U.S. Department of Labor

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

BRB No. 21-0261 BLA

JOHN B. SANDERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY, LLC	)	
	)	
and	)	
	)	DATE ISSUED: 01/24/2023
NATIONAL UNION FIRE/AIG	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-06151) rendered on a miner's subsequent claim filed on May 24, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Based on Employer's stipulation, the ALJ credited Claimant with twenty-four years of coal mine employment, with at least fifteen years underground, and determined he established 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. 30 U.S.C. §921(c)(4) (2018).[2] Finally, the ALJ determined Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant totally disabled.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Benefits Review Board's scope of review is defined by statute. The ALJ's Decision and Order must be affirmed 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).

[1] This is Claimant's ninth claim. Director's Exhibits 1-10. Seven of the prior claims were withdrawn and thus are considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibits 1-6, 8. Another prior claim was administratively closed; however, no additional information on that claim is provided in the record before us. Director's Exhibit 7; Decision and Order at 2.

[2] 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 employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, that Claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3; Hearing Transcript 16, 20.

[4] We will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment in Kentucky. *See Shupe* v. *Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 28.

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[5] pulmonary function or 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 medical opinion evidence and the evidence as a whole.[6] *See* 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 26.

The ALJ assessed the medical opinions of Drs. Green, Raj, and Jarboe. Decision and Order at 23-26. Drs. Green and Raj found Claimant totally disabled from performing his usual coal mine employment,[7] while Dr. Jarboe concluded he is not totally disabled. *Id.* at 23. The ALJ gave diminished weight to Dr. Jarboe's opinion as unreasoned and credited Drs. Green's and Raj's opinions to find total disability established. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23-26.

Employer asserts the ALJ erred in crediting Dr. Green's opinion, as Dr. Green provided an "unfounded" opinion that Claimant exhibits disabling hypoxemia, mischaracterized the arterial blood gas evidence, and failed to "adequately explain

[5] A "qualifying" pulmonary function or arterial blood gas study yields results equal or less than the applicable table values contained in Appendices B or C of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

[6] The ALJ found that total disability was not established by the pulmonary function study or arterial blood gas study evidence and there is no evidence of cor pulmonale. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 22-23. He further found the evidence insufficient to establish complicated pneumoconiosis and thus Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Id.* at 20-21. These findings are unchallenged on appeal; thus, we affirm them. *See Skrack*, 6 BLR at 1-711.

[7] We affirm as unchallenged the ALJ's finding that Claimant's usual coal mine employment as a foreman involved "components of very heavy" exertion. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22.

why Claimant could not perform his last coal mining job." Employer's Brief at 15. Employer, however, provides no support for these allegations.

In giving Dr. Green's opinion "substantial weight," the ALJ found him well-qualified as a pulmonologist, who examined Claimant twice. Decision and Order at 23. The ALJ found Dr. Green was aware of Claimant's varying blood gas study results and understood Claimant's usual coal mining work required heavy exertion. Decision and Order at 23-24. Dr. Green noted an exercise blood gas study Dr. Raj obtained in 2017 was qualifying, and further explained that while the exercise blood gas study he obtained on April 4, 2019, was not qualifying, it was just above the qualifying threshold and showed hypoxia with exercise. Decision and Order at 23; Claimant's Exhibit 1. He further explained that while the April 11, 2019 exercise study he obtained was also not qualifying, Claimant's blood oxygen declined with only light exercise,[8] and the ALJ found Dr. Green provided a "reasoned supposition" that it would have decreased further with continued exercise. *Id.* at 24; Claimant's Exhibit 2 at 4. The ALJ indicated that the exercise blood gas studies showed a "complex" picture, and credited Dr. Green's explanation that these abnormalities with exercise demonstrate Claimant has a chronic problem with impaired gas exchange that would prevent him from performing his usual coal mine employment. Decision and Order at 23-24, 26. As the ALJ provided permissible reasons for finding Dr. Green's opinion credible, which are supported by substantial evidence, we affirm them. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 352-53 (6th 2007); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Employer next asserts the ALJ erred in crediting Dr. Raj's 2017 opinion when the doctor lacked a complete picture of Claimant's arterial blood gas testing, as he was unaware of later non-qualifying, exercise blood gas study results. Employer's Brief at 15. However, the ALJ acknowledged this fact, and gave Dr. Raj's opinion "reduced weight" for this reason. Decision and Order at 23. The ALJ did accord his opinion at least some weight, however, as Dr. Raj's findings were consistent with the testing obtained during his examination, and with the physician's observations regarding Claimant's symptoms and physical limitations. *Id.* at 7, 23. Employer has not explained how the ALJ erred in according Dr. Raj's opinion at least some weight on these bases. Thus, the ALJ's credibility findings regarding Dr. Raj's opinion are affirmed. *See Jericol Mining, Inc. v.*

[8] In performing the April 11, 2019 exercise study, Claimant exercised only two minutes and forty-three seconds because of knee pain, whereas he had exercised for four minutes and thirteen seconds during the exercise study when Dr. Green first examined him on April 4, 2019. Claimant's Exhibits 1-2.

Napier, 301 F.3d 703, 713-14 (6th Cir. 2002) (it is within the purview of the ALJ to weigh the evidence, draw inferences, and determine credibility); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

Employer further argues the ALJ erred in finding Dr. Jarboe failed to address whether Claimant's hypoxemia would prevent him from performing his usual coal mine work. Employer's Brief at 13-14. Employer maintains that Dr. Jarboe specifically concluded "Claimant retains the pulmonary capacity to return to his previous coal mine work" and the ALJ found Dr. Jarboe understood the exertional requirements of Claimant's last coal mining job. Employer's Brief at 13-14.

Employer points to Dr. Jarboe's statement that Claimant could perform his usual coal mine work. Employer's Brief at 13-14, *citing* Employer's Exhibit 1 at 6. That statement, however, was in the physician's initial report from April 10, 2018, and did not include his consideration of the more recent blood gas studies at his deposition, where he acknowledged the more recent studies demonstrated at least some degree of hypoxemia. Employer's Exhibit 6; Decision and Order at 25. The ALJ's statement that Dr. Jarboe "never did address whether the Claimant's hypoxemia would prevent him from performing his usual coal mine work," was made specifically in the context of evaluating Dr. Jarboe's testimony regarding the hypoxemia the physician observed on the more recent April 2019 studies. Decision and Order at 25.

Further, as discussed below, the ALJ fully analyzed Dr. Jarboe's opinion in finding it inadequately explained regarding the impact of Claimant's hypoxemia demonstrated on the later testing. We therefore see no error in the ALJ's explanation that even if he were to construe Dr. Jarboe's opinion as concluding that Claimant is able to perform heavy work notwithstanding his hypoxemia, he would still find Drs. Green's and Raj's contrary opinions more persuasive. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 26 n.12.

Addressing Dr. Jarboe's discussion of the arterial blood gases performed after he authored his initial report, the ALJ found Dr. Jarboe's opinion "inherently contradictory." Decision and Order at 24. The ALJ noted that when Dr. Jarboe discussed Claimant's April 4, 2019[9] exercise blood gas study, he indicated it reflected both "normal" and "unusual" responses to exercise. Decision and Order at 24;

[9] At one point, the ALJ referenced an April 4, 2011 blood gas study. Decision and Order at 24. This appears to be a typographical error, as there are no studies of record from 2011.

Employer's Exhibit 6[10] at 12-13. In addition, the ALJ noted Dr. Jarboe found the study conducted on April 11, 2019 reflected "completely normal" results, but the doctor also noted "marginal hypoxemia." Decision and Order at 25; Employer's Exhibit 6 at 14. The ALJ further noted Dr. Jarboe emphasized that "the bottom line" was that Claimant's blood gas studies were not qualifying. Decision and Order at 24-25; Employer's Exhibit 6 at 13. However, as the ALJ correctly indicated, a miner may be disabled notwithstanding non-qualifying objective testing and even a mild impairment can be disabling depending on the miner's usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); Decision and Order at 23-24. Thus, the ALJ permissibly found Dr. Jarboe's opinion undermined as both contradictory and inadequately explained. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 24-26.

As Employer raises no further arguments regarding the ALJ's weighing of the evidence, we affirm the ALJ's findings that the opinions of Drs. Green and Raj outweigh Dr. Jarboe's, and that the evidence weighed as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 26. Therefore, we affirm the ALJ's invocation of the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 26.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish that Claimant has neither legal nor clinical pneumoconiosis,[11] or "no

[10] The ALJ refers to Dr. Jarboe's deposition testimony as Employer's Exhibit 7; however, it is identified as Employer's Exhibit 6 in the record before us.

[11] Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the condition 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). "Legal pneumoconiosis" refers to "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).

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. Decision and Order at 26. Employer does not challenge this finding on appeal; thus, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge