U.S. Department of Labor

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

BRB No. 23-0178 BLA

EBB HURLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HIGHLANDER COAL CORPORATION	)	
	)	DATE ISSUED: 03/11/2024
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Ebb Hurley, Bristol, Virginia.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Denying Benefits (2021-BLA-05643) rendered on a subsequent claim[2] filed on December 30, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis, and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In addition, although she credited Claimant with 16.16 years of underground or substantially similar coal mine employment, the ALJ determined Claimant did not establish he has a totally disabling respiratory or pulmonary impairment.[3] 20 C.F.R. §718.204(b)(2). Therefore, the ALJ concluded Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed two prior claims, each of which was denied. The district director denied the more recent one filed on January 19, 2011, because Claimant failed to establish total disability. Decision and Order at 3; 2011 Prior Closed Claim, Director's Exhibit 1 at 8-9, 182. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish total disability in his more recent prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *Id.*

[3] We affirm, as unchallenged on appeal, the ALJ's finding of 16.16 years of underground or qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-8.

(2018),[4] or establish entitlement to benefits at 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of his claim. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with the law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(3) Presumption

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lungs which: (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

The United States Court of Appeals for the Fourth Circuit has held that "'[b]ecause prong (A) sets out an entirely objective scientific standard' – i.e., an opacity on an x-ray greater than one centimeter – x-ray evidence provides the benchmark for determining what under prong (B) is a 'massive lesion' and what under prong (C) is an equivalent diagnostic result reached by other means." *E. Assoc. Coal Corp. v. Director* [*Scarbro*], 220 F.3d 250, 256 (4th Cir. 2000), *quoting Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th

[4] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[5] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19, 39.

Cir. 1999). In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Scarbro*, 220 F.3d at 255-56; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

20 C.F.R. §718.304(a) – X-rays

The ALJ considered eight interpretations[6] of three x-rays, dated April 7, 2020, August 4, 2021, and October 18, 2021. Decision and Order at 9. She observed Drs. Tarver, Seaman, Crum, Meyer, DePonte, and Adcock are all dually-qualified, Board-certified radiologists and B readers, whereas Dr. Forehand is only a B reader. *Id.*

The April 7, 2020 x-ray was read by five physicians. Dr. Forehand read the x-ray as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibit 10 at 6. Meanwhile, Drs. Tarver, Seaman, Meyer, and Crum opined the x-ray is positive for simple pneumoconiosis, but not complicated pneumoconiosis. Director's Exhibits 12 at 2, 32; 13; Claimant's Exhibit 3. Dr. DePonte interpreted the August 4, 2021 x-ray as positive for simple pneumoconiosis, but not complicated pneumoconiosis. Claimant's Exhibit 2. Drs. DePonte and Adcock interpreted the October 18, 2021 x-ray as positive for simple pneumoconiosis, but not complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 1.

The ALJ permissibly gave less weight to Dr. Forehand's positive reading for complicated pneumoconiosis because he is not a dually-qualified radiologist. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 9; Director's Exhibits 10, 12, 13; Claimant's Exhibits 1-3; Employer's Exhibit 1. Because the ALJ properly performed both a qualitative and quantitative assessment of the conflicting x-ray evidence, we affirm her finding that Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Addison*, 831 F.3d at 256-57 (ALJ performs a qualitative and quantitative assessment of the x-ray evidence when she takes into account the radiological qualifications of each reader and the number of readings by the better qualified readers); *Adkins*, 958 F.2d at 52-53 (same); Decision and Order at 9; Director's Exhibits 10, 12, 13; Claimant's Exhibits 1-3; Employer's Exhibit 1.

[6] Dr. Gaziano reviewed the April 7, 2020 x-ray to assess its film quality only, and thus the ALJ did not consider it with the other x-ray interpretations. Decision and Order at 9 n.5; Director's Exhibit 11.

20 C.F.R. §718.304(c) – "Other" Medical Evidence[7]

The ALJ next considered the "other medical evidence" in the form of computed tomography (CT) scans, Claimant's treatment records, and medical opinion evidence. 20 C.F.R. §718.304(c); Decision and Order at 9-10.

CT Scans

The ALJ considered six readings of four CT scans taken on August 27, 2020, January 22, 2021, February 9, 2021, and September 2, 2021. Decision and Order at 9-10. Drs. Ramakrishnan and Seaman read the August 27, 2020 CT scan as positive for simple pneumoconiosis, but not complicated pneumoconiosis. Claimant's Exhibit 6; Employer's Exhibit 5. Dr. Seaman read both the January 22, 2021 and February 9, 2021 CT scans as positive for simple pneumoconiosis, but not complicated pneumoconiosis. Employer's Exhibits 6, 7. Dr. Rao interpreted the September 2, 2021 CT scan as positive for complicated pneumoconiosis, whereas Dr. Seaman found it positive for simple pneumoconiosis, but not complicated pneumoconiosis. Claimant's Exhibit 7; Employer's Exhibit 8.

The ALJ permissibly afforded less weight to Dr. Rao's interpretation for failing to provide details regarding the size of the opacity he observed.[8] *See Blankenship*, 177 F.3d at 243-44 (to invoke the Section 411(c)(3) presumption, the opacity when viewed by x-ray must be greater than one centimeter); Decision and Order at 9 n.6. Because the remaining CT scans are negative for complicated pneumoconiosis, we affirm the ALJ's finding that the CT scan evidence does not support a finding of complicated pneumoconiosis. Decision and Order at 9-10; Claimant's Exhibits 6, 7; Employer's Exhibits 5-8.

Treatment Records

The ALJ noted that Claimant submitted a series of records that document his treatment for black lung, chronic cough, and shortness of breath from July 16, 2020 through

[7] There is no biopsy or autopsy evidence of record. 20 C.F.R. §718.304(b).

[8] The ALJ noted Dr. Rao failed to provide additional details regarding the size of the opacity, so she could not determine whether the opacity he observed met the criteria for a diagnosis of complicated pneumoconiosis under the regulations; in contrast, Dr. Seaman observed the largest nodule measured eight millimeters. Decision and Order at 9 n.6; Claimant's Exhibit 7; Employer's Exhibit 8.

September 7, 2021.[9] Decision and Order at 10; Claimant's Exhibit 8. The ALJ permissibly found the treatment records lack sufficient detail to support a finding of complicated pneumoconiosis. Decision and Order at 10; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012) (inquiry on review of black lung appeals is whether substantial evidence supports the ALJ's findings); Decision and Order at 10.

Medical Opinions

Dr. Forehand opined Claimant has complicated pneumoconiosis with progressive massive fibrosis based on his reading of Claimant's x-ray dated April 7, 2020. Director's Exhibits 10 at 3-4; 14. Dr. Sargent opined Claimant has simple pneumoconiosis based on Dr. Adcock's reading of the October 18, 2021 x-ray and the preponderance of the CT scan readings, but did not see evidence of complicated pneumoconiosis. Employer's Exhibit 2 at 1-2; *see also* Employer's Exhibit 17 at 27, 30-32.

The ALJ permissibly rejected Dr. Forehand's opinion because he relied on his x-ray interpretation, which she had discredited. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000) (medical opinion based on a discredited x-ray is not probative evidence that a miner has pneumoconiosis, or as here in *Hurley*, complicated pneumoconiosis); Decision and Order at 10; Director's Exhibits 10 at 3-4; 14. As the only remaining medical opinion from Dr. Sargent does not support a finding of complicated pneumoconiosis, we affirm the ALJ's finding that Claimant did not establish he has complicated pneumoconiosis at 20 C.F.R. §718.304(c).

Evidence as a Whole

As it is supported by substantial evidence, we affirm the ALJ's determination that the evidence overall does not establish complicated pneumoconiosis and her conclusion that Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33; Decision and Order at 10.

[9] Although Claimant was treated in follow-up after Dr. Rao's CT scan reading for complicated pneumoconiosis, the ALJ specifically discredited Dr. Rao's diagnosis because he did not indicate the size of the opacity he saw. Claimant's Exhibit 8 at 1-2. None of the treatment records Employer submitted include a diagnosis of complicated pneumoconiosis. Employer's Exhibits 14-16.

Invocation of the Section 411(c)(4) Presumption – Total Disability[10]

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). A miner is totally disabled if his pulmonary or respiratory impairment, 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 qualifying pulmonary function studies or arterial blood gas studies,[11] 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 Claimant failed to establish total disability by any method. 20 C.F.R. §718.204(b)(2); Decision and Order at 10-18.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies, dated December 9, 2019, April 7, 2020, August 4, 2021, October 18, 2021, and November 1, 2021. Decision and Order at 11-13. Three of the studies reported Claimant's height as 68 inches, while two others reported Claimant's height as 69 inches. Director's Exhibit 10 at 13; Claimant's Exhibits 4, 5; Employer's Exhibit 2 at 24-25; 3 at 5-6. The ALJ permissibly resolved the height discrepancy by averaging the heights (resulting in 68.4 inches) and using the closest greater table height (68.5 inches) for determining whether the pulmonary function studies are qualifying. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 114, 116 n.6 (4th Cir. 1995); *Carpenter v. GMS Mine & Repair Maint., Inc.*, ___ BLR ___, BRB No. 22-0100 BLA, slip op. at 4-6 (Sept. 6, 2023); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 12.

[10] The ALJ correctly found none of the blood gas studies established total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 13; Director's Exhibit 10; Employer's Exhibits 2, 3, 13 at 29.

[11] 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).

Three of the pulmonary function studies, dated December 9, 2019, April 7, 2020, and November 1, 2021, yielded non-qualifying results. Decision and Order at 11-12; Director's Exhibit 10 at 13; Claimant's Exhibit 4; Employer's Exhibit 3 at 5. The August 4, 2021 study yielded a non-qualifying result before the administration of a bronchodilator and a qualifying result after the administration of a bronchodilator. However, the ALJ found the qualifying result neither supports nor refutes a finding of total disability based on the technician's comments that the study did not produce acceptable and reproducible data. Decision and Order at 11-12; Employer's Exhibit 2 at 24. The October 18, 2021 study yielded qualifying results without a bronchodilator and no testing post-bronchodilator was administered. Decision and Order at 11-12; Claimant's Exhibit 5 at 1.

The ALJ concluded that overall the results of the studies were mixed and the results of the two most recent studies, which were taken only a few months apart, were conflicting. Decision and Order at 13. Because the ALJ permissibly exercised her discretion in weighing the pulmonary function studies, we affirm her finding that Claimant failed to establish total disability by a preponderance of evidence at 20 C.F.R. §718.204(b)(2)(i). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); Decision and Order at 13; Director's Exhibit 10 at 13; Claimant's Exhibits 4, 5; Employer's Exhibits 2 at 24; 3 at 5.

Medical Opinions and Treatment Records

In addressing whether Claimant established total disability based on the medical opinions or Claimant's treatment records, the ALJ first found Claimant's usual coal mine work as a buggy operator and a pinner required moderate to heavy exertion.[12] Decision and Order at 8; Director's Exhibits 3, 4. She then considered the medical opinions of Drs. Forehand and Sargent. Decision and Order at 13-17.

Dr. Forehand conducted the Department of Labor's complete pulmonary evaluation of Claimant on April 7, 2020, and provided a supplemental opinion on May 29, 2020. Director's Exhibits 10, 14. He opined Claimant is totally disabled despite non-qualifying pulmonary function and blood gas studies based on his diagnosis of complicated pneumoconiosis by x-ray. Director's Exhibit 10 at 4. Further, he opined Claimant is totally disabled "because additional exposure to coal mine dust of any extent would further injure already severely damaged lungs." *Id*.

[12] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's usual coal mine work as a buggy operator and a pinner required moderate to heavy exertion. *See Skrack*, 6 BLR at 1-711; Decision and Order at 8.

The ALJ permissibly gave little weight to Dr. Forehand's opinion because it was based, in part, on his erroneous belief that Claimant has complicated pneumoconiosis, contrary to the ALJ's overall conclusion that Claimant did not prove he has that disease. *See Compton*, 211 F.3d at 211-12; Decision and Order at 15-17; Director's Exhibits 10 at 4; 14 at 2. Furthermore, the ALJ properly found Dr. Forehand's opinion that Claimant should avoid further coal mine dust exposure is legally insufficient to establish total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989) (recommendation against further coal dust exposure is insufficient to establish total disability); Decision and Order at 15; Director's Exhibits 10 at 4; 14 at 2. As Dr. Sargent specifically opined Claimant is not totally disabled, Employer's Exhibits 2 at 2; 17 at 20-21, 25, we affirm the ALJ's finding that Claimant did not establish total disability based on the medical opinions.

Additionally, the ALJ accurately noted that Claimant's treatment and hospital records "do not expressly address the question of whether Claimant suffers from a totally disabling respiratory impairment, although they do document respiratory symptoms and conditions, including pneumoconiosis, lung nodules, shortness of breath, and chronic cough." Decision and Order at 18; *see* Claimant's Exhibit 8; Employer's Exhibits 9-13.

Because the ALJ found no specific statements in those records from which to conclude Claimant is totally disabled, we affirm her determination to give the records limited probative weight. Decision and Order at 18. We therefore affirm the ALJ's conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) (iv). *Id*.

Evidence as a Whole

We affirm, as supported by substantial evidence, the ALJ's overall conclusion that Claimant did not establish total disability and is unable to invoke the Section 411(c)(4) presumption. Decision and Order at 18. Claimant's failure to establish total disability, an essential element of entitlement, precludes an award of benefits pursuant to 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc); Decision and Order at 18.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge