U.S. Department of Labor

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

BRB No. 22-0079 BLA

COY L. MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 5/12/2023
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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

Before: BOGGS, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2019-BLA-05280) rendered on a claim filed on May 9,

2016,[1] 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 underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established he is totally disabled and therefore invoked the Section 411(c)(4) presumption. It also asserts the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief, unless requested.

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.[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).

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[1] Claimant filed four prior claims that he later withdrew. Director's Exhibits 1-4. As a withdrawn claim is considered not to have been filed, the ALJ treated the current claim as an initial claim. 20 C.F.R. §725.306(b); Director's Exhibit 6.

[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 coal mine employment and a totally disabling respiratory 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 at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript 10-11.

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

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work.[5] *See* 20 C.F.R. §718.204(b)(1). A miner 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 medical opinion evidence.[6] Employer argues the ALJ erred. Employer's Brief at 3-11. We disagree.

The ALJ considered the medical opinions of Drs. Raj, Nader, Green, Tuteur, and Vuskovich. Decision and Order at 9-17; Director's Exhibits 15, 21, 26; Claimant's Exhibits 1, 2; Employer's Exhibits 3, 6, 8. Drs. Raj, Nader, and Green opined Claimant is totally disabled based on his hypoxemia, Director's Exhibits 15 at 4-5; 26 at 3-4; Claimant's Exhibits 1 at 3; 2 at 3-4, whereas Drs. Tuteur and Vuskovich opined Claimant's mild impairment does not render him totally disabled. Director's Exhibit 21 at 3; Employer's Exhibits 3 at 3; 6 at 23; 8 at 20-21. The ALJ found the opinions of Drs. Raj, Nader, and Green "well-reasoned and well-documented." Decision and Order at 9-17. He found the opinions of Drs. Tuteur and Vuskovich unpersuasive because they failed to explain why Claimant's mild impairment is not totally disabling even if his objective testing is not qualifying.[7] *Id*. He also found their opinions undermined by the treatment records. *Id*. Finally, he found Dr. Tuteur's opinion internally inconsistent. *Id*.

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[5] The ALJ found Claimant's usual coal mine employment working as a general inside laborer and fine coal operator required a "medium to heavy level of exertion" as Claimant was "required to lift and carry 50 to 100 pounds and 50 to 75 pounds, respectively." Decision and Order at 3. We affirm this determination as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[6] The ALJ found the pulmonary function and arterial blood gas studies do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 6-8.

[7] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20

Employer argues the ALJ should have discredited the opinions of Drs. Raj, Nader, and Green because the objective testing is not qualifying. Employer's Brief at 3-11. Contrary to Employer's contentions, a physician may conclude a miner is disabled even if the objective studies are non-qualifying. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); 20 C.F.R. §718.204(b)(2)(iv).

We also reject Employer's argument that the ALJ erred in finding the opinions of Drs. Raj, Nader, and Green reasoned and documented. Employer's Brief at 5-9. All three physicians observed that Claimant's usual coal mine employment required him to lift fifty to seventy-five pounds and opined he is totally disabled based on the results of arterial blood gas studies demonstrating hypoxemia and symptoms of severe shortness of breath, chronic cough, mucus expectoration, and wheezing. Director's Exhibit 15 at 4-5; Claimant's Exhibits 1 at 3; 2 at 3-4. In rendering his opinion, Dr. Raj reviewed a non-qualifying arterial blood gas study Dr. Tuteur conducted and stated he was unable to address the non-qualifying results as he did not know the circumstances of how Claimant's blood was drawn. Director's Exhibit 26 at 3-6. He reiterated, however, that Claimant is totally disabled. *Id*. Dr. Nader opined that, in addition to her own qualifying arterial blood gas study, the study conducted by Dr. Raj also exhibited hypoxemia. Claimant's Exhibit 1 at 3. Finally, in determining Claimant is totally disabled, Dr. Green considered the three most recent arterial blood gas studies and opined they all exhibited hypoxemia. Claimant's Exhibit 2 at 4.

In weighing the opinions of Drs. Raj, Nader, and Green, the ALJ fully summarized their rationales for diagnosing total disability, including their respective interpretations of the arterial blood gas studies that exhibited hypoxemia and discussions of Claimant's symptoms. Decision and Order at 9-13. Contrary to Employer's argument, the ALJ accurately noted the three physicians reviewed additional arterial blood gas studies beyond their own tests when determining Claimant suffers from hypoxemia.[8] Decision and Order at 10, 11, 13, 17; Director's Exhibit 26 at 3-6; Claimant's Exhibits 1 at 3; 2 at 4; Employer's

C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] Moreover, even though Drs. Raj, Nader, and Green did not review the results of all the arterial blood gas studies in the record, the ALJ was not required to discount their opinions on that basis. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Employer's Brief at 7.

Brief at 6-9. He permissibly found their opinions credible as they were supported by Claimant's treatment records that document "shortness of breath[,] coughing, . . . rhonchi, wheezing, stridor, and intercostal retractions," and because the doctors explained how Claimant's respiratory impairment would prevent him from performing the exertional requirements of his usual coal mine employment. Decision and Order at 10, 11, 13, 17; *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); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 (4th Cir. 1991).

Employer next argues the ALJ erred in rejecting the contrary opinions of Drs. Tuteur and Vuskovich, asserting both doctors adequately explained why Claimant is not totally disabled and they reviewed the most extensive medical records in reaching their conclusion. Employer's Brief at 9-11. Employer does not, however, identify any error in the ALJ's specific reasons for discrediting their opinions. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b). Rather, Employer's arguments amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Thus, we affirm the ALJ's determination that Claimant established total disability based on the medical opinion evidence and the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 9-17. We therefore affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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 that "no part of

[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).

[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]

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. Tuteur and Vuskovich that Claimant does not have legal pneumoconiosis. Decision and Order at 22-27; Director's Exhibit 21; Employer's Exhibits 3, 6, 8. Both opined Claimant does not have any intrinsic lung disease or pulmonary impairment, and any impairment present on objective testing is related to Claimant's diaphragmatic hernia and unrelated to coal mine dust exposure. Director's Exhibit 21 at 3; Employer's Exhibits at 3 at 3; 6 at 20-23; 8 at 21-22.

The ALJ found Claimant's "treatment records clearly show pulmonary diagnoses that have produced clinical symptoms and examination abnormalities." Decision and Order at 23. Specifically, he noted that "as early as 1998, Claimant was diagnosed with [chronic obstructive pulmonary disease], emphysema and chronic bronchitis." Decision and Order at 23-26. Thus the ALJ found the treatment records undermine the opinions of Drs. Tuteur and Vuskovich that Claimant does not have any intrinsic lung disease. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 23-26. The ALJ also found Dr. Tuteur was internally inconsistent in opining that Claimant does not have any respiratory impairment. *Id.* Finally, the ALJ found that even if Claimant's objective test results that demonstrate a mild impairment can be attributed to his diaphragmatic hernia, the doctors did not adequately explain why the impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); Decision and Order at 23-26.

Employer argues the ALJ erred because Drs. Tuteur and Vuskovich persuasively explained why Claimant's mild impairment on arterial blood gas testing is due to his

[10] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 7, 18.

diaphragmatic hernia. Employer's Brief at 13-14. However, as its arguments amount to a request that the Board reweigh the evidence, we reject them. *Anderson*, 12 BLR at 1-113.

Because the ALJ acted within his discretion in rejecting the opinions of Drs. Tuteur and Vuskovich, the only opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer did not disprove legal pneumoconiosis.[11] Employer's failure to disprove legal pneumoconiosis precludes a finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ discredited the opinions of Drs. Tuteur and Vuskovich on disability causation for the same reasons he found them not credible on legal pneumoconiosis, and thus found Employer did not rebut the Section 411(c)(4) 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 Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 41-42. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's total disability is caused by legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27-28.

[11] Because the ALJ permissibly discredited the opinions of Drs. Tuteur and Vuskovich, the only opinions supportive of Employer's burden, we need not address Employer's arguments regarding the opinions of Drs. Raj, Nader, and Green that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 11-12.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge