U.S. Department of Labor

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

BRB No. 21-0505 BLA

ROBERT E. FRAZIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 5/10/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Laura Davidson (Mountain State Justice, Inc.), Morgantown, West Virginia, for Claimant.

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

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: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2019-BLA-06074) rendered on a claim filed on December 4, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined the claim was timely filed and credited Claimant with thirty-three years of qualifying coal mine employment. He found Claimant established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and thus 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] He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding the claim timely filed. Alternatively, it contends the ALJ erred in finding Claimant established total disability and that it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting Claimant timely filed his claim and Employer's due process rights were not violated.

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

[1] Claimant's prior claim, filed June 8, 1988, was withdrawn. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

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

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).

Timeliness of the Claim

"Any claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have been "communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. §725.308(a). A miner's claim is presumed to be timely filed. 20 C.F.R. §725.308(b). To rebut the presumption, Employer must show the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). The United States Court of Appeals for the Fourth Circuit has held that an oral communication of a medical determination of total disability due to pneumoconiosis is sufficient to trigger the statute of limitations. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426-27 (4th Cir. 2006); *see also Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96 (6th Cir. 2013).

As the ALJ noted, the record does not contain any written evidence predating the filing of the present claim. Decision and Order at 5. Claimant testified Dr. Combs told him in the 1960s that he had "black lung," Dr. White told him in the late 1970s that he had "black lung," and Dr. Rasmussen told him in the 1970s or early 1980s that he was totally disabled due to pneumoconiosis. Hearing Transcript at 23-24, 34, 38-40. The ALJ also observed Claimant filed four West Virginia State Workers' Compensation claims alleging black lung disease and, though he was awarded twenty percent permanent partial disability due to silicosis in 1976, the remainder of his claims had been denied. Decision and Order at 6; Director's Exhibit 9; Hearing Tr. at 36-38. In addition, as the ALJ noted, Claimant returned to coal mine employment following these diagnoses, having worked in coal mine employment for twenty-two years prior to 1978 and for eleven years between 1978 and 1988. Decision and Order at 6, 8.

The ALJ determined that, because West Virginia denied Claimant's black lung claims for benefits, Drs. Combs's, White's, and Rasmussen's diagnoses did not trigger the statute of limitations because they constituted "misdiagnos[e]s." Decision and Order at 6 (citing *Eighty Four Mining Co. v. Director, OWCP* [*Morris*], 812 F.3d 308, 313 (3d Cir.

[4] 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); Director's Exhibit 5; Hearing Tr. at 15.

2016) (state denial of worker's compensation claim for pneumoconiosis rendered diagnosis of total disability due to pneumoconiosis a misdiagnosis for purposes of triggering the federal statute of limitations); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 253-54 (3d Cir. 2011) (misdiagnosis does not constitute a "medical determination" for purposes of 30 U.S.C. §932(f) and therefore does not trigger the statute of limitations)). The ALJ further determined the statute of limitations was not triggered because Claimant returned to his coal mine employment following these diagnoses. Decision and Order at 6 (citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 996 (6th Cir. 1994) (miner's return to coal mine employment following a diagnosis of total disability due to pneumoconiosis reset the statute of limitations)). Therefore, the ALJ found Claimant timely filed his application for benefits. Decision and Order at 7.

Employer contends the ALJ erred in applying the United States Court of Appeals for the Third Circuit's decisions in *Morris* and *Obush* to find the denial of Claimant's West Virginia State Workers' Compensation claims rendered Drs. Combs's, White's, and Rasmussen's opinions misdiagnoses. Employer's Brief at 5-12. Employer does not challenge, however, the ALJ's finding that the statute of limitations "reset when Claimant returned to his coal mine employment," Decision and Order at 6, and we therefore affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, even assuming, *arguendo*, that the ALJ erred in finding Drs. Combs's, White's, and Rasmussen's diagnoses each constituted a "misdiagnosis," any such error was 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 thus affirm the ALJ's finding that the claim is timely filed.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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. 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). The ALJ found Claimant established total disability based on the

pulmonary function studies, medical opinion evidence, and the evidence as a whole.[5] Decision and Order at 9-14, 16-17; *see* 20 C.F.R. §718.204(b)(2)(i), (iv).

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated February 14, 2018, July 26, 2018, and August 26, 2020, all of which produced qualifying values. Decision and Order at 9-11; Director's Exhibits 16, 20; Employer's Exhibit 2. Because all studies were qualifying, the ALJ found they support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 16.

Employer generally contends the ALJ erred in finding the pulmonary function studies support a finding of total disability because Claimant was between eighty-four and eighty-seven at the time of the testing, whereas the table values at 20 C.F.R. Part 718, Appendix B do not go beyond seventy-one years of age. Employer's Brief at 17. Contrary to Employer's argument, absent contrary probative evidence, the values for a seventy-one-year-old miner listed in Appendix B of the regulations should be used to determine if pulmonary function studies of miners over the age of seventy-one qualify for total disability. *K.J.M.* [*Meade*] v. *Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). Employer points to no such contrary probative evidence,[6] and we thus affirm the ALJ's finding that the pulmonary function studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 16.

Medical Opinions

The ALJ considered the medical opinions of Drs. Forehand,[7] Go, Basheda, and Zaldivar. Decision and Order at 11-14, 17. Noting each physician opined Claimant is

[5] The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 16; *see* 20 C.F.R. §718.204(b)(2)(ii),(iii).

[6] Employer asserts Dr. Forehand agrees the tables do not accurately gauge the impairment of older miners. Employer's Brief at 17 n.7. However, while Dr. Forehand agreed it may be scientifically or medically inaccurate to "cut off" the tables at age seventy-one, Director's Exhibit 34 at 13-14, he further opined the February 14, 2018 pulmonary function study, performed when Claimant was eighty-four, demonstrated Claimant is disabled. *Id.* at 24.

[7] Employer notes that, at the hearing, it objected to the admission of Dr. Forehand's April 24, 2019 supplemental report on the basis that the district director requested the report after Employer's counsel conducted Dr. Forehand's deposition. Employer's Brief at 13

totally disabled and unable to perform his last coal mining work, he found the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17.

Employer contends the ALJ erred by "failing to make a finding about what [Claimant's] last coal mine job required," which should invalidate his findings because Drs. Basheda and Zaldivar opined Claimant could perform "light labor." Employer's Brief at 15. It further contends the ALJ erred in finding Dr. Zaldivar's opinion supports a finding of total disability because he opined Claimant could operate equipment. *Id.* We disagree.

Based on his testimony, the ALJ found Claimant's last coal mine job was as a truck driver, this job required that he both drive a truck and work on equipment, and it required "moderate exertion." Decision and Order at 8 (citing Hearing Tr. at 17, 28). Thus, as the ALJ determined Claimant's usual coal mine employment required moderate exertion, he permissibly found Drs. Basheda's and Zaldivar's opinions support a finding of total disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); Decision and Order at 17. Because substantial evidence supports the ALJ's finding that the opinions of Drs. Forehand, Go, Basheda, and Zaldivar support a finding of total disability, we affirm his finding that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 17.

We also affirm, as supported by substantial evidence, the ALJ's finding that all the relevant evidence, when weighed together, establishes total respiratory disability. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 17-18. Thus, we affirm his finding that Claimant invoked the Section

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n.3; Hearing Transcript at 7; Director's Exhibit 38. At that time, Employer' counsel stated, "I did not re-notice [Dr. Forehand's] deposition, and don't intend to, which may make my argument moot." Hearing Transcript at 7. The ALJ admitted the report into evidence as a supplemental report of Dr. Forehand. Decision and Order at 2. The Director maintains that Employer was provided with an opportunity to respond to Dr. Forehand's supplemental report before the ALJ "without any consideration of the district director's findings and determinations." Director's Brief at 3. We agree with Employer's concession that its objection is moot and with the Director's argument that, in light of these circumstances, there has been no violation of Employer's due process. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999) (to establish due process violation, party must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim).

411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 18.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[8] 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.[9] Decision and Order at 25-27.

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). Employer relied on the medical opinions of Drs. Basheda and Zaldivar, who opined Claimant does not have legal pneumoconiosis, but instead suffers from asthma unrelated to his coal mine dust exposure. Director's Exhibit 20 at 8, 11; Employer's Exhibit 2 at 4, 7. The ALJ gave their opinions little weight and found they did not meet Employer's burden to rebut the existence of legal pneumoconiosis. Decision and Order at 24-25.

[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). "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).

[9] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 24.

Employer generally contends the ALJ erred in discrediting Drs. Basheda's and Zaldivar's opinions and asserts they are documented and well-reasoned. Employer's Brief at 12-19. We disagree.

The ALJ noted Dr. Basheda based his opinion in part, on an assertion that Claimant experienced a "significant decline in his lung function over a [five] month time period" which "would be inconsistent with coal dust induced obstruction." Decision and Order at 25; Director's Exhibit 20 at 10. The ALJ permissibly found Dr. Basheda's opinion inconsistent with the objective evidence which produced qualifying pulmonary function studies at all times during the five-month period referenced by Dr. Basheda, i.e., in February 2018 during Dr. Forehand's examination to July 2018 during Dr. Basheda's examination. Decision and Order at 25; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his or her findings unless they are inherently unreasonable); Director's Exhibit 20 at 10. He further permissibly discredited the opinions of Drs. Basheda and Zaldivar because both physicians failed to adequately explain why Claimant's thirty-three years of coal mine dust exposure could not have contributed to, or aggravated, Claimant's asthma.[10] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 25.

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 24. Because the ALJ permissibly discredited Drs. Basheda's and Zaldivar's opinions, we affirm his finding that Employer did not disprove legal

[10] Further, contrary to Employer's contention, in discounting Drs. Basheda's and Zaldivar's opinions, the ALJ did not use the preamble to the revised 2001 regulations to create "rules or regulations" inherently tying asthma to coal mine dust exposure. Employer's Brief at 15. Rather, he permissibly found their opinions unpersuasive because they failed to adequately explain why Claimant's asthma was not significantly related to or substantially aggravated by his thirty-three years of coal mine dust exposure. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 25.

pneumoconiosis.[11] Decision and Order at 25. Thus, we affirm his determination that Employer did not 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); Decision and Order at 25.

Disability Causation

The ALJ next considered whether Employer rebutted the Section 411(c)(4) presumption by establishing "no part of the miner'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); Decision and Order at 26-27. He rationally discounted the opinions of Drs. Basheda and Zaldivar because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *see also Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (an ALJ who has found the disease and disability elements established may not credit an opinion denying causation without providing "specific and persuasive" reasons for concluding it does not rest upon a disagreement with those elements); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 38-39. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

[11] Because Employer bears the burden of disproving pneumoconiosis and we affirm the ALJ's rejection of its experts, we need not address Employer's arguments concerning the ALJ's weighing of the opinions of Drs. Forehand and Go, who diagnosed legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 24; Employer's Brief at 16.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge