weight.[4] *Id.* at 6-7.

[3] Employer argues the ALJ erred in failing to consider the smoking history noted on a pulmonary function study dated April 9, 2021, that Dr. Jin conducted as part of Claimant's Department of Labor (DOL) complete pulmonary evaluation. Employer's Brief at 19-20. In the notes accompanying the study, a technician noted a fifteen-pack-year smoking history. Director's Exhibit 10 at 9. As the ALJ considered Dr. Jin's medical report noting that Claimant smoked a quarter-pack of cigarettes per day from 1971 to 1999, any error the ALJ made in failing to specifically discuss the smoking history the doctor's technician reported on the pulmonary function study is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[4] Some of Claimant's treatment records from Uniontown Hospital between 2017 and 2019 stated he never smoked, while some treatment records from Dr. Kolar between

Taking into consideration the complete range of reported smoking histories and Claimant's hearing testimony, and acknowledging there are inconsistencies between them, the ALJ permissibly determined the evidence establishes Claimant smoked on average a quarter-pack of cigarettes per day for thirty years, or "about 7.5 pack years." *Id*. at 7; *see Lafferty*, 12 BLR at 1-192; *Mabe*, 9 BLR at 1-68. As it is supported by substantial evidence, we affirm this finding. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 395 (3d Cir. 2002) ("Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (citation omitted); Decision and Order at 7.

Entitlement to Benefits – 20 C.F.R. Part 718

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. Failure to establish any one of these elements precludes an award of benefits. *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).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.202(a), 718.201(b)(2), (c).

Medical Opinions

The ALJ considered the medical opinions of Drs. Jin, Basheda, and Rosenberg. Decision and Order at 22-26. Dr. Jin opined Claimant has chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and smoking and has probable asthma. Director's Exhibit 10 at 5. Drs. Basheda and Rosenberg opined Claimant does not have legal pneumoconiosis but has COPD and asthma unrelated to his coal mine dust exposure. Employer's Exhibits 2 at 22-23; 4 at 5; 5 at 33, 41; 6 at 30-34, 40. The ALJ found Drs. Basheda's and Rosenberg's opinions poorly reasoned and entitled to diminished weight. Decision and Order at 23-26. He found Dr. Jin's opinion reasoned, documented, and

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1995 and 2001 noted he has a current smoking history of between less than a half a pack per day to two and a half packs per day for unknown durations. Employer's Exhibits 7, 8.

entitled to significant weight. *Id*. at 23. He thus found the medical opinion evidence establishes the existence of legal pneumoconiosis. *Id*. at 26.

We reject Employer's argument that the ALJ provided invalid reasons for finding Drs. Basheda's and Rosenberg's opinions not credible. Employer's Brief at 23-32. Drs. Basheda and Rosenberg eliminated coal mine dust exposure as a contributing cause of Claimant's obstructive impairment because his impairment is partially reversible. Employer's Exhibits 2 at 23-24; 4 at 10, 12; 6 at 33-34, 46. They explained the reversibility of Claimant's obstructive impairment is inconsistent with the fixed nature of a coal mine dust-induced lung disease. *Id*. The ALJ permissibly found their rationale unreasoned because they did not explain why, "even if cigarette smoking exposure and asthma are other contributing causes," coal mine dust exposure did not also contribute to the fixed portion of Claimant's obstructive impairment given that his "pulmonary function studies were qualifying both pre and post bronchodilator."[5] Decision and Order at 23-26; *see Balsavage*, 295 F.3d at 396; *Kertesz v. Crescent Hills Coal Co.*; 788 F.2d 158, 163 (3d Cir. 1986).

Employer's general argument that the ALJ should have credited Drs. Basheda's and Rosenberg's opinions because they are reasoned and documented amounts to a request to reweigh the evidence, which we are not empowered to do.[6] *Anderson*, 12 BLR at 1-113; Employer's Brief at 23-32.

[5] We also reject Employer's argument that the ALJ applied a "double standard" in discrediting Dr. Basheda's opinion that Claimant has asthma unrelated to his coal dust exposure without similarly discrediting Dr. Jin's opinion. Employer's Brief at 20. Dr. Jin diagnosed "probable" asthma and stated it is not related to coal mine dust exposure and smoking but acknowledged that these exposures can aggravate asthma attacks. Director's Exhibit 10 at 5. She further stated that "there is no definite medical evidence of clinical asthma." *Id*. Contrary to Employer's argument, the ALJ did not credit Dr. Jin's opinion that Claimant has "probable" asthma. Rather, he credited Dr. Jin's opinion that Claimant has chronic obstructive pulmonary disease (COPD) related to coal mine dust exposure and cigarette smoking. Decision and Order at 23. Consequently, the ALJ could not have rationally discredited Dr. Jin's opinion on the same grounds that he discredited Dr. Basheda's opinion.

[6] Because the ALJ provided a valid reason for discrediting the opinions of Drs. Basheda and Rosenberg on legal pneumoconiosis, we need not address Employer's remaining arguments concerning his weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 22-32.

We further reject Employer's argument that the ALJ erred in crediting Dr. Jin's opinion because she "never made a specific diagnosis of 'legal' pneumoconiosis." Employer's Brief at 20-21. Contrary to Employer's argument, to satisfy the definition of legal pneumoconiosis, a physician need only credibly diagnose a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Here, Dr. Jin diagnosed COPD related to coal mine dust exposure.[7] Director's Exhibit 10 at 4. We therefore see no error in the ALJ's finding that Dr. Jin's opinion constitutes a diagnosis of legal pneumoconiosis. Decision and Order at 23.

Employer's general argument that the ALJ erred in finding Dr. Jin's opinion reasoned and documented amounts to a request to reweigh the evidence, which again we are not empowered to do. *Anderson*, 12 BLR at 1-113; Employer's Brief at 19.

As Employer raises no further arguments, and it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the existence of legal pneumoconiosis based on Dr. Jin's opinion. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order at 26.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work.[8] *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 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).

[7] Dr. Jin identified Claimant's coal mine dust exposure as a "well known risk of COPD" and concluded the "etiological contribution of smoking and exposure to coal dust (smoking vs. coal dust exposure) is allocated to 40% vs. 60% respectively, based on current scientific evidence[]." Director's Exhibit 10 at 4.

[8] The ALJ found Claimant's last coal mine job as a roof bolter required "heavy labor." Decision and Order at 30.

The ALJ found the pulmonary function studies, blood gas studies, and medical opinions establish total disability.[9] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 28-31.

Employer does not challenge the ALJ's finding that Claimant established total disability based on the pulmonary function study and arterial blood gas study evidence; thus, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 28-29.

Medical Opinions

The ALJ considered the medical opinions of Drs. Jin, Basheda, and Rosenberg that Claimant has a totally disabling respiratory or pulmonary impairment. Director's Exhibit 10 at 4; Employer's Exhibits 2 at 22-23; 4 at 5; 5 at 35, 40; 6 at 40, 42-44. He found their opinions reasoned and documented, and sufficient to establish total disability. Decision and Order at 31.

As Employer does not challenge the ALJ's finding that Drs. Basheda's and Rosenberg's opinions are reasoned and documented, and sufficient to establish total disability, we affirm it. *See Skrack*, 6 BLR at 1-711.

Employer instead argues the ALJ erred in crediting Dr. Jin's opinion, alleging it is equivocal because she stated only that Claimant "may" be disabled and "never states that [his] respiratory impairment actually prevents him from performing" his usual coal mine job as a roof bolter. Employer's Brief at 21-23. We disagree.

Dr. Jin opined Claimant's "respiratory impairment is moderate for his severe COPD, which may prevent him from performing his essential job function as a roof bolter with estimate[d] heavy physical requirement." Director's Exhibit 10 at 5. Contrary to Employer's argument, Dr. Jin's use of the word "may" does not render her opinion equivocal. *See Balsavage*, 295 F.3d at 396; *see also Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (physician's use of cautious language does not necessarily reflect equivocation, and it is the function of the ALJ to evaluate the strength of the doctor's opinion). Within his discretion, the ALJ permissibly concluded Dr. Jin's opinion supports a finding that Claimant "suffers from a totally disabling pulmonary or respiratory impairment that would prevent him from performing his last coal mine employment which required heavy labor." Decision and Order at 31; *see Balsavage*, 295 F.3d at 396.

[9] The ALJ found no evidence in the record of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 29.

Moreover, as the ALJ's finding that the medical opinions establish a totally disabling respiratory or pulmonary impairment is otherwise supported by the opinions of Drs. Basheda and Rosenberg, any error the ALJ made in weighing Dr. Jin's opinion is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm his finding that the medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(4); Decision and Order at 31. Further, we affirm his finding that the evidence considered as a whole established total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 31.

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling respiratory or pulmonary impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(i), (ii).

The ALJ again considered the medical opinions of Drs. Jin, Basheda, and Rosenberg. Decision and Order at 32-33. Dr. Jin opined Claimant is disabled due to his COPD which, as discussed, the ALJ found constitutes legal pneumoconiosis. Director's Exhibit 10 at 4. Drs. Basheda and Rosenberg agreed Claimant has a totally disabling obstructive impairment but opined the disability was not caused by legal pneumoconiosis or coal mine dust exposure. Employer's Exhibits 2 at 22-23; 4 at 12. The ALJ found Drs. Basheda's and Rosenberg's opinions unpersuasive and Dr. Jin's opinion reasoned and documented. Decision and Order at 33. He thus found Claimant established that his legal pneumoconiosis is a substantially contributing cause of his disabling respiratory or pulmonary impairment. *Id*.

As Employer does not challenge the ALJ's finding that Dr. Jin's opinion on disability causation is reasoned and documented, we affirm it. *See Skrack*, 6 BLR at 1-711. Employer instead argues the ALJ provided invalid reasons for finding Drs. Basheda's and Rosenberg's opinions not credible. Employer's Brief at 32. Contrary to Employer's argument, the ALJ permissibly discredited their opinions on disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding that Claimant established the disease. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 32. We therefore affirm the ALJ's finding that Claimant established that his legal

pneumoconiosis is a substantially contributing cause of his total disability based on Dr. Jin's opinion. 20 C.F.R. §718.204(c)(1); Decision and Order at 33.

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

MELISSA LIN JONES
Administrative Appeals Judge