U.S. Department of Labor

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

BRB No. 22-0512 BLA

CHARLES JOLLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED: 02/22/2024
	)	
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 Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

Cecelia B. Freeman (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Jeannie B. Walston and P. Andrew Laird, Jr. (Webster, Henry, Bradwell, Cohan, Speagle & DeShazo, P.C.), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Angela F. Donaldson's Decision and Order Awarding Benefits (2020-BLA-05682) rendered on a subsequent claim filed on July 5, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act).

The ALJ accepted the parties' stipulation of at least twenty-three years of qualifying coal mine employment and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked 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] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer challenges the ALJ's findings regarding total disability and thus invocation of the presumption. It further argues the ALJ erred in her determinations regarding legal pneumoconiosis and disability causation.[4] Claimant responds in support of

[1] This is Claimant's seventh claim for benefits. Director's Exhibits 1-6. The district director denied his most recent prior claim, filed in 2016, for failing to establish any element of entitlement. Director's Exhibit 32 at 379.

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 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 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); *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). As Claimant's prior claim was denied for a failure to establish any element of entitlement, Claimant was required to submit new evidence establishing at least one element to obtain review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 32 at 379.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least twenty-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 6.

the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response.

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

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.[6] 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 study evidence, medical opinion evidence, and evidence as a whole.[7] Decision and Order at 20.

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[5] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 9.

[6] The ALJ accepted, as consistent with the evidence, the parties' stipulation that Claimant's usual coal mine work was as a longwall utility worker and longwall machine helper, which required heavy to very heavy labor. Decision and Order at 5; Director's Exhibit 11; Hearing Transcript at 22. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[7] We affirm, as unchallenged, the ALJ's determination that the arterial blood gas studies do not support total disability and there was no evidence of cor pulmonale. 20 C.F.R. §718.204(b)(2)(ii)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 9-10.

Pulmonary Function Studies

Employer argues the ALJ erred in finding the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The ALJ considered four pulmonary function studies from the current claim conducted on August 29, 2018, February 24, 2020, July 31, 2020, and January 25, 2021. Director's Exhibit 19; Claimant's Exhibit 1; Employer's Exhibits 3, 4.

The August 29, 2018, February 24, 2020, and July 31, 2020 pulmonary function studies produced qualifying[8] values pre-bronchodilator but not post-bronchodilator. Director's Exhibit 23; Claimant's Exhibit 1; Employer's Exhibit 3. The January 25, 2021 pulmonary function study was non-qualifying, with bronchodilators not administered. Employer's Exhibit 4.

The ALJ found the three qualifying pre-bronchodilator studies more probative than the non-qualifying post-bronchodilator studies, as the preamble to the revised 2001 regulations recognizes that the use of a bronchodilator in a pulmonary function study "does not provide an adequate assessment of [a] miner's disability." 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); Decision and Order at 8. Further, the ALJ accorded the non-qualifying January 25, 2021 study less weight as insufficiently reliable.[9] Decision and Order at 8. Thus, the ALJ found the pulmonary function study evidence supported total disability. *Id.* at 8-9.

Employer acknowledges there are pulmonary function study values that are qualifying under the regulations but argues the ALJ erred in finding the pulmonary function study evidence established total disability because the physicians found the pulmonary function studies were normal or "essentially normal." Employer's Brief at 31. It further argues that one must consider Claimant's race when assessing the pulmonary function values, which renders Claimant's results non-disabling. *Id.* at 31, 33. We disagree.

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

[9] Specifically, the ALJ noted the January 25, 2021 pulmonary function study contains only one tracing, does not note whether the Claimant had good understanding or whether the test was reproducible, and therefore did not comply with the quality standards set forth in 20 C.F.R. §718.103 and Appendix B to 20 C.F.R. Part 718. Decision and Order at 8.

Initially, even assuming the Employer's summation of the physicians' opinions is correct, their interpretations do not address the pertinent issue under 20 C.F.R. §718.204(b)(2)(i), which is whether the studies are qualifying under the regulations. Further, the ALJ permissibly declined to credit Dr. Rosenberg's indication that Claimant's pulmonary functions studies should not be assessed using the values in the regulations, which assess function for Caucasians, as Claimant is African-American. Decision and Order at 17. The table values at 20 C.F.R. Part 718, Appendix C unambiguously apply to all miners regardless of race. Indeed, the Department of Labor specifically declined to promulgate separate qualifying table values given the lack of a scientific basis for it, concluding in the absence of any such data "it is appropriate to apply the same table to blacks and whites." 45 Fed. Reg. at 13,711.

In addition, Employer does not contest the ALJ's finding that the non-qualifying January 25, 2021 pulmonary function study is worthy of little weight given its lack of compliance with quality standards set forth in 20 C.F.R. §718.103 and Appendix B to Part 718. Decision and Order at 8. Nor does Employer challenge the ALJ's crediting of the qualifying pre-bronchodilator results over the non-qualifying post-bronchodilator results. *Id.*; *see* 45 Fed. Reg. at 13,682. Therefore, we affirm these findings as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

Based on the foregoing, we affirm the ALJ's findings that the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-9.

Medical Opinions

The ALJ considered the medical opinions of Drs. Barney, Hasson, Rosenberg, and Connolly. Decision and Order at 10-18. Dr. Connolly opined it would be very difficult for Claimant to meet all the physical requirements of his job given his abnormal testing, while Drs. Barney, Hasson, and Rosenberg found Claimant is not totally disabled. Director's Exhibits 19, 25; Claimant's Exhibit 3; Employer's Exhibits 4, 5, 9. The ALJ found Dr. Connolly's opinion well-reasoned and well-documented and accorded the conflicting opinions little weight. Decision and Order at 16-18. Consequently, she found the medical opinion evidence supports total disability. *Id.* at 18.

Employer argues the ALJ erred in weighing the medical opinion evidence. Specifically, it contends the ALJ erroneously inferred Dr. Connolly's opinion supported total disability when he did not expressly make such a finding but rather acknowledged Claimant's spirometry was essentially normal. Employer's Brief at 5, 31, 34. Employer also argues the ALJ mischaracterized Dr. Barney's opinion and erroneously found Drs.

Rosenberg's and Hasson's opinions undermined because they only considered the most recent pulmonary function study. *Id.* at 7-10. Employer's arguments are unpersuasive.

First, contrary to Employer's implication, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in a doctor's report are sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion."); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc).

While Dr. Connolly did not specifically state Claimant was incapable of performing his usual coal mine employment, he explained, as the ALJ found, that Claimant's abnormal spirometry[10] would make it difficult to perform all expected tasks in his coal mining job, including heavy, repetitive lifting. Decision and Order at 17-18; Claimant's Exhibit 3 at 53-54. Thus, the ALJ permissibly inferred Claimant would be incapable of performing heavy to very heavy labor based on Dr. Connolly's explanations and thus supported a finding of total disability. *Poole*, 897 F.2d at 894; Decision and Order at 17-18.

The ALJ also permissibly found the conflicting opinions undermined. As the ALJ found, Dr. Barney noted "at most" mild obstruction on the pulmonary function study obtained in his examination and stated Claimant was not totally disabled; however, he did not explain how Claimant could perform heavy exertion based on this finding. Decision and Order at 16; Director's Exhibits 19, 25; s*ee 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). She also permissibly found the doctor did not explain why he determined Claimant was not disabled given the pre-bronchodilator studies he obtained were qualifying. Decision and Order at 16; *see Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); *Taylor v. Ala. By-Products Corp.*, 862 F.2d 1529, 1531 n.1 (11th Cir. 1989). We find no

[10] Contrary to Employer's argument, while Dr. Connolly initially indicated Claimant's spirometry was "normal," he did not opine that Claimant's function was normal. Claimant's Exhibit 3 at 42; Employer's Brief at 34. He clarified that Claimant's FEV1/FVC ratio was normal but the FEV1 and FVC values were abnormally low. Claimant's Exhibit 3 at 53.

mischaracterization of Dr. Barney's opinion and affirm the ALJ's according Dr. Barney's opinion little weight.

We further reject Employer's arguments that the ALJ erred in discrediting Drs. Rosenberg's and Hasson's opinions because they only considered the most recent pulmonary function study. Employer's Brief at 9-10, 32. As Employer indicates, Dr. Rosenberg reviewed the pulmonary function studies in the record; however, as the ALJ found, his disability opinion relied primarily on the January 25, 2021 non-qualifying study, which the ALJ found unreliable. Employer's Exhibit 5; Decision and Order at 16-17. Moreover, the ALJ also found that while Dr. Rosenberg acknowledged that Claimant's usual coal mine employment required heavy exertion, he did not address these requirements when analyzing disability. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 577; Decision and Order at 17. Thus, we affirm the ALJ's according Dr. Rosenberg's opinion little weight. Decision and Order at 17.

Similarly, the ALJ found Dr. Hasson did not adequately discuss the pulmonary function studies other than the non-qualifying study obtained in his own examination, which the ALJ found unreliable. Decision and Order at 16. The ALJ permissibly found that while Dr. Hasson summarized other testing of record, he did not adequately address how these studies were "normal," particularly given three of the tests were qualifying. Decision and Order at 16; Employer's Exhibit 4. As the ALJ's findings are supported by substantial evidence, they are affirmed. *Jordan*, 876 F.2d at 1460; *Taylor*, 862 F.2d at 1531 n.1.

Employer's arguments amount to a request to reweigh the evidence, which the Board may not do.[11] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the ALJ's findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and that, when weighed together, the evidence as a whole establishes total disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order at 18, 20.

[11] Employer also argues the ALJ erred in failing to address whether Claimant could perform comparable gainful employment, pointing to his employment with Owens and Minor for several years after leaving coal mine work. Employer's Brief at 8, 35. But it did not raise this argument below; thus, we decline to address it. 20 C.F.R. §802.301(a); *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995) (cannot raise argument before the Board for the first time on appeal); Employer's Post-Trial Brief.

We thus affirm the ALJ's determinations that Claimant invoked the Section 411(c)(4) presumption and thus established a change in an applicable condition of entitlement.[12] 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309; Decision and Order at 20.

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,[13] or "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); *Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1287-88 (11th Cir. 2019); *Minich v. Keystone Coal*

[12] Contrary to Employer's argument, the ALJ did not err in failing to consider all the evidence from Claimant's prior claims in determining whether there is a change in an applicable condition of entitlement. Employer's Brief at 6-7, 13. When evaluating whether a change in an applicable condition of entitlement has been established, an ALJ is not bound by the credibility findings in a prior claim but rather should "consider only the new evidence to determine whether the element of entitlement previously found lacking is now present." *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 731 (7th Cir. 2013). After finding a change in condition has been established, the ALJ must weigh all of the evidence to determine if a claimant is entitled to benefits. In doing so, "no findings made in connection with the prior claim . . . will be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309. Here, the ALJ determined the new evidence established total disability and thus a change in condition. Decision and Order at 20. She then considered the prior claims' evidence but found it of little value in assessing Claimant's current condition; thus, she permissibly provided the prior claims' evidence little weight. *Id.*; *see Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718-19 (4th Cir. 1993).

[13] "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).

Mining Corp., 25 BLR 1-149, 1-155 n.8 (2015). The ALJ found Employer failed to establish rebuttal by either method.[14] Decision and Order at 21-25.

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 opinions of Drs. Barney, Hasson, and Rosenberg, who opined that Claimant does not have legal pneumoconiosis, but instead has asthma unrelated to his coal mine dust exposure. Director's Exhibits 19, 25; Employer's Exhibits 4, 5. The ALJ also considered the opinion of Dr. Connolly, who diagnosed Claimant with legal pneumoconiosis in the form of asthma resulting from his coal mine exposures. Claimant's Exhibit 3. Employer argues that the ALJ erred in determining Dr. Connolly's opinion supports a finding of legal pneumoconiosis and generally argues the other evidence also does not support a finding of pneumoconiosis. Employer's Brief at 36-39.

Other than generally asserting Drs. Barney, Hasson, and Rosenberg[15] are well-credentialed and opine pneumoconiosis is not present, Employer has provided no

[14] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 25.

[15] Insofar as Employer adequately raised the argument under the proper rebuttal standard, we reject its contention that the ALJ ignored Dr. Rosenberg's explanations regarding why Claimant's asthma is not due to coal mine dust. Employer's Brief at 9-10. Contrary to Employer's argument, the ALJ addressed Dr. Rosenberg's opinion, noting while Dr. Rosenberg contended only *current* exposure to coal mine dust could cause bronchitis or aggravate Claimant's asthma, he cited to only a single study to support his conclusion and provided no other cause for Claimant's condition, rendering his opinion less probative. Decision and Order at 24-25. As the credibility determination of an expert's opinion is within the ALJ's discretion, we affirm the ALJ's finding that Dr. Rosenberg's opinion is insufficient to rebut legal pneumoconiosis. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (ALJ is not required to accept the opinion or theory of any medical expert).

arguments regarding how the ALJ erred in finding their medical opinions were inadequate to rebut the presumption of legal pneumoconiosis; thus, the ALJ's determinations are affirmed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986) (party challenging an ALJ's decision must do more than recite evidence favorable to its case; rather it must demonstrate with some degree of specificity the manner in which the ALJ's decision is not supported by substantial evidence); Decision and Order at 23-25; Employer's Brief at 36-38.

Moreover, as Dr. Connolly's opinion does not support rebuttal of the presumption, Employer has failed to demonstrate how, even if the ALJ had discredited Dr. Connolly's opinion, it would have made a difference in the outcome. *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"). Therefore, we affirm the ALJ's finding that Employer failed to rebut the presumption that Claimant has legal pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 25.

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Because Drs. Barney, Hasson, and Rosenberg failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to rebut the presumption that Claimant has legal pneumoconiosis, substantial evidence supports the ALJ's finding that their disability causation opinions are not credible. *See Ferguson*, 920 F.3d at 1289; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (where a physician erroneously fails to diagnose pneumoconiosis, his opinion as to disability causation "is not worthy of much, if any, weight"); Decision and Order at 26-27. We therefore affirm the ALJ's conclusion Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Further, while Employer argues the ALJ failed to address Dr. Rosenberg's opinion that obesity caused any restriction, this argument appears misplaced as, even if this were accurate, Dr. Rosenberg acknowledged Claimant also has asthma. Employer's Brief at 10.

[16] Employer also argues the ALJ erred in "discarding" Claimant's treatment notes on the issue of legal pneumoconiosis. Employer's Brief at 39. The ALJ, however, addressed the treatment notes and permissibly concluded they did not support Employer's burden because they contain no significant analysis of Claimant's respiratory issues, but rather relate to other medical issues. *See Bradberry v. Director, OWCP*, 117 F.3d 1361, 1367 (11th Cir. 1997); Decision and Order at 25.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge