U.S. Department of Labor

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

BRB No. 20-0554 BLA

BOBBY J. MCPEEK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALLIANCE COAL CORPORATION	)	
	)	DATE ISSUED: 01/24/2022
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2018-BLA-06204) on a claim filed on June 4, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-eight years of underground coal mine employment and found he has 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). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and invoked the Section 411(c)(4) presumption. Employer also argues he erred in finding the presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

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.[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, 362 (1965).

Invocation of the Section 411(c)(4) Presumption

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[4] evidence of pneumoconiosis and

[1] Section 411(c)(4) 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); *see* 20 C.F.R. §718.305.

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

[3] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine employment in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 17; Director's Exhibit 3.

[4] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R.

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 established total disability based on medical opinions and the weight of the evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14.

We initially affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine work as a laborer and lead man required heavy manual labor, including lifting fifty to sixty pounds while rock dusting and setting timbers; building and lifting eighty-pound concrete brattices; cleaning belts; walking one to three miles per shift; and hanging ventilation curtains. *Skrack*, 6 BLR at 1-711; Decision and Order at 6-7.

As to whether Claimant has the respiratory capacity to perform this work, the ALJ considered four medical opinions.[6] Decision and Order at 6-14. Dr. Cohen conducted the Department of Labor's complete pulmonary evaluation on July 14, 2016. Director's Exhibit 12. He noted Claimant's history of shortness of breath since 2010 and obtained a non-qualifying pulmonary function study and a qualifying blood gas study.[7] Director's Exhibit 10 at 8-14. He stated the studies showed a "moderate diffusion impairment and

---

Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The ALJ found Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). He found the two pulmonary function studies were non-qualifying; the two blood gas studies in equipoise because one study was qualifying and one was non-qualifying; and no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 3-6. The ALJ also found Claimant did not establish complicated pneumoconiosis and thus was unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 20 C.F.R. §718.304; Decision and Order at 4.

[6] We affirm, as unchallenged, the ALJ's finding that all of the physicians had a similar understanding of the exertional requirements of Claimant's work. Skrack, 6 BLR at 1-711; Decision and Order at 8-14.

[7] Dr. Cohen's blood gas study produced a PO2 value of 60 and a PCO2 value of 42 at rest. Director's Exhibit 10 at 14-15.

resting hypoxemia." *Id.* at 8-12. He opined Claimant is totally disabled from performing the heavy labor required of his usual coal mine work. *Id.* at 12.

Dr. Selby examined Claimant on January 26, 2017, administered non-qualifying pulmonary function and blood gas studies,[8] and reviewed medical records. Director's Exhibit 20 at 5, 16. Dr. Selby concluded Claimant "has a slight but not clinically significant degree of airway obstruction that essentially normalizes with bronchodilator." *Id.* He further opined Claimant has the respiratory capacity to perform his last coal mine work. *Id.* at 5, 18. Dr. Selby also reviewed Dr. Cohen's July 14, 2016 medical report and opined Dr. Cohen's exercise blood gas study was "inconclusive and incomplete" because Claimant did not complete the peak exercise testing. *Id.* at 17-18. At his subsequent deposition, Dr. Selby explained that Dr. Cohen's qualifying arterial blood gas study results were due to uncontrolled asthma and speculated that if it were adequately treated, Claimant's PO2 would improve. Employer's Exhibit 6 at 12-15, 20. He also stated Claimant's blood gas values were affected by his age because "there is a fairly general regression as one ages" and thus older people are "clearly expect[ed]" to have lower PO2 values. *Id.* at 13. He provided a "general formula" to calculate Claimant's expected PO2 based on his age but did not have "any scientific treatise" to support his use of the formula and "c[ouldn't] remember where it came from." *Id.* Dr. Selby also testified that Claimant is capable of performing his last coal mine work because his pulmonary function testing was "essentially normal" and his PO2 value improved from 61 to 66 when he exercised. *Id.* at 16-20. He speculated that if Claimant's asthma were adequately treated, his PO2 value may continue to improve. *Id.* at 18.

In a July 31, 2017 supplemental report, Dr. Cohen reviewed Dr. Selby's objective testing and noted Dr. Selby's blood gas study yielded results that were "nearly identical" to the study he obtained as both recorded PCO2 values of 42 and Dr. Selby's corresponding non-qualifying PO2 value of 61 was only one millimeter of mercury (mm Hg) above Dr. Cohen's qualifying value of 60. Director's Exhibit 23 at 2. He further opined that Dr. Selby's testing showed "a significant widening of the A-a gradient which is abnormal and indicates a significant gas exchange abnormality." *Id.* Given the "combined impairments" that he and Dr. Selby both observed, Dr. Cohen opined that Claimant is totally disabled from performing the heavy manual labor required by his last coal mine job. *Id.* at 3. During his deposition, Dr. Cohen testified that Claimant would be unable to perform his last coal

[8] At rest, Dr. Selby's blood gas study produced PO2 and PCO2 values of 61 and 42, respectively; at peak exercise, his study produced a PO2 value of 66. Director's Exhibit 20 at 5, 16.

mine job based on his moderate diffusing impairment and resting hypoxemia. Claimant's Exhibit 9 at 16.

Dr. Chavda reviewed Drs. Cohen's and Selby's medical reports. Claimant's Exhibit 7. He opined Claimant has a severe impairment and is totally disabled based on Drs. Cohen's and Selby's blood gas studies, stating that "clinically there is no difference between [a] PO2 of 60 and 62 for disability."[9] *Id.* at 4. He explained that, even with the non-qualifying blood gas values Dr. Selby recorded, Claimant would not be capable of performing the "significant labor-intensive work" required of his last coal mine job "in a dusty environment for 8 to 10 hours [sic] even with breaks in between." *Id.* at 4. In a subsequent deposition, Dr. Chavda reiterated that there is clinically no difference between a qualifying PO2 value of 60 and non-qualifying value of 62 when considering its impact on Claimant's ability to perform his coal mine work; under either measurement, Claimant's hypoxemia would cause him to become short of breath, feel fatigued and tired, and lack "enough oxygen" to carry out his job duties. Claimant's Exhibit 11 at 9-10. He disagreed with Dr. Selby that age has any impact on arterial blood gas study results, and further testified that Claimant's rise in PO2 to 66 mm Hg on Dr. Selby's blood gas study was a normal response to exercise.[10] *Id.* at 29-32.

Dr. Rosenberg also reviewed Drs. Cohen's and Selby's medical reports. Employer's Exhibit 4. He opined that Claimant is not totally disabled because his oxygenation did not fall with exercise, he had a "vast ventilator reserve when he stopped exercis[ing]," and his pulmonary function testing indicated only a mild obstruction. *Id.* at 5.

The ALJ found the opinions of Drs. Cohen and Chavda more persuasive than Drs. Selby's and Rosenberg's because they better explained their total disability conclusions in light of the specific exertional requirements of Claimant's usual coal mine work. Decision and Order at 14. Thus, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.*

---

[9] We note Dr. Selby's study produced a resting PO2 value of 61, not 62. Director's Exhibit 20 at 5; Claimant's Exhibit 7 at 4.

[10] Dr. Chavda explained why Claimant's PO2 value increased with exercise on Dr. Selby's testing: "[W]hen you exercise you're going to breathe harder and faster, you know, so you're going to suck in more air, you know. And when you exercise your heart rate is high, your blood flow is high, so that's a natural phenomenon." Claimant's Exhibit 11 at 31. He reiterated that Claimant remains totally disabled despite the increase in the PO2 value with exercise. *Id.* at 31-32.

Employer asserts, generally, that the ALJ erred by failing to provide "any reasons" for discounting the opinions of Drs. Selby and Rosenberg. Employer's Brief at 12-14. Employer contends that each of its experts specifically accounted for Claimant's blood gas study results in rendering their opinions that Claimant is not totally disabled. *Id.* Employer's assertions are without merit.

The ALJ permissibly credited the opinions of Drs. Cohen and Chavda as well-documented and well-reasoned because each physician understood the exertional requirements of Claimant's usual coal mine work and explained how his impairment would impact his ability to perform those specific duties. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-95 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Decision and Order at 13-14. He also found Dr. Chavda's opinion persuasive that the difference between the non-qualifying PO2 values Dr. Selby recorded, and the qualifying values Dr. Chavda recorded, was not clinically significant and thus permissibly credited Dr. Chavda's opinion that Claimant would be unable to perform his usual coal mine work based on Dr. Selby's January 26, 2017 blood gas values. Decision and Order at 10-14. The significance of even non-qualifying objective tests is for a physician to determine and a physician may find that such test results indicate that a miner would be unable to perform his last coal mine employment. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1989); *Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). As Employer raises no specific challenge to the weight accorded the opinions of Drs. Cohen and Selby, we affirm the ALJ's findings. *See Skrack*, 6 BLR at 1-711.

Further, although Drs. Selby and Rosenberg pointed to Claimant's increased PO2 value with exercise as indicating Claimant is not totally disabled, the ALJ permissibly found neither physician adequately addressed whether Claimant would be able to continue performing his usual coal mine work based on both the *resting* and exercise values. Decision and Order at 12-14. He also accurately described that Dr. Selby could only speculate as to whether Claimant's PO2 values would have continued to increase beyond 66 while performing the heavy exertion required of his coal mine work. Decision and Order at 13-14. Moreover, the ALJ correctly noted Dr. Selby agreed Claimant's blood gas results are "not normal" and Claimant has some degree of blood gas impairment. *Id*. at 14; Employer's Exhibit 6 at 12; *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (a miner is totally disabled if his respiratory or pulmonary condition is in itself enough to prevent him from performing his usual coal mine work); *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).

The ALJ has discretion to weigh the evidence, draw appropriate inferences, and determine credibility. *See Poole*, 897 F.2d at 893-95; *Burns*, 855 F.2d at 501; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). While Employer generally alleges the ALJ's findings are conclusory and Drs. Rosenberg and Selby "fully" and "clearly" explained their opinions, it fails to identify any error in the ALJ's reasons for finding their opinions less credible than Drs. Cohen's and Chavda's opinions. Employer's Brief at 12-14. Because the ALJ acted within his discretion and his credibility findings are supported by substantial evidence, we affirm the ALJ's determination that Claimant established total disability based on the medical opinions and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); *Poole*, 897 F.2d at 893-95; *Burns*, 855 F.2d at 501; Decision and Order at 14.

In light of our affirmance of the ALJ's findings that Claimant established thirty-eight years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2); Decision and Order at 14.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish 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 rebutted the presumption that Claimant suffers from clinical pneumoconiosis but did not rebut the presumption that he has legal

[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).

pneumoconiosis or that no part of his total disability was caused by it. Decision and Order at 20-26.

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).

Employer relies on Dr. Selby's opinion to disprove legal pneumoconiosis[12] and asserts the ALJ did not rationally explain why it is insufficient to satisfy Employer's burden of proof. Employer's Brief at 15-16. We disagree.

As the ALJ noted, Dr. Selby attributed Claimant's mild airflow obstruction solely to smoking and untreated asthma, and his blood gas impairment to untreated asthma and age. Director's Exhibit 20 at 5; Employer's Exhibit 6 at 8, 12-13. The ALJ permissibly found Dr. Selby's opinion unpersuasive because he did not sufficiently explain why coal dust does not "typically" exacerbate asthma or why, even assuming Claimant has untreated asthma, it is "highly likely" that coal mine dust exposure played no role in causing or aggravating his respiratory condition. Decision and Order at 24-25; *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013) (ALJ may reject an opinion that relies on generalities, rather than the specific facts of a case); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (ALJ may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure"); Decision and Order at 22-25. The ALJ also permissibly gave "no weight" to Dr. Selby's opinion that Claimant's decreased blood gas values are due in part to his age, as the physician provided "no support for his position." Decision and Order at 13; *see* 20 C.F.R. Part 718 Appendices B and C (the qualifying nature of pulmonary function study values depends on age, but blood gas studies do not).

Employer's arguments regarding legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. We therefore

[12] Drs. Cohen and Chavda diagnosed legal pneumoconiosis, while Dr. Rosenberg opined Claimant "possibly has a degree of legal [pneumoconiosis]." Employer's Exhibit 4 at 6-7; Claimant's Exhibits 7 at 3, 9 at 26-27; Director's Exhibit 10 at 11-12; Decision and Order at 22.

affirm the ALJ's finding that Employer did not disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 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 25-26. The ALJ permissibly discredited Dr. Selby's opinion on the cause of Claimant's pulmonary disability because he did not diagnose legal pneumoconiosis.[13] *See Burris*, 732 F.3d at 735; *Amax Coal Co. v. Director, OWCP*, 312 F.3d 882, 890 (7th Cir. 2002); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 25-26. We therefore affirm the ALJ's finding that Employer failed to establish that no part of Claimant's pulmonary disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[13] Dr. Selby did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of his conclusion that Claimant does not have the disease. Dr. Rosenberg did not offer an opinion on disability causation.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge