U.S. Department of Labor

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

BRB No. 21-0035 BLA

DANNY R. BOGGS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH FORK COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY, n/k/a BERKLEY INDUSTRIAL COMPANY	)	DATE ISSUED: 4/11/2022
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Revised Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee for Employer and its Carrier.

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

BUZZARD and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theodore W. Annos's Revised Decision and Order Awarding Benefits (2015-BLA-05459)

rendered on a subsequent claim,[1] filed on November 15, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially issued a Decision and Order Awarding Benefits on June 22, 2020. He credited Claimant with 14.88 years of coal mine employment and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, he found Claimant did not establish clinical pneumoconiosis,[3] but established legal pneumoconiosis[4] and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203, 718.204(b), (c). He therefore found Claimant established a change in an applicable condition of entitlement,[5] 20 C.F.R. §725.309(c), and awarded benefits.

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[1] This is Claimant's second claim for benefits. The district director denied his first claim, filed on December 14, 1995, as abandoned. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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] "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).

[4] "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)

[5] Where a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must also deny the subsequent claim unless she finds that "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.

Employer timely requested reconsideration, asserting the ALJ erred in finding Claimant established total disability. After considering Employer's motion, on October 13, 2020 the ALJ issued a Revised Decision and Order Awarding Benefits. He again determined Claimant established 14.88 years of coal mine employment and could not invoke the Section 411(c)(4) presumption. Considering entitlement under 20 C.F.R. Part 718, he again found Claimant established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203, 718.204(b), (c). He therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and again awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment.[6] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Revised Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any element precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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§725.309(c)(3). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *Id*.

[6] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 14.88 years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Revised Decision and Order at 8.

[7] 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 Tr. at 10.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the opinions of Dr. Ajjarapu, who diagnosed Claimant with legal pneumoconiosis in the form of chronic bronchitis, and Drs. McSharry and Sargent, who opined Claimant has asthma unrelated to coal mine dust exposure. Revised Decision and Order at 19-21; Director's Exhibits 15, 20; Employer's Exhibits 1, 13-14. Crediting Dr. Ajjarapu's opinion over those of Drs. McSharry and Sargent, the ALJ found the medical opinion evidence established the existence of legal pneumoconiosis. Revised Decision and Order at 19-21.

Employer argues Dr. Ajjarapu's diagnosis of legal pneumoconiosis is not well-reasoned because she did not explain her conclusion that coal mine dust exposure is a significant contributing cause to Claimant's impairment.[8] Employer's Brief at 11-16. We disagree.

The determination of whether a medical opinion is adequately reasoned is designated to the ALJ. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). As the ALJ noted, Dr. Ajjarapu diagnosed legal pneumoconiosis based on her physical examination of Claimant, including "her own findings of decreased breath sounds on exam," his reported symptoms, employment and exposure history, and the objective testing from her examination. Revised Decision and Order at 19; Director's Exhibit 15 at 1-3, 8-9. She explained Claimant's chronic bronchitis and hypoxemia have been substantially aggravated by coal mine dust exposure and there is no evidence of alternate etiologies, including no evidence of smoking history or coronary artery disease, and that, though "he

[8] We affirm, as unchallenged on appeal, the ALJ's discrediting Drs. McSharry's and Sargent's opinions on the existence of legal pneumoconiosis as not well-reasoned. *See Skrack*, 6 BLR 1-711; Revised Decision and Order at 19-20.

may have diminished respiratory drive" due to obesity, coal mine dust exposure is a more significant factor in his impairment. Director's Exhibit 15 at 1-2.

The ALJ permissibly found Dr. Ajjarapu's diagnosis consistent with Claimant's treatment records documenting diminished breath sounds, his history of severe sustained oxygen desaturation, and his fourteen years of coal mine employment. *See Groves*, 761 F.3d at 598-99; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; Revised Decision and Order at 19; Claimant's Exhibits 5 at 5, 13; 7 at 3. He thus permissibly found Dr. Ajjarapu's diagnosis well-reasoned. *See Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155; Revised Decision and Order at 19.

Employer's argument regarding the reasoning underlying Dr. Ajjarapu's opinion is a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4). Consequently, we affirm the ALJ's conclusion that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Revised Decision and Order at 27.

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). The ALJ found Claimant established total disability based on the blood gas studies, medical opinion evidence, and the evidence as a whole.[9] Revised Decision and Order at 21-25; *see* 20 C.F.R. §718.204(b)(2)(ii), (iv).

[9] The ALJ found the pulmonary function studies do not establish total disability, and there is no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure. Revised Decision and Order at 22, 24; *see* 20 C.F.R. §718.204(b)(2)(i), (iii).

The ALJ considered the results of four arterial blood gas studies dated January 15, 2014, September 20, 2014, April 1, 2015, and May 24, 2018.[10] Revised Decision and Order at 13, 23; Director's Exhibits 15, 20; Employer's Exhibits 1, 8. The January 15, 2014 study administered by Dr. Ajjarapu produced qualifying values at rest and non-qualifying values during exercise.[11] Director's Exhibit 15 at 31. The September 20, 2014 study administered by Dr. McSharry produced qualifying values at rest. Director's Exhibit 20 at 11. The April 1, 2015 study administered by Dr. McSharry produced qualifying values at rest. Employer's Exhibit 1 at 10. The May 24, 2018 study administered by Dr. Burja produced non-qualifying values.[12] Employer's Exhibit 8. The ALJ acknowledged the May 24, 2018 study is part of Claimant's medical treatment record and is thus not subject to the quality standards set forth at 20 C.F.R. §718.105. Revised Decision and Order at 23. The ALJ discredited the May 24, 2018 study, however, because he found he could not rely on it to accurately represent Claimant's usual condition. *Id.* Thus, noting three of the four remaining studies, including all of the studies conducted at rest, produced qualifying values, the ALJ determined the preponderance of the arterial blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*

Employer argues the ALJ erred in assigning no probative weight to the May 24, 2018 arterial blood gas study. Employer's Brief at 4-9. We disagree. It is within the ALJ's discretion, as the trier of fact, to determine the weight and credibility to be accorded the medical evidence. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). As the ALJ correctly noted, while quality standards do not apply to objective tests contained in treatment notes, *see* 20 C.F.R. §718.101(b), the ALJ must still address whether the tests are reliable to assess a claimant's condition. *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); Revised Decision and Order at 23. Contrary to Employer's assertion, the ALJ did not discredit the

[10] The ALJ incorrectly stated the September 20, 2014 arterial blood gas study was administered on October 20, 2014 and that the April 1, 2015 study was administered by Dr. Sargent. Revised Decision and Order at 13; Director's Exhibit 20 at 11. These appear to be scrivener's errors, as no blood gas studies were performed on any of these dates. Thus, any errors in misidentifying the September 20, 2014 and April 1, 2015 studies are harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

[12] As noted by the ALJ, it is unclear whether the May 24, 2018 arterial blood gas study was performed at rest or during exercise. Revised Decision and Order at 13, 23; Employer's Exhibit 8.

May 24, 2018 arterial blood gas study because he determined it was invalid or not in compliance with the quality standards. Employer's Brief at 4-9. Rather, he permissibly found that because "the circumstances surrounding the need for the [arterial blood gas study] are unknown," such as whether the study was performed during or soon after an acute respiratory illness or whether the study was performed at rest or during exercise, he was "not persuaded" that the May 24, 2018 study "is reliable for forming a basis for a finding of total disability or lack thereof." Revised Decision and Order at 23; *see* 65 Fed. Reg. at 79,928; *Mabe*, 9 BLR at 1-68. Thus, we reject Employer's assertion that the ALJ erred in discrediting the May 24, 2018 pulmonary function study.[13] As Employer raises no other challenge to the ALJ's weighing of the arterial blood gas study evidence, we affirm his conclusion that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii).

The ALJ next considered the opinion of Dr. Ajjarapu that Claimant is totally disabled and those of Drs. McSharry and Sargent that he is not. Revised Decision and Order at 24-25; Director's Exhibits 15, 23; Employer's Exhibits 1, 13-14. Crediting the opinion of Dr. Ajjarapu over those of Drs. McSharry and Sargent, the ALJ found the medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(iv). Revised Decision and Order at 24-25.

Employer contends Dr. Ajjarapu's opinion is not well-documented because she did not review the non-qualifying May 24, 2018 arterial blood gas study.[14] Employer's Brief at 9-10. We disagree. As previously noted, the ALJ permissibly determined the May 24, 2018 arterial blood gas study is entitled to no probative weight. Revised Decision and Order at 23; *see* 65 Fed. Reg. at 79,928; *Mabe*, 9 BLR at 1-68. Moreover, an ALJ is not required to discredit a physician who did not review all of a miner's medical records if the opinion is otherwise well-reasoned, documented, and based on her own examination of the miner and objective test results. *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 argument

[13] Employer further quotes the opinions of Drs. McSharry and Sargent at length and asserts the ALJ ignored their conclusions that the May 24, 2018 arterial blood gas study is valid and reliable. Employer's Brief at 6-8. Contrary to Employer's assertion, neither physician specifically addressed whether the May 24, 2018 study is valid or reliable. *See* Employer's Exhibits 13 at 13-14; 14 at 16-17.

[14] We affirm, as unchallenged on appeal, the ALJ's discrediting of Drs. McSharry's and Sargent's opinions on total disability. *See Skrack*, 6 BLR 1-711; Revised Decision and Order at 25.

regarding the documentation of Dr. Ajjarapu's opinion is a request to reweigh the evidence, which we are not empowered to do.[15] *See Anderson*, 12 BLR at 1-113.

We therefore affirm, as supported by substantial evidence, the ALJ's finding that Dr. Ajjarapu's opinion establishes that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv). We further affirm his conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204()b)(2); Revised Decision and Order at 25.

Disability Causation

To establish total disability due to pneumoconiosis, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsen[ed] a totally disabling respiratory or pulmonary impairment which [was] caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii). Because Employer raises no specific challenge to the ALJ's finding that Claimant established total disability due to pneumoconiosis, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Revised Decision and Order at 27.

[15] Employer further contends the ALJ erroneously credited Dr. Ajjarapu's opinion as consistent with Claimant's reported symptoms, asserting the presence of symptoms does not demonstrate a loss of pulmonary or respiratory function. Employer's Brief at 10-11. Even accepting Employer's argument, the ALJ also credited Dr. Ajjarapu's opinion as consistent with the arterial blood gas testing, which he determined established total disability, her own exam findings, and Claimant's history of severe and sustained oxygen desaturation. Revised Decision and Order at 23-24; Claimant's Exhibit 7 at 3. In this context, Employer cannot explain how the "error to which [it] points could [make] any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *see Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge