U.S. Department of Labor

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

BRB No. 21-0351 BLA

ALBERT C. MICHALIDES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL PENNSYLVANIA COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 01/06/2023
CONSOL ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2020-BLA-05438) rendered on a claim filed on April 3, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with forty-nine 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). Thus, she found 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). She 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. Employer further argues she erred in finding it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief, unless requested to do so.

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 (1965).

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had 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.

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

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14, 26; Director's Exhibit 9.

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. *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 the pulmonary function study and medical opinion evidence establishes total disability.[4] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 10-18. Weighing all the evidence together, she found Claimant established total disability. Decision and Order at 17-18.

Employer does not challenge the ALJ's finding that the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10-11. Thus we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the ALJ erred in weighing Drs. Basheda's and Rosenberg's medical opinions. Employer's Brief at 5-7.

The ALJ noted that both doctors initially opined Claimant has a totally disabling obstructive respiratory impairment based on pulmonary function testing. Decision and Order at 13-17. However, they concluded Claimant is able to perform his usual coal mine employment notwithstanding the objective testing because he had returned to coal mine employment as a mechanic helper from February 3, 2020 to April 10, 2020. Decision and Order at 13-17.

[4] The ALJ found the arterial blood gas studies did not support total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 9 n.5, 11-12.

Specifically, in his initial report, Dr. Basheda opined Claimant's March 13, 2020 qualifying[5] pulmonary function study demonstrates a "severely reduced FEV1 [value] that would classify [Claimant with] a Class IV (51-100%) impairment of the whole person" under the American Medical Association (AMA) guides to the evaluation of permanent disability. Employer's Exhibit 2 at 38. With this impairment level, Dr. Basheda opined Claimant could not perform "any coal mining work."[6] *Id*. In a supplemental report, Dr. Basheda indicated he learned Claimant had "returned to his usual coal mining work on February 3, 2020" and then stopped working on April 10, 2020, because he was furloughed. Employer's Exhibit 4 at 3-4. As a result, Dr. Basheda changed his opinion and concluded Claimant is not totally disabled from working as a mechanic helper, explaining "there is a discordance, at times, between pulmonary function test results and a person's functional capacity." *Id*. Noting Claimant "apparently can perform his last coal mining work without any difficulty," Dr. Basheda opined Claimant is not totally disabled "despite the objective data." *Id*.

Dr. Rosenberg reviewed the objective testing of record, including the qualifying March 13, 2020 pulmonary function study. Employer's Exhibit 6. He opined Claimant has a severe airflow obstruction evidenced by pulmonary function testing based on a "marked reduction of his FEV1 down to [thirty-three percent] predicted or lower combined with [a] severely reduced" FEV1/FVC ratio. Employer's Exhibit 6 at 10. Nonetheless, he opined Claimant is not totally disabled from working as a mechanic helper because he was still working and thus "remained functionally compensated" until retiring. *Id*.

As the ALJ correctly noted, the regulation at 20 C.F.R. §718.204(e)(2) states that "[i]n the case of a living miner, proof of current employment in a coal mine shall not be conclusive evidence that the miner is not totally disabled unless it can be shown that there are no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work." 20 C.F.R. §718.204(e)(2). Changed circumstances of employment indicative of a miner's reduced ability to perform his usual coal mine work include a "miner's transfer by request or assignment to less vigorous duties or to duties in a less dusty part of the mine." 20 C.F.R. §718.204(e)(3)(iii).

[5] A "qualifying" pulmonary function study yields results 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 exceeding those values. See 20 C.F.R. §718.204(b)(2)(i).

[6] Dr. Basheda also opined Claimant has a significant oxygenation impairment based on a six-minute walk pulse oximetry test that would prevent Claimant from performing coal mining work. Employer's Exhibit 2 at 38-40; 8 at 27.

Both Drs. Basheda and Rosenberg excluded a diagnosis of total disability based on the fact that Claimant worked as a mechanic helper from February 3, 2020 to April 10, 2020. The ALJ found, however, that Claimant worked as a mechanic helper as a result of changed circumstances. Decision and Order at 4-5, 17. She noted Claimant testified that because his "black lung [was] so bad" and he was having trouble breathing, he asked to be "moved from his previous mining position on the longwall to a 'barn job,' a position as a mechanic helper, where he took a small reduction in pay, was exposed to less dust, and would work servicing and washing machinery." *Id.*, *quoting* Employer's Exhibit 7 at 36, 40-41. She also noted Claimant testified "that this job as a mechanic helper was less exertional than his previous mining jobs." *Id.*, *quoting* Employer's Exhibit 7 at 38. Contrary to Employer's argument, the ALJ permissibly found Claimant's return to coal mine employment from February 3, 2020 to April 10, 2020 as a mechanic helper is not a basis to conclude he is not totally disabled, as his transfer to this less vigorous, less dusty job constitutes a change in circumstances under 20 C.F.R. §718.204(e)(2), (3)(iii).[7] *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). Because the only basis set forth by Drs. Basheda and Rosenberg to support their opinions that Claimant is not totally disabled is that he worked as a mechanic helper from February 3, 2020 to April 10, 2020, the ALJ rationally discredited their opinions. *Balsavage*, 295 F.3d at 396; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order at 17.

Thus, we affirm, as supported by substantial evidence, the ALJ's determination that the contrary medical opinion evidence does not undermine her finding that Claimant established total disability based on the pulmonary function study evidence.[8] *See*

[7] Contrary to Employer's contention, the ALJ did not find Claimant's job as a mechanic helper is his usual coal mine employment; rather she found "Claimant's last position in the coal mines was that of a mechanic helper," a less dusty, less exertional job he requested due to his breathing problems. Decision and Order at 6. Claimant's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). If a miner's most recent job was obtained because of his inability, from a respiratory standpoint, to perform his prior job, the most recent job should not be considered his usual coal mine employment. *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201, 1-204-05 (1986); *Pifer*, 8 BLR at 1-155.

[8] The ALJ also found Dr. Celko's opinion diagnosing total disability is reasoned and documented. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16-17. Because we affirm the ALJ's finding that Claimant established total disability through pulmonary function testing at 20 C.F.R. §718.204(b)(2)(i), and the contrary medical opinions of Drs.

Balsavage, 295 F.3d at 396; 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 17-18. Because there is no evidence undermining the pulmonary function study evidence, we further affirm the ALJ's conclusion 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.

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,[9] 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.[10]

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

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Basheda and Rosenberg do not undermine the pulmonary function study evidence, any error in finding total disability established through Dr. Celko's medical opinion at 20 C.F.R. §718.204(b)(2)(iv) is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] "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).

[10] As the ALJ found Employer disproved clinical pneumoconiosis, we need not address Employer's argument regarding the ALJ's finding that Claimant's CT scans support a finding of clinical pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (explaining an appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 7, 18.

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

The ALJ considered the opinions of Drs. Basheda and Rosenberg that Claimant does not have legal pneumoconiosis. Employer's Exhibits 2, 4, 6, 8, 9. Dr. Basheda diagnosed an obstructive respiratory impairment consistent with chronic obstructive pulmonary disease (COPD) and emphysema with an asthmatic component due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 2 at 35, 8 at 25. Dr. Rosenberg similarly opined Claimant's COPD and emphysema are due to smoking and unrelated to coal mine dust exposure. Employer's Exhibit 6 at 11-17; 9 at 21-23, 28-29. Contrary to Employer's contention, substantial evidence supports the ALJ's finding their opinions inadequately reasoned and contrary to the preamble to the 2001 revised regulations. Decision and Order at 21-22.

Dr. Basheda opined Claimant's obstructive impairment is partially reversible with bronchodilators. Employer's Exhibits 2, 8. He explained coal mine dust exposure causes a fixed, irreversible impairment. *Id.* As Dr. Basheda conceded Claimant's impairment is not fully reversible, the ALJ permissibly discredited his opinion because he did not "adequately address the additive properties of coal mine dust and tobacco smoke exposures, especially in light of the fact that Claimant had significant exposure to both."[11] *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 22.

Dr. Rosenberg opined Claimant's COPD is due to cigarette smoking and unrelated to coal mine dust exposure because Claimant's pulmonary function testing revealed a reduced FEV1/FVC ratio, which he indicated is inconsistent with legal pneumoconiosis. Employer's Exhibits 2, 7 at 21-24. The ALJ permissibly found this rationale conflicts with the medical science set forth in the preamble that "a reduction in the FEV1/FVC ratio is a marker for obstructive lung disease, including that caused by coal mine employment." Decision and Order at 22; *see Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

[11] Because the ALJ provided a valid reason for discrediting Dr. Basheda's opinion, we need not address Employer's remaining arguments regarding the weight she accorded his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 9-10.

Furthermore, the ALJ acknowledged Dr. Rosenberg opined that more recent medical studies and literature establish that an earlier Attfield and Hodous study the DOL relied on in the preamble to the 2001 regulatory revisions underestimates the negative effects of cigarette smoking. Decision and Order at 22; Employer's Exhibit 6 at 13-15. Contrary to Employer's contentions, ALJ permissibly found the more recent medical literature and studies Dr. Rosenberg identified for the proposition that cigarette smoking is more detrimental than coal mine dust exposure neither negate the results of the earlier studies cited in the preamble demonstrating that coal mine dust is detrimental, nor explain why coal mine dust is not a contributing or aggravating factor along with smoking in Claimant's "significant obstructive lung disease." Decision and Order at 22; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (observing only one of the employer's medical experts "cited literature that post-dates the Preamble – none of which appears to even discuss the effects of coal mine dust exposure on the lungs").

Because the ALJ permissibly discredited the opinions of Drs. Basheda and Rosenberg, we affirm her finding that Employer did not disprove legal pneumoconiosis.[12] *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Balsavage*, 295 F.3d at 396; Decision and Order at 22. 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). She permissibly discredited the opinions of Drs. Basheda and Rosenberg regarding the cause of the Claimant's total respiratory disability because both failed to diagnose legal pneumoconiosis, contrary to her finding Employer did not rebut the presumption of the disease *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Employer's Brief at 11. Therefore, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's total respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[12] We need not address Employer's arguments regarding Dr. Celko's opinion because it does not assist Employer in proving that Claimant does not have legal pneumoconiosis. Employer's Brief at 8-9.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge