U.S. Department of Labor

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

BRB No. 22-0027 BLA

RAYMOND R. COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KISER BROTHERS COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 7/13/2023
	)	
INSURANCE OF WAUSAU c/o LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
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 on Remand of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds) Norton, Virginia, for Claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits on Remand (2018-BLA-05852) 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 miner's claim filed on September 30, 2016,[1] and is before the Benefits Review Board for the second time.

In his initial July 31, 2019 Decision and Order Awarding Benefits, the ALJ credited Claimant with fifteen years of underground coal mine employment based on the parties' stipulation, and found Claimant established complicated pneumoconiosis, thus invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and establishing a change in an applicable condition of entitlement.[2] 20 C.F.R. §725.309. He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits.

In consideration of Employer's appeal, the Board affirmed the ALJ's determination that Claimant had fifteen years of underground coal mine employment but held the ALJ erred in weighing the evidence on the issue of complicated pneumoconiosis. *Collins v. Kiser Bros. Coal Co.*, BRB No. 19-0482 BLA, slip op. at 3 n.3 (Sept. 23, 2020) (unpub.).

[1] Claimant filed two previous claims. Director's Exhibits 1, 2. On March 22, 1993, the district director denied his initial claim, filed on September 23, 1992, because Claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed and withdrew a second claim. Director's Exhibit 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[2] When a claimant files a claim for benefits more than one year after the final denial of a previous claim becomes final, the ALJ must 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); *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 prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

It thus vacated his finding that Claimant invoked the Section 411(c)(3) presumption and remanded the case for further consideration.[3] *Id*. at 6-7.

On remand, the ALJ determined Claimant did not establish complicated pneumoconiosis and thus could not invoke the Section 411(c)(3) presumption. Decision and Order on Remand at 6. He found, however, that Claimant established a totally disabling respiratory or pulmonary impairment and thus invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4), and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b), 718.305, 725.309. He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding claimant established total disability and thus invoked the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response.

The 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.[5] 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).

[3] The Board further declined to consider, as moot, Employer's argument that the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), is unconstitutional because the ALJ did not award benefits based on the Section 411(c)(4) presumption. *Collins v. Kiser Bros. Coal Co.*, BRB No. 19-0482 BLA, slip op. at 3 (Sept. 23, 2020) (unpub.).

[4] 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.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989); Hearing Tr. at 10; Director's Exhibit 5.

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

Employer summarily "objects to the application of 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(*l*) because section 1556 of the Affordable Care Act, Pub. Law 111-148, reviving these provisions, violates Article II of the United States Constitution." Employer's Brief at 3. Employer has failed to adequately brief its challenge to the constitutionality of the Section 411(c)(4) presumption. *See* 20 C.F.R. §802.211(b); *see also Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57 (1994). Moreover, even had Employer set forth arguments with respect to the constitutionality of the Affordable Care Act and the severability of its amendments to the Act, those arguments are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

Invocation of the Section 411(c)(4) Presumption: Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 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). The ALJ found Claimant established total disability based on the medical opinion evidence and the evidence as a whole.[6] Decision and Order on Remand at 8.

The ALJ considered the medical opinions of Drs. Green, Nader, and Raj that Claimant is totally disabled and the opinion of Dr. Rosenberg that he is not.[7] Decision and

[6] The ALJ determined that the pulmonary function studies 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 on Remand at 4, 6.

[7] Dr. Green initially opined Claimant is not totally disabled based on the pulmonary function and arterial blood gas studies. Director's Exhibit 14 at 4 (before us as Director's Exhibit 15). After reviewing Dr. DePonte's reading of the January 26, 2017 x-ray diagnosing complicated pneumoconiosis, he revised his opinion, indicating Claimant is disabled based on the x-ray demonstrating complicated pneumoconiosis. Director's

Order on Remand at 6-8; Director's Exhibits 14, 20, 25 (before us as Director's Exhibits 15, 21, 25); Claimant's Exhibits 1, 2; Employer's Exhibits 1, 4. The ALJ gave Drs. Green's and Nader's opinions little weight because they were based entirely on the conclusion that Claimant has complicated pneumoconiosis, contrary to his finding that Claimant did not establish the disease. Decision and Order on Remand at 6-7; Director's Exhibit 20 at 2 (before us as Director's Exhibit 21); Claimant's Exhibit 1. Although he found Drs. Raj's and Rosenberg's opinions reasoned and documented, he credited Dr. Raj's opinion over Dr. Rosenberg's because "only Dr. Raj's opinion takes into consideration Claimant's physical limitations due to his shortness of breath on exertion." Decision and Order on Remand at 7-8. He thus found the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).

Employer asserts the ALJ erred in crediting Dr. Raj's opinion, asserting that, like Drs. Green and Nader, his opinion that Claimant is totally disabled is based on his erroneous conclusion that Claimant has complicated pneumoconiosis. Employer's Brief at 3-5. We disagree.

As the ALJ observed, in addition to opining Claimant has complicated pneumoconiosis, Dr. Raj diagnosed clinical pneumoconiosis causing shortness of breath with exertion such that Claimant is unable to perform his usual coal mine work.[8] Decision and Order on Remand at 7; Claimant's Exhibit 2 at 3. The ALJ further permissibly found Dr. Raj's opinion reasoned and documented because he had an accurate understanding of the exertional requirements of Claimant's usual coal mine work and explained that Claimant's shortness of breath with exertion would prevent him from being able to perform that work. *See Jericol Mining, Inc., v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *see also Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (physician who asserts whether a miner is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991).

Employer also contends the ALJ erred in crediting Dr. Raj's opinion *over* Dr. Rosenberg's, arguing the ALJ incorrectly found that only Dr. Raj took into consideration Claimant's shortness of breath with exertion. Employer's Brief at 4. We disagree.

Exhibit 20 at 2 (before us as Director's Exhibit 21). He noted, however, that his revised opinion was based entirely on the x-ray evidence of complicated pneumoconiosis. *Id.*

[8] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's usual coal mine work required moderate-to-heavy exertion. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7.

Contrary to Employer's contention, Dr. Rosenberg acknowledged Claimant reported shortness of breath with activities of daily living, Employer's Exhibit 1 at 1, but did not explain why Claimant would be able to perform his usual coal mine work given his shortness of breath. Thus, although Dr. Rosenberg concluded Claimant is disabled as a whole person due to heart disease, the ALJ permissibly found his opinion undermined by his failure to address whether Claimant's shortness of breath with exertion would prevent him from performing his usual coal mine work. *Id.* at 2.

The ALJ has discretion to weigh the medical evidence and draw his own inferences. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-77 (6th Cir. 2013); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Napier*, 301 F.3d at 713-14. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *See Morrison v. Tenn. Consol. Col Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in weighing the opinions of Drs. Green, Nader, Raj, and Rosenberg, we affirm his finding that the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2) as it is supported by substantial evidence. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence that a reasonable mind could accept as adequate to support a conclusion). As Employer raises no additional arguments, we affirm the ALJ's finding that Claimant established total disability based on his consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR 1-232.

As Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's finding that he invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. Decision and Order at 8; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §§718.305, 725.309. Because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge