U.S. Department of Labor

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

BRB No. 22-0352 BLA

JERRY D. WILLIAMS Claimant-Respondent v. ICG HAZARD, LLC and Self-Insured through ARCH COAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 8/24/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

James Holliday, Hazard, Kentucky, for Claimant.

Ashley M. Harman (Jackson Kelly, PLLC), Morgantown, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2019-BLA-05831) rendered on a subsequent claim filed on June 27, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with at least fifteen years of surface coal mine employment in conditions substantially similar to those in an underground mine. He found Claimant established a totally disabling respiratory or pulmonary impairment and thus 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), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309. He further determined Employer did not rebut the presumption and awarded benefits.

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

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[1] Claimant filed an initial claim on January 18, 2008, which the district director denied on August 8, 2008 because he failed to establish any element of entitlement. Decision and Order at 2; Director's Exhibit 1.

[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] 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 he 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); *see 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 any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id.*

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

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.[5] 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).

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.[6] *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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 4-11, 12-17.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 8, 9; Hearing Transcript at 14, 30.

[6] The ALJ found Claimant's usual coal mine work as a drill operator included drilling holes, loading holes for blasting, and shoveling holes with a hand shovel. Decision and Order at 13; Hearing Transcript at 22-24. After considering Claimant's testimony and the medical opinion evidence regarding his usual coal mine work, the ALJ found Claimant's work required "strenuous activity and occasional medium manual labor for periods of up to an hour and a half," which included "occasional lifting up to [fifty] pounds." Decision and Order at 13. As Employer does not challenge the ALJ's findings, we affirm them. *See Skrack*, 6 BLR at 1-711.

[7] The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 4, 11-12.

Pulmonary Function Studies

Employer argues the ALJ erred in finding Claimant established total disability based on the pulmonary function studies. Employer's Brief at 24-30. We disagree.

The ALJ considered four studies dated August 19, 2018, December 10, 2018, April 11, 2019, and February 17, 2021. Decision and Order at 4-11; Director's Exhibits 12, 22; Claimant's Exhibit 1; Employer's Exhibit 1. He permissibly credited the pre-bronchodilator results of these studies over post-bronchodilator results because he found the relevant inquiry "is whether a miner is able to perform his job, not whether he is able to perform his job after he takes medication." Decision and Order at 10-11, 16; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (the Department of Labor has cautioned against reliance on post-bronchodilator pulmonary function test results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."). He also permissibly assigned the greatest weight to the February 17, 2021 study[8] that produced qualifying[9] pre-bronchodilator values because Claimant performed it most recently. *See Woodward v. Director, OWCP*, 991

[8] The ALJ found the December 10, 2018 and April 11, 2019 studies are invalid. Decision and Order at 8-9. We affirm this finding as unchallenged. *Skrack*, 6 BLR at 1-711. He found the pre-bronchodilator FEV1 and FVC results of the August 19, 2018 study are valid as he discredited Dr. Dahhan's invalidation opinion and credited Dr. Green's contrary opinion. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); 20 C.F.R. §718.103(c); Decision and Order at 6-8. He also addressed the reliability of the February 17, 2021 pulmonary function study contained in Claimant's treatment records and found it reliable. Decision and Order at 9-11. He credited Dr. Jarboe's opinion the test is reliable over Dr. Goodman's contrary opinion. *Napier*, 301 F.3d at 712-14; 20 C.F.R. §718.103(c); Decision and Order at 9-11. Employer generally argues Claimant failed to produce any valid testing results and they were all performed with "variable and insufficient effort." Employer's Brief at 4, 13. Because Employer identifies no specific error in the ALJ's findings with respect to the August 19, 2018 and February 17, 2021 studies, we affirm them. *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).

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

F.2d 314, 319-20 (6th Cir. 1993); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 10 (June 27, 2023); Decision and Order at 11.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the February 17, 2021 qualifying pre-bronchodilator results. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11.

Medical Opinions

Employer argues the ALJ erred in weighing the medical opinions. Employer's Brief at 4-14. The ALJ weighed Dr. Green's opinion Claimant is totally disabled and the contrary opinions of Drs. Dahhan and Jarboe. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13-16. He found Dr. Green's opinion is reasoned and documented. Decision and Order at 13-14. He found the opinions of Drs. Dahhan and Jarboe unpersuasive and contrary to the weight of the objective testing and therefore not credible. *Id.* at 14-16.

We are not persuaded by Employer's argument that the ALJ erred in discrediting the contrary opinions of Drs. Dahhan and Jarboe. Employer's Brief at 4-14. The ALJ permissibly discredited Dr. Dahhan's opinion because he "did not have the opportunity to review the most recent [February 17, 2021 pulmonary function study] that yielded qualifying values before the administration of bronchodilators." Decision and Order at 15; *see Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185. Further, Dr. Jarboe acknowledged that Claimant's February 17, 2021 pre-bronchodilator pulmonary function study evidences a severe restrictive impairment, but he opined Claimant is not totally disabled because his post-bronchodilator pulmonary function test results are not qualifying. Employer's Exhibit 5 at 7-10. The ALJ permissibly found his opinion unpersuasive because, as discussed above, the relevant inquiry is whether Claimant can perform his usual coal mine employment and not whether he can perform his usual coal mine employment while on medication. *See Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185; 45 Fed. Reg. at 13,682; Decision and Order at 16.

Thus, we affirm, as supported by substantial evidence, the ALJ's determination that the contrary medical opinion evidence does not undermine his finding that Claimant established total disability based on the pulmonary function study evidence.[10] 20 C.F.R. §718.204(b)(2) (qualifying pulmonary function studies "shall establish" total disability "[i]n the absence of contrary probative evidence"); Decision and Order at 16. Because

[10] Because Claimant established total disability based on the pulmonary function studies, we need not address Employer's argument that the ALJ erred in finding Dr. Green's opinion reasoned and documented as this opinion does not constitute contrary probative evidence. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 4-14.

there is no credible evidence undermining the pulmonary function study evidence, we further affirm the ALJ's finding that Claimant established total disability, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and thus invoked the Section 411(c)(4) presumption, 20 C.F.R. §718.305, and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

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,[11] 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.[12]

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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Dahhan and Jarboe that Claimant does not have legal pneumoconiosis. Director's Exhibit 22; Employer's Exhibits 1, 3, 5.

Dr. Dahhan opined Claimant does not have legal pneumoconiosis because he has no lung disease or impairment as there are no valid, qualifying objective studies. Director's Exhibit 22 at 35; Employer's Exhibit 3 at 20, 22-24. He specifically opined the August 19, 2018 pulmonary function study is invalid. *Id*. The ALJ permissibly rejected the doctor's

[11] "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).

[12] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 19.

opinion because it is contrary to his own finding that the pre-bronchodilator FEV1 and FVC results of the August 19, 2018 study are valid. *Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185; Decision and Order at 6-18, 21. The ALJ also permissibly found Dr. Dahhan's opinion unpersuasive because he did not review the February 17, 2021 qualifying pre-bronchodilator results, which the ALJ found reliable. *Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185; Decision and Order at 21

Dr. Jarboe opined Claimant has chronic bronchitis and obstructive airways disease that are due to his cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 1 at 9-12; 5 at 23-25, 36-37. He explained the objective testing reveals an elevated residual volume and this "striking elevation of residual volume in [Claimant] is a marker of causation by cigarette smoking and not the inhalation of coal mine dust." Employer's Exhibit 1 at 11. The ALJ permissibly found this reasoning unpersuasive because Dr. Jarboe "failed to explain why the increase in the residual volume could not be due, at least in part, to Claimant's coal mine dust exposure." Decision and Order at 22; *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); *Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185.

Dr. Jarboe also excluded a diagnosis of legal pneumoconiosis because Claimant worked as a surface miner and, according to Jarboe, more than ninety percent of surface coal miners work in conditions below the two milligram "per cubic meter permissible exposure limit." Employer's Exhibit 1 at 11. He further stated that "surface coal miners in general have lower dust exposures than do underground miners." Employer's Exhibit 5 at 15-17. In light of Claimant's cigarette smoking history and because he believed Claimant had limited dust exposure as a surface miner, Dr. Jarboe opined "it is likely that cigarette smoking is the cause of the [C]laimant's obstructive impairment." *Id.* The ALJ permissibly found this reasoning unpersuasive because it was not specific to Claimant as Dr. Jarboe "failed to explain how he determined that Claimant's surface coal mine work as a drill operator fell into such category." Decision and Order at 22; *see Young*, 947 F.3d at 405-08; *Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185.

In challenging the ALJ's rebuttal findings, Employer contends remand is necessary because the ALJ applied an improper standard in requiring it "to establish [] Claimant's impairment was not caused 'in part' by his coal dust exposure." Employer's Brief at 15. This argument has no merit. The Sixth Circuit holds an employer can "disprove the existence of legal pneumoconiosis by showing that [Claimant's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Young*, 947 F.3d at 405. "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)). Thus the ALJ correctly stated the standard for disproving legal pneumoconiosis. Decision and Order at 19-20 (citing *Young*, 947 F.3d at 405).

Employer also argues the opinions of Drs. Dahhan and Jarboe are credible and sufficient to rebut the presumption of legal pneumoconiosis. Employer's Brief at 16-17. Its argument amounts to 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).

We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 23. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [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); Decision and Order at 23-24. He permissibly discredited the opinions of Dr. Dahhan and Jarboe regarding the cause of Claimant's total respiratory disability because they failed to diagnose legal pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 23-24; Employer's Brief at 18-19. Consequently, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's total respiratory disability was due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24.

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