U.S. Department of Labor

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

BRB No. 24-0087 BLA

JOHN A. SEAMAN Claimant-Respondent v. MEPCO LLC Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 01/30/2025 DECISION and ORDER

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

Deanna Lyn Istik (Sinatra & Istik Law Office, PLLC), Cranberry Township, Pennsylvania, for Claimant.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2023-BLA-05281) rendered on a claim filed on June 29, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of twenty-nine years of coal mine employment. The ALJ found Claimant performed all of his coal mine employment underground and that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he 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). 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.[2] Claimant responds in support of the award of benefits. The Acting 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.[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 and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[4] evidence of

[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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-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 4-7.

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 13; Director's Exhibit 5.

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

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).

Employer challenges the ALJ's conclusion that Claimant established total disability based on the medical opinions and evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20-24.

Medical Opinions

The ALJ weighed the medical opinions of Drs. Celko, Vuskovich, Rosenberg, Fino, and Sood.[6] Decision and Order at 11-14, 20-24. Drs. Fino and Sood opined Claimant is totally disabled, while Drs. Vuskovich and Rosenberg opined he is not, and Dr. Celko initially opined Claimant is not disabled but later opined he is disabled. Director's Exhibits 19, 25, 33, 35; Claimant's Exhibits 1, 1a; Employer's Exhibits 3, 6. The ALJ found Dr. Celko's opinion was not well-reasoned because of inconsistencies between his initial and supplemental reports[7] as to whether Claimant is totally disabled and because he failed to address the exertional requirements of Claimant's last coal mine job. Decision and Order at 23; Director's Exhibits 19 at 4; 35 at 1. In addition, the ALJ discredited Dr. Vuskovich's opinion because it conditioned Claimant's ability to perform his last coal mining job on him receiving treatment for his asthma.[8] Decision and Order at 23; Director's Exhibit 33 at 18. The ALJ found the opinions of Drs. Rosenberg, Fino, and Sood well-reasoned and

[5] The ALJ found the pulmonary function and arterial blood gas studies do not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 18-19.

[6] The ALJ determined Claimant's last coal mine employment as a mechanic/battery repairman required medium work. Decision and Order at 20 n.17; Hearing Transcript at 13-14; Director's Exhibit 5.

[7] In his original report, Dr. Celko opined Claimant is not disabled from a pulmonary standpoint. Director's Exhibit 19 at 4. In his supplemental report, Dr. Celko stated that he "continu[ed] to believe that [Claimant] is totally disabled[,]" but failed to address the inconsistency between his two reports. Director's Exhibit 35 at 1.

[8] As Employer does not challenge the ALJ's discrediting of Dr. Vuskovich's opinion, we affirm the finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 23.

worthy of "great weight" based on their credentials and understanding of the exertional requirements of Claimant's last coal mine job. Decision and Order at 23-24. The ALJ then concluded that "[t]he majority of experts' opinions given weight" on the issue of total disability demonstrate Claimant has a totally disabling pulmonary impairment. *Id*. at 24.

Employer contends that the ALJ's failure to consider a non-qualifying October 19, 2022 pulmonary function study[9] "tainted" his weighing of the physicians' opinions. Specifically, Employer argues the opinions of Drs. Fino and Sood are not credible to establish Claimant is totally disabled because they also failed to review the October 19, 2022 non-qualifying study.[10] Employer's Brief at 4-7; Employer's Evidence Summary Form at 8; Employer's Exhibit 5. We disagree.

Contrary to Employer's argument, a medical opinion need not be discounted merely because the physician did not review additional medical evidence of record. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986) (ALJ properly considered whether objective data offered as documentation adequately supported the opinion); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion).

Here, Drs. Fino and Sood both identified disabling respiratory or pulmonary impairments based, in part, on their review of Claimant's non-qualifying pulmonary function study results.[11] Director's Exhibit 25 at 7, 10; Claimant's Exhibit 1 at 6, 10-11.

[9] The study is included in Claimant's treatment records that Employer submitted as Employer's Exhibit 5.

[10] Employer concedes that any error the ALJ made in not considering the non-qualifying October 19, 2022 study at 20 C.F.R. §718.204(b)(2)(i) is harmless because the ALJ determined the pulmonary function study evidence does not support a finding of total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 18; Employer's Brief at 5 n.1; Employer's Exhibit 5.

[11] Specifically, Dr. Fino stated the spirometry results "show[] a moderate obstructive ventilatory defect as evidenced by a reduction in the FEV1 and the FEV1/FVC ratio[,]" that the results were consistent with asthma, and that Claimant is disabled from continuing his last coal mine work by his asthma and emphysema. Director's Exhibit 25 at 7, 10. Dr. Sood noted that "[a]lthough the most recent valid spirometry test[,] dated April 6, 2022, did not meet the criteria for total disability, a pre-bronchodilator FEV1 value of 67% predicted is not consistent with the ability to perform heavy and very heavy physical labor." Claimant's Exhibit 1 at 10.

The ALJ accurately summarized Drs. Fino's and Sood's opinions and permissibly credited their opinions based on their credentials and understanding of the exertional requirements of Claimant's last coal mine job. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order at 13-14, 22-24; Director's Exhibit 25; Claimant's Exhibits 1, 1a.

Employer speculates that Drs. Fino and Sood may have changed their opinion if they had considered the non-qualifying October 19, 2022 study. Employer's Brief at 5-6. However, as both physicians took into account the non-qualifying nature of the pulmonary function studies they did review, Employer has failed to explain how consideration of one additional non-qualifying study, without reference to any specific results, would have impacted their disability findings. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Additionally, apart from its general assertion of error, Employer has not sufficiently explained how the ALJ's failing to consider the October 19, 2022 study would have impacted his consideration of Drs. Fino's and Sood's opinions. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 4-6. As Employer raises no other challenges to the ALJ's weighing of Drs. Fino's and Sood's opinions, we affirm his determination that they are entitled to "great weight." Decision and Order at 23-24.

Finally, we reject Employer's argument that the ALJ erred by impermissibly "head counting" as he conducted both a qualitative and quantitative analysis in finding Claimant established total disability based on the medical opinion evidence. Employer's Brief at 7. Here, the ALJ properly reviewed each medical opinion individually to determine whether they were well-reasoned and worthy of probative weight. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 11-14, 19-24. Only after assigning probative weight to each physician did the ALJ permissibly determine that "the majority of the opinions *given weight*" support a finding that Claimant could not perform his last coal mine job. Decision and Order at 24 (emphasis added); *see Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53, 255-56 (4th Cir. 2016) (ALJ must conduct an appropriate analysis of the evidence to support his conclusions and render necessary credibility findings).

Employer's arguments regarding the ALJ's weighing of the medical opinions amount to a request to reweigh the evidence, which the Board may not do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). 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 24. We therefore also affirm the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); Decision and Order at 15-16.

Additionally, 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 v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15-16, 25-27.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge