U.S. Department of Labor

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

BRB No. 21-0175 BLA

TERRY W. PRICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	DATE ISSUED: 6/22/2022
	)	
Employer-Petitioner	)	
	)	
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 Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Awarding Benefits (2017-BLA-05690) rendered on a claim filed on April 13, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least fifteen years of qualifying coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore 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). She further found Employer did not rebut the presumption and awarded benefits.

On appeal,[2] Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding Claimant totally disabled, and therefore erred in finding he invoked the Section 411(c)(4) presumption. It further asserts she erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response asserting the Section 411(c)(4) presumption is constitutional.

The 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).

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[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); 20 C.F.R. §718.305.

[2] By Order dated May 4, 2021, the Benefits Review Board directed Employer to show cause why its appeal should not be dismissed for failure to file a petition for review and brief. By Order dated May 27, 2021, the Board accepted Employer's response that it did not receive the Board's appeal acknowledgement letter that set the briefing schedule, and it ordered Employer to file a petition for review and brief within ten days of receipt of the Order. May 27, 2021 Order; 20 C.F.R. §802.211. Employer subsequently timely filed a petition for review and brief.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because 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

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 21-23. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. C.t. 2104, 2120 (2021); Director's Response Brief at 1.

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

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 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). 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). In this case, the ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and the evidence as a whole.[4] 20 C.F.R. §718.204(b)(i), (iv).

Pulmonary Function Studies

The ALJ considered five pulmonary function studies dated June 22, 2016, October 27, 2016, June 19, 2017, July 24, 2017, and March 29, 2018. Decision and Order at 5; Director's Exhibits 11, 12; Claimant's Exhibits 1, 2; Employer's Exhibit 5. The June 22, 2016, October 27, 2016, June 19, 2017, and July 24, 2017 studies produced qualifying

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[4] The ALJ found the arterial blood gas studies do not establish 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 6.

values pre-bronchodilator[5] but non-qualifying values post-bronchodilator. Director's Exhibits 11, 12; Claimant's Exhibits 1, 2. The March 29, 2018 study produced qualifying values both pre- and post-bronchodilator. Employer's Exhibit 5. Noting that the majority of the qualifying values were obtained pre-bronchodilator and that the most recent study was qualifying before and after bronchodilators, the ALJ found a preponderance of the pulmonary function study evidence established total disability. Decision and Order 5-6.

Employer contends the ALJ erred in finding the pulmonary function study evidence establishes total disability. Employer's Brief at 6-8. We disagree.

Initially, we reject Employer's argument that the ALJ erred in not considering contrary probative evidence in the form of Dr. Jarboe's opinion that the March 29, 2018 qualifying pulmonary function study is not reliable for establishing total disability. Employer's Brief at 7. In the absence of evidence to the contrary, compliance with the quality standards set forth in the regulations is presumed. 20 C.F.R. §718.103(c); *see* Appendix B to 20 C.F.R. Part 718; *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable). While Employer asserts Dr. Jarboe questioned the validity of the pulmonary function study, the record reflects he questioned only whether the results reflected a permanent impairment and not whether the testing was valid. Employer's Exhibit 5. Dr. Jarboe opined the test itself demonstrated a severe and disabling impairment but that, based on prior testing, this impairment could improve with time. *Id*. The technician who conducted the test noted good effort and understanding, and no physician questioned the validity of the test. *Id*. As there is no evidence that questions the reliability of the March 29, 2018 pulmonary function study, we reject Employer's arguments. 20 C.F.R. §718.103(c); *Vivian*, 7 BLR at 1-361.

We further reject Employer's argument that the ALJ erred in crediting the most recent test because it was conducted only eight months after the next most recent test. Employer's Brief at 6-7. The ALJ permissibly found the weight of the pulmonary function testing establishes total disability, noting all five pre-bronchodilator studies are qualifying, as is one post-bronchodilator study, while only four post-bronchodilator studies are non-qualifying. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 5-6. Employer has failed to explain how affording the March 29, 2018 study no additional weight as the most recent study of record would make any difference when the majority of

[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).

the studies, including all pre-bronchodilator studies, are still qualifying. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which he points could have made any difference"); Decision and Order at 5-6. To the extent Employer believes the ALJ should have relied on the post-bronchodilator results instead of the pre-bronchodilator results, we reject its arguments. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.").

Because substantial evidence supports the ALJ's finding that the weight of the pulmonary function study evidence is qualifying, we affirm her determination that considering the pulmonary function tests alone Claimant could establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 5-6.

Medical Opinion Evidence

The ALJ considered the opinions of Drs. Green, Nader, Raj, Dahhan, and Jarboe. Decision and Order at 6-10. Drs. Green, Nader, and Raj opined Claimant is totally disabled from a pulmonary impairment. Director's Exhibit 11; Claimant's Exhibits 1, 2. Dr. Dahhan opined Claimant is not totally disabled. Director's Exhibit 12. Dr. Jarboe opined Claimant has a severe obstructive impairment and would be considered totally disabled based upon the results of his examination of Claimant, but he also opined the impairment may not be "permanently" disabling. Employer's Exhibit 5. The ALJ accorded less weight to the opinions of Drs. Dahhan and Jarboe. Decision and Order at 9. She therefore found the medical opinion evidence supports a finding of total disability. *Id*. at 9-10; 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the ALJ erred in discrediting Dr. Dahhan's opinion when he "relied on the whole of the testing," including the non-qualifying post-bronchodilator pulmonary function studies and non-qualifying blood gas studies, to find Claimant is not disabled. Employer's Brief at 9. We disagree. The ALJ accurately noted Dr. Dahhan opined Claimant was not totally disabled "despite the Claimant's [pulmonary function study] results from his examination, which produced qualifying values pre-bronchodilator." Decision and Order 8-9. The ALJ permissibly accorded less weight to Dr. Dahhan's opinion because he failed to provide an explanation as to why he relied only on Claimant's post-bronchodilator values in assessing whether Claimant is disabled based on the pulmonary function study results. *See* 45 Fed. Reg. at 13,682; *see also Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Peabody Coal*

Co. v. Groves, 277 F.3d 829, 835 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order 9.

We further reject Employer's contention that the ALJ failed to adequately explain why she did not credit Dr. Jarboe's opinion. Employer's Brief at 11-12. Dr. Jarboe opined Claimant has a severe obstructive pulmonary impairment that was qualifying for total disability at his most recent examination, but he was "reluctant to use the term permanently disabled" based on the earlier non-qualifying post-bronchodilator studies as Claimant's "function could change and improve to a non-qualifying level." Employer's Exhibit 5. The ALJ considered Dr. Jarboe's opinion but noted the physician acknowledged Claimant's pre-bronchodilator studies and most recent post-bronchodilator study were qualifying[6] and therefore declined to credit his opinion that Claimant's impairment may not be permanent. Decision and Order at 9. As we have affirmed the ALJ's determination that the non-qualifying post-bronchodilator studies were outweighed by the qualifying pulmonary function study evidence, including all pre-bronchodilator studies, we see no error in the ALJ's determination to discredit Dr. Jarboe's opinion that the qualifying studies may not indicate permanent disability. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 9. Consequently, we affirm the ALJ's weighing of the opinions of Drs. Dahhan and Jarboe at 20 C.F.R. §718.204(b)(2)(iv).[7]

The ALJ further found the evidence as a whole, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 10. Employer asserts the ALJ failed to give proper consideration to the non-qualifying blood gas studies as contrary

[6] Dr. Jarboe disagreed with Dr. Green's opinion that Claimant was totally disabled based on the qualifying pre-bronchodilator results from the June 22, 2016 pulmonary function study, opining that the post-bronchodilator result was a better indicator of Claimant's respiratory capacity and was non-qualifying. Employer's Exhibit 5. Similarly, Dr. Jarboe disagreed with Dr. Nader's opinion that Claimant is totally disabled based on the qualifying pre-bronchodilator results from the June 19, 2017 pulmonary function study, when the post-bronchodilator study was non-qualifying. *Id.*

[7] Employer further contends the ALJ erred in failing to explain why she credited the opinions of Drs. Nader, Green, and Raj. Employer's Brief at 12. However, as the ALJ found the pulmonary function study evidence establishes total disability and permissibly discredited the opinions of Drs. Dahhan and Jarboe, Employer has failed to explain why this would make any difference as the opinions diagnosing total disability are not contrary to the totally disabling results of the pulmonary function studies. *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).

probative evidence. Employer's Brief at 8. Because they measure different types of impairment, non-qualifying blood gas studies do not necessarily 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). Thus, we affirm the ALJ's permissible finding that the evidence as a whole establishes total disability and Claimant invoked the Section 411(c)(4) presumption. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d 255; 20 C.F.R. §718.204(b)(2); Decision and Order at 10.

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[8] nor clinical pneumoconiosis,[9] or that "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 failed to establish rebuttal by either method.[10]

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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact

[8] "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).

[9] "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 clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 12.

on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

In determining whether Employer rebutted the existence of legal pneumoconiosis, the ALJ considered the medical opinions of Drs. Jarboe and Dahhan.[11] Decision and Order at 12. Dr. Jarboe opined Claimant does not have legal pneumoconiosis, but suffers from a severe obstructive airways disease due to smoking and bronchial asthma. Employer's Exhibit 5 at 9. Dr. Dahhan similarly opined Claimant does not have legal pneumoconiosis, but has a mild obstructive ventilatory impairment due to smoking. Director's Exhibit 12 at 3. The ALJ discredited their opinions as inadequately explained. Decision and Order at 12.

Employer contends the ALJ did not adequately explain her reasons for discrediting the opinions of Drs. Jarboe and Dahhan. Employer's Brief at 16-20. We disagree.

Dr. Jarboe diagnosed a severe obstruction due to cigarette smoking and bronchial asthma based upon a partial response to bronchodilators on pulmonary function testing, as well as his opinion that the reduction in Claimant's FEV1 on pulmonary function testing was too severe to have been caused by coal dust exposure and that cigarette smoking is "much more harmful" than coal mine dust exposure. Employer's Exhibit 5. The ALJ permissibly discredited his opinion because he did not address why Claimant's coal mine dust exposure was not an additive factor in his obstructive impairment or could not have contributed to or aggravated that impairment. 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (concluding that the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 12. The ALJ also permissibly found Dr. Jarboe's opinion entitled to little weight as he failed to address why Claimant's coal mine employment did not contribute to or aggravate his bronchial asthma, which Dr. Jarboe opined is not caused by coal mine dust exposure. *Groves*, 761 F.3d at 599; *Barrett*, 478 F.3d at 456; Decision and Order at 12.

Dr. Dahhan also opined Claimant's obstructive impairment is unrelated to coal mine dust exposure because he exhibited a partial response to bronchodilators and the decrease in his FEV1 on pulmonary function testing was too severe to be accounted for by his coal mine dust exposure. *Id*. The ALJ permissibly found Dr. Dahhan's opinion entitled to little

[11] The ALJ also considered the opinions of Drs. Green, Nader and Raj and found them well reasoned, but accurately noted they do not support Employer's burden as the physicians diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease due to coal mine dust exposure and cigarette smoking. Decision and Order 12.

weight as he did not explain why Claimant's coal mine dust exposure was not an additive factor in his obstructive impairment or could not have contributed to or aggravated that impairment. 65 Fed. Reg. at 79,941; *Barrett*, 478 F.3d at 356; Decision and Order at 12.

Employer's arguments amount to a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited the opinions of Drs. Jarboe and Dahhan, we affirm her finding that Employer failed to establish that Claimant does not have legal pneumoconiosis.[12] *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). We, therefore, affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The ALJ also found Employer did not rebut the presumption by establishing "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); *see* Decision and Order at 14. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to prove no part of Claimant's total disability was caused by legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.304(d)(1)(ii); Decision and Order at 13-14.

[12] As we have affirmed the ALJ's determination that the opinions of Drs. Jarboe and Dahhan do not credibly rebut the existence of legal pneumoconiosis, we need not address Employer's arguments that the ALJ erred in crediting the opinions of Drs. Green, Raj, and Nader as they do not assist Employer in rebutting the presumption. *See Shinseki*, 556 U.S. at 413; Employer's Brief at 13-14.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge