U.S. Department of Labor

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

BRB No. 23-0044 BLA

JOHNNY CHARLES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARACOMA COAL COMPANY, LLC	)	
	)	
and	)	
	)	DATE ISSUED: 12/08/2023
Self-insured through ANR INCORPORATED	)	
	)	
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 Granting Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson, Kentucky, for Claimant.

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

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, 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, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BOGGS, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Granting Benefits (2020-BLA-05591) rendered on a claim filed on January 7, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant worked for 41.01 years in coal mine employment, with at least fifteen years in underground coal mines or surface coal mines in conditions substantially similar to underground mines. He also found Claimant 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 thereby invoked the Section 411(c)(4) presumption. It also contends the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response indicating the ALJ erred in applying the decision of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019) when calculating Claimant's coal mine employment.

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] 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).

[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] 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 (1989) (en banc); Hearing Transcript at 15.

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, Claimant must establish he has a totally disabling respiratory or pulmonary impairment.[3] 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his

[3] The Director states the ALJ erred in calculating Claimant's coal mine employment by applying the Sixth Circuit's decision in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019) when finding 41.01 years of coal mine employment. Director's Letter Brief at 1-2 n.1. He asserts that in cases arising out of the Fourth Circuit, such as this case, the regulation defining a year requires the ALJ to first determine whether Claimant engaged in coal mine employment for a period of one calendar year, or partial periods totaling one year. *Id.*; *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); 20 C.F.R. §725.101(a)(32). Then, according to the Director, if the threshold one-calendar year period is met, the ALJ must determine whether Claimant worked for at least 125 working days within that period in order to be credited with a year of coal mine employment. *Id.* He contends the ALJ erred in crediting Claimant with a year of coal mine employment if he established 125 working days even where Claimant and an operator did not have a 365-day employment relationship. *Id.*

We agree that the ALJ erred to the extent he applied that approach. Although our colleague would apply *Shepherd's* rationale in all circuits, this case arises in the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 days of earnings establishes a year-long employment relationship. To credit a miner with a year of coal mine employment in the Fourth Circuit, the Board has long interpreted Fourth Circuit case law as supporting the position the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Mitchell*, 479 F.3d at 334-35; *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003).

Nevertheless, we note that the ALJ applied the *Shepherd* method only for the years 1978 to 1996 and 2000 to 2003. Decision and Order at 7-8. The ALJ found Claimant established a calendar year employment relationship with Road Fork Coal and Employer for the years 2004 to 2018 and established 125 working days in each calendar year during that period, and thus (because he found that employment also was at an underground coal mine) he found fifteen years of qualifying coal mine employment with these operators. *Daniels*, 479 F.3d at 334-36; Decision and Order at 7. The Director has not set forth how the error he alleges would make a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413

pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 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,[4] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and the evidence as a whole.[5] Decision and Order at 9-14.

Employer does not specifically challenge the ALJ's finding that the pulmonary function study evidence supports total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9-11. Thus we affirm the ALJ's determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the ALJ erred in finding the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 7-16, 18-21, 31-32.

The ALJ considered Dr. Forehand's opinion that Claimant is totally disabled by a respiratory or pulmonary impairment and the medical opinions of Drs. Zaldivar and Spagnolo that he is not. Decision and Order at 11-14; Director's Exhibit 17; Employer's Exhibits 1, 2, 8, 9. The ALJ found Dr. Forehand's opinion, as corroborated by Claimant's

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(2009). As the parties raise no other argument, we affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] A "qualifying" pulmonary function study or arterial blood gas study yields results 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 yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The ALJ found the arterial blood gas studies do not support 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)(ii), (iii); Decision and Order at 9, 11.

treatment records, reasoned and documented and the opinions of Drs. Zaldivar and Spagnolo unpersuasive. Decision and Order at 11-14.

Employer argues the ALJ erred in rejecting the contrary opinions of Drs. Zaldivar and Spagnolo that Claimant is not totally disabled. Employer's Brief at 7-10, 12-16, 31-32. We disagree.

Dr. Zaldivar opined Claimant's pulmonary function testing demonstrates restriction of forced vital capacity and an FEV1 value that is borderline for total disability. Employer's Exhibit 1 at 3. He cited medical literature explaining that obesity can have an effect on lung function testing. *Id.* In light of Claimant's lung volume results, he concluded Claimant does not have a disabling intrinsic pulmonary impairment as his lung function testing can be explained by his obesity. *Id.* Similarly, Dr. Spagnolo opined Claimant's lung function testing does not evidence any intrinsic pulmonary impairment but rather "reduced vital capacity secondary to morbid obesity." Employer's Exhibit 2 at 6-7. In his deposition, he conceded Claimant's FEV1 and FVC values on pulmonary function studies are "slightly reduced," but he attributed those reductions to obesity. Employer's Exhibit 8 at 33. Notwithstanding the etiology of the reduced FEV1 and FVC values, he concluded that the pulmonary function studies are not qualifying for total disability. *Id.* at 33-34. He cited post-bronchodilator results to support his conclusion. *Id.*

Contrary to Employer's argument, the ALJ permissibly found the opinions of Drs. Zaldivar and Spagnolo unpersuasive because both doctors focused on the etiology of the pulmonary function test results and not whether Claimant is totally disabled in light of those studies. Decision and Order at 12-14. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the miner has 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); *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023). As substantial evidence supports the ALJ's credibility finding, we affirm it.[6] Decision and Order at 12-14.

Thus we affirm, as supported by substantial evidence, the ALJ's determination that the medical opinion evidence does not undermine the totally disabling results of the

[6] Because the ALJ provided a valid reason for discrediting the opinions of Drs. Zaldivar and Spagnolo, we need not address Employer's additional arguments as to why the ALJ erred in weighing their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-16, 31-32.

pulmonary function studies. Decision and Order at 14. Because there is no evidence undermining the qualifying pulmonary function studies, we further affirm his conclusion that the evidence,[7] when weighed together, establishes total disability.[8] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 14. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b).

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,[9] 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]

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[7] As Claimant has established total disability through pulmonary function testing, we need not address Employer's argument that the ALJ erred in assessing the exertional requirements of Claimant's usual coal mine employment before weighing the medical opinions, erred in crediting Dr. Forehand's diagnosis of total disability, and erred in finding Claimant's treatment records establish total disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 7-22.

[8] Contrary to Employer's argument, the ALJ correctly found that because arterial blood gas studies and pulmonary function studies measure different types of impairment, non-qualifying blood gas studies do not call into question valid and qualifying pulmonary function studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Decision and Order at 14; Employer's Brief at 11-12.

[9] "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).

[10] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 16-18.

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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Zaldivar and Spagnolo that Claimant does not have legal pneumoconiosis because he does not have an intrinsic lung disease or impairment evidenced by objective testing. Employer's Exhibits 1, 2, 8, 9. Both physicians opined Claimant's reduced values on pulmonary function testing, when considered in conjunction with lung volume testing, do not reflect an obstructive or restrictive impairment. *Id*. They concluded his objective test results, clinical findings, and symptoms are related to his obesity or cardiac conditions and are unrelated to coal mine dust exposure. *Id*. The ALJ found their opinions unpersuasive and unsupported by Claimant's treatment records. Decision and Order at 19-20.

We reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Zaldivar and Spagnolo. Employer's Brief at 13-14, 21-33. The ALJ accurately found that Claimant's treatment records include an x-ray that was read as positive for chronic obstructive pulmonary disease (COPD). Decision and Order at 19-20. Specifically, medical records from Tug Valley Area Regional Hospital indicate Dr. Singh read a January 14, 2019 x-ray as revealing COPD. Claimant's Exhibit 3 at 8 (unpaginated). In addition, Dr. Zaldivar conceded Claimant's treatment records reflect he was given medication to treat chronic bronchitis. Employer's Exhibit 9 at 26-27. Based on the foregoing, the ALJ acted within his discretion in concluding that the treatment records undermine the opinions of Drs. Zaldivar and Spagnolo that Claimant has no intrinsic lung disease. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (ALJ has the discretion to weigh the evidence and draw inferences therefrom); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 189 (4th Cir. 2002) (reviewing court cannot disturb factual findings that are supported by substantial evidence even if it might reach a different conclusion if it were reviewing the evidence de novo).

In addition, both Drs. Zaldivar and Spagnolo excluded legal pneumoconiosis because each physician opined that obesity and cardiological problems fully accounted for Claimant's reduced values on pulmonary function testing when one accounts for lung volume testing. Employer's Exhibits 1 at 4; 2 at 7. The ALJ acted within his discretion in rejecting their opinions on the grounds that they did not explain why coal dust did not at least contribute to the reduced pulmonary function study values. Decision and Order at 19, 20; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017); *Hobet Mining, LLC v. Epling*, 783 F.3d 498 (4th Cir. 2015).

Because we affirm the ALJ's discrediting of the opinions of Drs. Zaldivar and Spagnolo's opinions,[11] the only opinions that support Employer's burden on rebuttal,[12] we also affirm his finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed whether Employer established that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally discredited the opinions of Drs. Zaldivar and Spagnolo regarding the cause of Claimant's total disability because they failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease. *See Epling*, 783 F.3d at 506; *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 21-22. We therefore affirm the ALJ's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[11] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Zaldivar and Spagnolo on legal pneumoconiosis, we need not address Employer's other arguments that the ALJ erred in weighing their opinions. *Kozele*, 6 BLR at 1-382 n.4; Employer's Brief at 24-28.

[12] As Dr. Forehand's opinion does not aid Employer in rebutting the Section 411(c)(4) presumption, we decline to address Employer's arguments regarding the ALJ's weighing of the opinion. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 20; Employer's Brief at 16-18.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring.

I concur in the majority opinion except its conclusion that the ALJ erred by applying the Sixth Circuit's rationale in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019) to credit Claimant with full years of coal mine employment during certain calendar years. *See* n.3, *supra*. For the reasons I set forth in *Baldwin v. Island Creek Kentucky Mining*, BRB No. 21-0547 BLA, 2023 WL 5348588, at *5-8 (DOL Ben. Rev. Bd. July 14, 2023) (Buzzard, J., concurring and dissenting), I would apply *Shepherd's* rationale in all circuits, *i.e.*, a miner who worked 125 days in a given year is entitled to credit for one full year of coal mine employment under the Act, without having to also establish a 365-day employment relationship with his employer.

GREG J. BUZZARD
Administrative Appeals Judge