U.S. Department of Labor

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

BRB No. 23-0125 BLA

GREGORY G. CLARK (deceased)[1]	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED C/O HEALTHSMART CASUALTY CLAIMS	)	DATE ISSUED: 04/12/2024
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

[1] The Miner died on May 23, 2020, and his "children/estate" are pursuing the claim on his behalf. Claimant's Brief at 2; *see also* Employer's Brief at 2; Hearing Transcript at 12-13.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Toni J. Williams (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2021-BLA-06050) rendered on a claim filed on May 3, 2016, 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. Although the ALJ credited the Miner with thirty-three years of underground coal mine employment, he also found the Miner was not totally disabled at the time of his death, and thus Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).[2] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ found the Miner suffered from legal pneumoconiosis, but not clinical pneumoconiosis. Nonetheless because the evidence was insufficient to establish total disability, a requisite element of entitlement, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in weighing the medical opinions on total disability.[3] Employer and its Carrier (Employer) respond in support of the denial of

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis at the time of death if he had 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(b).

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3), but did establish thirty-three years of underground coal mine employment. *See* 20 C.F.R. §718.304; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 6.

benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.

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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his respiratory or pulmonary impairment, standing alone, prevented him from performing his usual coal mine work and comparable and 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 did not establish total disability based on any category of evidence.[5] 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 18-20, 23-24. He therefore found the evidence as a whole does not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 24.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibits 4, 5.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii) because all of the pulmonary function and blood gas studies are non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Skrack*, 6 BLR at 1-711; Decision and Order at 19-20.

The ALJ considered three medical opinions. Decision and Order at 21-23. Dr. Zlupko conducted the Department of Labor (DOL) sponsored complete pulmonary evaluation of the Miner, including pulmonary function and blood gas studies, which yielded non-qualifying values.[6] Director's Exhibit 18. He opined the Miner had "a moderate pul[monary] function impairment and *would have* [had] *trouble* doing his last job as a shuttle car operator" based on the pulmonary function test results. *Id.* at 3, 6. In a supplemental report, he reiterated his opinion and clarified it by stating the Miner would not have been able to perform his past work as a shuttle car operator due to "his pulmonary function impairment . . . ." *Id.* at 1.

Dr. Saludes did not state whether the Miner could have performed his last coal mine work but did state he had a mild to moderate airflow obstruction. Claimant's Exhibit 1 at 2-3. Dr. Basheda opined the Miner could have performed his last coal mining work based on his objective pulmonary testing, which reflected mild airway obstruction. Employer's Exhibits 2 at 25; 4 at 25-28. Dr. Rosenberg stated the Miner was not disabled from a pulmonary perspective and would have been able to perform his last coal mining job based on the results of his pulmonary function and blood gas studies, describing him as having had "at worst a minimal degree of airflow obstruction." Employer's Exhibits 3 at 7, 9; 5 at 30-32.

The ALJ considered the physicians' opinions in light of the exertional requirements of the Miner's usual coal mine work. He found the opinions of Drs. Basheda and Rosenberg persuasive because they discussed the results of objective diagnostic testing and addressed the exertional requirements of the Miner's job. Decision and Order at 23. Conversely, the ALJ found Dr. Zlupko's opinion was not well-reasoned because he failed to discuss those exertional requirements. *Id*. Thus, he found Claimant failed to establish total disability based on the medical opinions.[7] *Id*.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The ALJ found Dr. Saludes's opinion did not address the issue of total disability. Decision and Order at 23; Claimant's Exhibit 1. We affirm that finding as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

The ALJ also considered the Miner's son's testimony at the hearing regarding his father's breathing problems but found it insufficient, by itself, to establish total disability. Decision and Order at 24.

Claimant generally argues Dr. Zlupko's diagnosis of a moderate impairment supports a finding of total disability and the ALJ erred in "summarily dismissing" that opinion due to Dr. Zlupko's failure to address the exertional requirements of the Miner's usual coal mine work. Claimant's Brief at 8-11. Contrary to Claimant's assertion, the ALJ acted well within his discretion in finding that Dr. Zlupko did not adequately explain why the moderate impairment he diagnosed would have prevented the Miner from performing those job duties. 20 C.F.R. §718.204(b)(2); *Gonzales v. Director, OWCP*, 869 F.2d 776, 779 (3d Cir. 1989) (ALJ can reasonably discount a physician's opinion if the ALJ finds that the physician relied upon an inadequate understanding of the exertional requirements of a claimant's usual coal mine employment); Decision and Order at 23-24.

Although Claimant generally asserts Dr. Zlupko's opinion is consistent with the Miner's son's testimony, Claimant fails to allege error in the ALJ's conclusion that, having found Dr. Zlupko's opinion not credible, he could not rely solely on the son's lay testimony to find the Miner totally disabled. Decision and Order at 24; *see Hillibush v. Benefits Review Board*, 853 F.2d 197, 204 (3d Cir. 1988); *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 288-89 (3d Cir. 1989).[8] We affirm that finding as it is unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held an ALJ must consider whether lay testimony alone establishes total disability if the medical evidence is "inconclusive," "not dispositive," and thus "not relevant" to the issue. *See Hillibush v. Benefits Review Board*, 853 F.2d 197, 204 (3d Cir. 1988) ("evidence must be relevant to the disability in order to preclude the [sole] use of [lay] affidavits"); *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 288-89 (3d Cir. 1989) (claimant may establish total disability with lay testimony alone if the medical evidence is "not conclusive" and thus "not relevant" to the issue). The circuit has also held an ALJ may not ignore lay testimony where it otherwise corroborates the credible medical evidence. *Mancia v. Director, OWCP*, 130 F.3d 579, 594 (3d Cir. 1997) (widow's testimony that the miner had breathing difficulties corroborated the "medical evidence [that] clearly, consistently and unwaveringly demonstrated that the miner's death was caused by his lung disease"). In the present claim, however, Dr. Zlupko's opinion was found relevant to total disability, but ultimately not credible to carry Claimant's burden of proof. Claimant does not allege the son's testimony by itself establishes total disability, nor does Claimant discuss any case law to support his general assertion that the ALJ was required to find Dr. Zlupko's opinion credible and supported by the Miner's son's lay

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found not credible to establish a requisite element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Claimant's limited arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the ALJ's determination that Claimant failed to establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and the evidence as a whole.[9] Thus, we also affirm the ALJ's findings that Claimant failed to invoke the Section 411(c)(4) presumption and that Claimant's failure to establish total disability precludes an award of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

testimony. *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).

[9] Having affirmed the ALJ's rejection of Dr. Zlupko's opinion, the only opinion supportive of a finding of total disability, we need not address Claimant's contentions regarding the weight the ALJ gave the opinions of Drs. Basheda and Rosenberg. *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).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge