U.S. Department of Labor

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

BRB No. 20-0533 BLA

BENNIE STEFFEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMONT COAL COMPANY VIRGINIA, LLC, c/o ALPHA NATURAL RESOURCES	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL GROUP (AIG)	)	DATE ISSUED: 01/27/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Awarding Benefits (2018-BLA-05218) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on April 8, 2016.

The ALJ found Claimant has over twenty-six years of surface coal mine employment in conditions substantially similar to those in an underground mine and 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,[1] 30 U.S.C. §921(c)(4) (2018). He further found 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 argues he erred in finding it did not rebut the presumption.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Benefit 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.[3] 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 his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he establishes 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established over twenty-six 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, 7.

[3] 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); Director's Exhibits 3, 7, 8; Hearing Tr. at 13-14.

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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 opinions, crediting the opinions of Drs. Ajjarapu and Fino that Claimant is disabled over Dr. McSharry's opinion he is not.[4] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18-19.

Employer argues the ALJ erred in discrediting Dr. McSharry's opinion. Employer's Brief at 10-12. We disagree. Dr. McSharry indicated Claimant's pulmonary function testing evidences a moderate restrictive pulmonary impairment. Employer's Exhibits 4, 5 at 18-19. He conceded this degree of impairment "would make it harder" for Claimant to perform his usual coal mine employment as a loader operator. Employer's Exhibit 5 at 18-19. Nonetheless, he opined Claimant is not totally disabled because pulmonary function study results "are above the [d]isability [s]tandards and many people working in mining have lung function tests of this type and are succeeding at that work." *Id.*

The ALJ correctly recognized that total disability can be established with reasoned medical opinions even in the absence of qualifying[5] pulmonary function or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18-19. He rationally rejected Dr. McSharry's opinion because the doctor did not explain whether Claimant is totally disabled from his usual coal mine employment by the moderate impairment even if the objective test itself is non-qualifying. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory

[4] The ALJ found the pulmonary function and 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)(i)-(iii); Decision and Order at 18.

[5] A "qualifying" pulmonary function study or blood gas study yields values equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

impairment may preclude the performance of the miner's usual duties"); Decision and Order at 18-19.

Dr. McSharry also opined that Claimant's usual coal mine employment as a loader operator is "probably less strenuous" than most coal mining jobs. Employer's Exhibit 5 at 18-19. He recognized the heaviest part of Claimant's job involved "having to battle the cab and hold onto the controls." *Id.* at 19-20. He believed Claimant "probably" performed this duty, but it was not a "routine" task. *Id.* Further, he felt "[Claimant's] description to Dr. Fino" of light manual labor "probably was [a] closer" characterization of the routine tasks of Claimant's usual coal mine employment. *Id.* He concluded Claimant's "pulmonary system would be challenged but not overwhelmed by performing" the work of a loader operator. *Id.* The ALJ rationally found Dr. McSharry's discussion of Claimant's usual coal mine employment, including the doctor's assumption of which tasks Claimant performed routinely, to be "speculative and equivocal." Decision and Order at 19; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999); *Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Thus we affirm the ALJ's decision to discredit Dr. McSharry's opinion.

Employer also argues the ALJ erred in finding Dr. Fino's opinion supports the conclusion Claimant is totally disabled. Employer's Brief at 9. This argument has no merit. Dr. Fino stated Claimant is not totally disabled by an intrinsic pulmonary process. Director's Exhibit 19. He opined, however, that "because of the effects of [Claimant's] obesity *on his lungs, he is disabled*[,]" explaining "[t]he reductions in the FVC and FEV1 [on pulmonary function testing] are due to the obesity binding [Claimant's] chest and preventing it from expanding." *Id.* at 10 (emphasis added).

The ALJ accurately recognized Dr. Fino's opinion supports the conclusion Claimant is totally disabled. Decision and Order at 19. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). Dr. Fino opined Claimant could not perform his usual coal mine employment based on the reduced FVC and FEV values, but he attributed those reduced values to Claimant's obesity. Director's Exhibit 19. Thus we affirm the ALJ's finding Dr. Fino's opinion supports that Claimant is totally disabled.

As Employer raises no other specific argument with respect to the ALJ's consideration of Dr. Fino's opinion, we affirm the ALJ's finding that Claimant established

total disability at 20 C.F.R. §718.204(b)(2)(iv) based on Dr. Fino's conclusions.[6] Decision and Order at 19.

We further affirm, as supported by substantial evidence, the ALJ's finding that Claimant established total respiratory disability when considering the record 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 19. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 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[7] 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). The ALJ found Employer failed to establish rebuttal by either method.

Employer argues the ALJ erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 16-25. 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

[6] Dr. Ajjarapu stated Claimant's pulmonary function testing showed marked decline in spirometric measures and severe pulmonary impairment. Director's Exhibit 15. She opined Claimant does not have the pulmonary capacity to do his previous coal mine employment. *Id*. Because Claimant established total disability through Dr. Fino's opinion, however, we need not address Employer's argument that the ALJ erred in his consideration of Dr. Ajjarapu's opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 5-7.

[7] "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).

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).

Employer relied on the medical opinions of Drs. Fino and McSharry. Director's Exhibit 19; Employer's Exhibits 3, 4, 5, 6. Both doctors opined Claimant has a restrictive lung impairment caused by obesity and unrelated to coal mine dust exposure. Director's Exhibit 19 at 9; Employer's Exhibits 3, 4 at 3, 5 at 20-21, 6 at 13-14, 19. The ALJ found their opinions not well-reasoned, equivocal, and inconsistent with the regulations. Decision and Order at 24-26.

Employer argues the ALJ applied the wrong legal standard when discrediting Dr. Fino's and Dr. McSharry's opinions, as it argues he required each doctor to "rule out" coal mine dust as a causative factor of Claimant's restrictive lung impairment. Employer's Brief at 18-25. We disagree. The ALJ accurately stated "Employer must establish that Claimant's impairment is not 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" Decision and Order at 23-24; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. Moreover, he discredited their opinions because he found them inadequately reasoned and equivocal, not because they failed to meet a particular legal standard. *Minich*, 25 BLR at 1-155 n.8; Decision and Order at 24-26.

Employer also argues the ALJ erred in discrediting the opinions of Drs. Fino and McSharry. Employer's Brief at 17. We disagree. Dr. Fino opined Claimant's "significantly reduced FVC and FEV_1 values with reduced lung volumes and an extremely reduced expiratory reserve volume, or ERV . . . is a classic finding with obesity." Director's Exhibit 19 at 10. Dr. McSharry opined Claimant has a respiratory impairment caused by his obesity, not coal mine dust exposure. Employer's Exhibit 4 at 3. He stated "[t]here is no evidence of intrinsic lung disease causing this respiratory impairment." *Id.* The ALJ indicated Drs. Fino and McSharry excluded coal mine dust exposure as a causative factor of Claimant's respiratory impairment because they believe obesity can explain the impairment. Decision and Order at 24, 25. He permissibly found they "failed to explain why Claimant's significant history of coal dust exposure was not a contributing or aggravating factor" in Claimant's obesity-related restrictive impairment. Decision and Order at 25; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Dr. McSharry also opined that "[w]hen coal workers (sic) pneumoconiosis causes significant physiologic changes such as restrictive or obstructive lung disease, there is generally clear-cut radiographic evidence of high profusion pneumoconiosis or more often progressive massive fibrosis to explain these findings." Employer's Exhibit 4 at 3.

Because "[n]either of these findings is present in this case," he excluded legal pneumoconiosis. *Id*. The ALJ permissibly found Dr. McSharry's opinion inconsistent with the regulations that provide legal pneumoconiosis may be present even in the absence of a positive x-ray reading for clinical pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009) (affirming the discrediting of a physician's opinion because the ALJ "fairly read" it as requiring radiographic evidence of clinical pneumoconiosis before he would diagnose legal pneumoconiosis); 20 C.F.R. §§718.202(a)(4), 718.202(b); Decision and Order at 25.

Employer generally argues Dr. Fino's and Dr. McSharry's opinions are well-reasoned and documented on the issue of legal pneumoconiosis. Employer's Brief at 16-25. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in discrediting Dr. Fino's and Dr. McSharry's opinions, we affirm his finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 25-26. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[8] Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

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 26-27. Contrary to Employer's argument, the ALJ permissibly discredited the disability causation opinions of Drs. Fino and McSharry because they failed to diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 26; Employer's Brief at 25-26. We therefore affirm the ALJ's finding that 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).

[8] Because Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we need not address its allegations of error with regard to the ALJ's findings on clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; 20 C.F.R. §718.305(d)(1)(i); Employer's Brief at 13-15.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge