U.S. Department of Labor

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

BRB No. 21-0048 BLA

DONALD R. GIBSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 01/27/2022
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 Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05223) 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 subsequent claim filed on August 18, 2017.[1]

The ALJ found Claimant established at least twenty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the 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. 20 C.F.R. §725.309.[3] He 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 thus erred in finding he invoked the Section 411(c)(4) presumption.[4] Neither Claimant nor the Director, Office of Workers' Compensation Programs, have filed 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

[1] This is Claimant's second claim for benefits. Director's Exhibit 3. The district director denied Claimant's first claim, filed on September 24, 2012, because Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(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] Where a miner files a claim for benefits more than one year after the denial of a previous claim, 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)(1); *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 total disability in his most recent prior claim, he had to submit evidence establishing this element 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 twenty-four years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 4-5.

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 Associates, Inc.*, 380 U.S. 359 (1965).

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. 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 the relevant evidence supporting a finding of 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). 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 medical opinions.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17-20. He considered Dr. Forehand's opinion that Claimant is totally disabled and the opinions of Drs. Dahhan and McSharry that he is not. Decision and Order at 7-15; Director's Exhibits 13, 24, 26, 29, 30; Employer's Exhibits 1, 5, 6. He found Dr. Forehand's opinion reasoned and documented, and the opinions of Drs. Dahhan and McSharry not credible. Decision and Order at 17-20.

Employer argues the ALJ erred in crediting Dr. Forehand's total disability opinion because it alleges the opinion is based on Claimant's subjective symptoms and the need to avoid further coal mine dust exposure. Employer's Brief at 6-17. This argument has no merit. Although Dr. Forehand acknowledged Claimant's symptoms of cough, wheezing, sputum production, and dyspnea, and he indicated Claimant should avoid further dust exposure, he did not rely exclusively on those factors to diagnose total disability. Director's Exhibit 13. Rather he diagnosed Claimant with a mixed obstructive and

[5] 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); Decision and Order at 4; Hearing Tr. at 13.

[6] 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 6-7, 17.

restrictive ventilatory impairment based on pulmonary function testing. *Id*. He indicated the FEV1 value indicates Claimant has an insufficient "ability to increase ventilation in response to an increase in physical activity," and thus he is unable to "perform the physical demands" of his usual coal mine employment. *Id*. He further stated the "significant work-limiting respiratory impairment" leaves Claimant with insufficient "gas exchange capacities" to meet the demands of his work. *Id*. Thus contrary to Employer's argument, the ALJ did not err in finding Dr. Forehand's opinion can establish total disability. *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995); *Jordan v. Benefits Review Bd. of the U.S. Dep't of Labor,* 876 F.2d 1455, 1460-61 (11th Cir. 1989).

Employer next argues Dr. Forehand's opinion is not credible because it is based on non-qualifying[7] pulmonary function and arterial blood gas testing. Employer's Brief at 6-7. Contrary to Employer's contention, a physician may conclude a miner is disabled even if the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *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); 20 C.F.R. §718.204(b)(2)(iv). Moreover, as the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013).

The ALJ permissibly found Dr. Forehand's opinion "well-reasoned and supported by the objective medical evidence," and thus entitled to "significant weight." Decision and Order at 18; *see Cochran*, 718 F.3d at 324; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).[8]

[7] 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).

[8] Employer also argues the ALJ used the wrong standard in crediting Dr. Forehand's opinion because a recommendation against returning to the mines is not a finding of total disability. Even assuming the ALJ's opinion can be construed as crediting a portion of Dr. Forehand's testimony as recommending Claimant avoid further dust exposure for health reasons, *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988); Decision and Order at 8, 18, the ALJ also specifically concluded that Claimant was disabled because Dr. Forehand credibly opined he could not meet the increases in physical activity required by

Employer further argues the ALJ erred in discrediting Dr. McSharry's opinion. Employer's Brief at 11-13. We disagree. Dr. McSharry opined Claimant's pulmonary function testing evidences a "moderate airflow obstruction at baseline, which improves to mild airflow obstruction with bronchodilator treatment." Director's Exhibit 29. During his deposition, he testified Claimant "retain[s] the pulmonary capacity" to perform his usual coal mine employment because his lung function measurements "exceed[] the Department of Labor standards for disability . . . ." Employer's Exhibit 6 at 31-32.

As discussed above, the ALJ correctly recognized that total disability can be established with reasoned medical opinions even in the absence of qualifying pulmonary function or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19-20. He rationally rejected Dr. McSharry's opinion because the doctor did not adequately explain whether Claimant is totally disabled from his usual coal mine employment by the moderate obstructive impairment even if the pulmonary function testing is non-qualifying.[9] *See Hicks*, 138 F.3d at 533; *Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 577; Decision and Order at 19-20. Thus we affirm the ALJ's decision to discredit Dr. McSharry's opinion.[10]

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his last usual coal mine employment. Decision and Order at 8. Consequently, the ALJ applied the correct total disability standard.

[9] Employer argues the ALJ failed to address Dr. McSharry's explanation that Claimant is not totally disabled because his exercise blood gas testing reflects normal oxygen levels at peak exercise and he was "able to exercise on a treadmill . . . without evidence of problems." Employer's Brief at 12-13; Employer's Exhibit 6 at 23-24, 31. Contrary to Employer's argument, the ALJ recognized this aspect of Dr. McSharry's opinion. Decision and Order at 19-20. Although Dr. McSharry opined Claimant has no impairment on blood gas testing, the ALJ correctly found pulmonary function studies and blood gas studies measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797 (1984); Decision and Order at 20. Thus the ALJ permissibly found the absence of an impairment on blood gas testing is an inadequate explanation for why Claimant's obstructive impairment on pulmonary function testing is not totally disabling. *Id*.

[10] Because the ALJ provided a valid reason for discrediting Dr. McSharry's exclusion of total disability, we need not address Employer's remaining arguments that the ALJ erred in weighing this medical opinion. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *see* Employer's Brief at 11-13.

Employer also generally argues the ALJ erred in discrediting Dr. Dahhan's opinion, asserting that the doctor "incorporated the results of the exercise testing, a medically acceptable clinical and laboratory diagnostic technique, to explain why" Claimant is not totally disabled. Employer's Brief at 12, 15. This argument is 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). Because Employer fails to identify or explain how the ALJ erred in weighing Dr. Dahhan's opinion, we affirm his decision to discredit it. *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); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established total disability based on the medical opinion evidence and the evidence 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 19-20. We therefore affirm his determination that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309. Moreover, because Employer does not challenge the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption, we affirm that determination. *See Skrack*, 6 BLR at 1-711; Decision and Order at 20-28. We therefore affirm the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge