U.S. Department of Labor

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

BRB No. 23-0258 BLA

JOHN D. OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ORANGE CONSTRUCTION CORPORATION	)	
	)	
	)	DATE ISSUED: 01/18/2024
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2020-BLA-05817) rendered on a claim filed on November 2, 2018, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least fifteen years of qualifying surface coal mine employment and found Claimant established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4). However, he found Claimant did not establish a totally disabling respiratory or pulmonary impairment and therefore could not invoke 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); *see* 20 C.F.R. §718.305. Because Claimant failed to establish an essential element of entitlement, he denied benefits.

On appeal, Claimant argues the ALJ erred in finding he is not totally disabled. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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.[2] 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 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 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);

[1] 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.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 23-24; Director's Exhibit 4.

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).

Claimant contends the ALJ erred in finding that he did not establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole.[3] Claimant's Brief at 6.

Medical Opinions

The ALJ considered the opinions of Drs. Scattaregia, Werntz, and Zaldivar. Decision and Order at 18-20; Director's Exhibit 13; Employer's Exhibits 2, 3. Dr. Scattaregia diagnosed chronic bronchitis, chronic obstructive pulmonary disease (COPD), and a granuloma of the right lung. Director's Exhibits 13, 34. He opined Claimant has a moderate obstructive impairment that "may" prevent him from doing his last coal mine job, which he described as requiring moderate exertion. *Id*. Dr. Werntz similarly described the exertional demands of Claimant's last coal mine job as at the "upper end of the moderate aerobic demand category." Employer's Exhibit 2 at 1. Further, he noted Claimant's report of being able to walk over one mile on flat ground or one hundred yards uphill before needing to stop and catch his breath. *Id*. at 2. Dr. Werntz opined Claimant's exercise blood gas testing suggests he "should be able to sustain at least 9 METS of exertion, which would be adequate for all coal mine employment." *Id*. Dr. Zaldivar noted Claimant's blood gas study was normal and that Claimant's ventilatory study shows a moderate airway obstruction. Employer's Exhibit 3 at 2. Despite Claimant's airway obstruction, Dr. Zaldivar opined Claimant is fully capable of performing his work in the mines. *Id*. at 4.

The ALJ found Dr. Scattaregia's opinion, that Claimant's impairment *may* prevent him from performing his last coal mine job, to be equivocal and thus not well-reasoned. Decision and Order at 19. Further, the ALJ found the opinions of Drs. Werntz and Zaldivar to be supported by the non-qualifying objective evidence of record.[4] *Id*. Consequently, he

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii) based on the pulmonary function or blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14-18.

[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.

found Claimant failed to establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. *Id.* at 18-20; *see* 20 C.F.R. §718.204(b)(2).

We reject Claimant's assertion that the ALJ erred when he "summarily dismissed" Dr. Scattaregia's opinion as equivocal because the doctor "credibly explained that Claimant would be unable to perform his last coal mine employment based on the abnormal, albeit non-qualifying[,] . . . objective test results." Claimant's Brief at 6. Contrary to Claimant's contention, the ALJ permissibly found Dr. Scattaregia's opinion equivocal and not well-reasoned because he neither definitively nor sufficiently explained whether the obstructive impairment he diagnosed would prevent Claimant from performing the exertional requirements of his usual coal mine work. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (ALJ may reject an equivocal medical opinion); Decision and Order at 19-20; Director's Exhibit 13. Claimant's argument amounts to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). Thus, we affirm the ALJ's finding that Dr. Scattaregia's opinion is not credible. Decision and Order at 19-20. Because Dr. Scattaregia's opinion is the only medical opinion potentially supportive of Claimant's burden of establishing total disability,[5] we affirm the ALJ's finding that the medical opinions do not support total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18-20.

As Claimant has not established total disability through any of the methods at 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the ALJ's finding that Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2). In addition, we affirm the ALJ's finding that Claimant did not establish entitlement to benefits as he has failed to establish an essential element of entitlement.[6] *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc); Decision and Order at 20.

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

[5] As neither Dr. Werntz nor Dr. Zaldivar opined Claimant has a totally disabling pulmonary or respiratory impairment, we need not address Claimant's argument that the ALJ erred in crediting their opinions. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Brief at 6; Employer's Exhibits 2, 3.

[6] As we affirm the ALJ's finding that Claimant failed to establish total disability, a requisite element of entitlement, we need not address Employer's contention that the ALJ

erred in finding it was the properly designated responsible operator. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 10-13.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge