U.S. Department of Labor

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

BRB No. 22-0138 BLA

WILLIAM R. ROSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAGNET COAL, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 7/13/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2020-BLA-05287) 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 November 20, 2018.[1]

The ALJ found Claimant established 22.19 years of coal mine employment in underground mines and surface mines in conditions substantially similar to those underground, and 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, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement,[3] 20 C.F.R. §725.309(c). He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established a totally disabling respiratory or pulmonary impairment necessary to invoke the Section 411(c)(4)

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[1] This is Claimant's second claim for benefits. On June 15, 1999, the district director denied his prior claim, filed on February 1, 1999, because he failed to establish total disability. Director's Exhibit 1. Claimant took no further action until filing his current claim. Director's Exhibit 3.

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, 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 prior claim, he had to submit new evidence establishing this element of entitlement to obtain review of the merits of his current claim. *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Decision and Order at 15-16.

presumption. It also argues the ALJ erred in finding it did not rebut the presumption.[4] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[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).

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)(i). 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 qualifying[6] pulmonary function studies or 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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).

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[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 22.19 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6.

[5] 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); Director's Exhibit 4; Hearing Tr. at 29.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields results 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 results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 17-20.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated December 21, 2018, January 29, 2020, August 13, 2020, and August 25, 2020. Decision and Order at 8-9, 17-18; Director's Exhibit 17; Claimant's Exhibits 4, 5; Employer's Exhibit 3. The December 21, 2018 study Dr. Agarwal conducted produced non-qualifying values before the administration of bronchodilators and qualifying values after the administration of bronchodilators. Director's Exhibit 17. The January 29, 2020 study Dr. Zaldivar conducted produced non-qualifying values before and after the administration of bronchodilators. Employer's Exhibit 3. The August 13, 2020 study Dr. Wachowski conducted produced qualifying values before and after the administration of bronchodilators. Claimant's Exhibit 4. Finally, the August 25, 2020 study Dr. Raj conducted produced qualifying values before the administration of bronchodilators and non-qualifying values after the administration of bronchodilators. Claimant's Exhibit 5.

The ALJ found the August 13, 2020 and August 25, 2020 pre-bronchodilator studies, which are qualifying based on their FEV_1 and MVV values,[8] entitled to greater weight because "they are the most recent and more indicative of Claimant's current disability." Decision and Order at 17. Further, he found the pre-bronchodilator values of the August 25, 2020 study entitled to more weight than its post-bronchodilator values, as "the question is whether Claimant can perform his last coal mine job, not whether Claimant can perform his duties while medicated." *Id.* In addition, he found the non-qualifying pre-bronchodilator values of the December 21, 2018 study and the non-qualifying pre- and post-bronchodilator values of the January 29, 2020 study entitled to less weight because

[7] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies 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 18.

[8] For a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce both a qualifying FEV_1 value and one of the following: either an FVC value or MVV value equal to or less than the values appearing in the tables set forth in Appendix B, or an FEV_1/FVC ratio equal to or less than fifty-five percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). The qualifying values in Appendix B are based on gender, height, and age. 20 C.F.R. Part 718, Appendix B.

these studies do not contain MVV values.[9] *Id.* He thus concluded the "weighted" pulmonary function study evidence supports a finding of total disability. *Id.*

The ALJ's finding that the qualifying pre-bronchodilator August 13, 2020 pulmonary function study is entitled to greater based on its recency is unchallenged; thus, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

Employer generally argues the ALJ erred in weighing the qualifying pre-bronchodilator August 25, 2020 pulmonary function study because he "accorded more weight to [its] results than Dr. Raj did."[10] Employer's Brief at 6. But Employer has not identified any specific error in the ALJ's finding that the pre-bronchodilator August 25, 2020 study is qualifying for total disability and entitled to greater weight based on its recency. *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, 109 (1983); 20 C.F.R. §802.211(b); Decision and Order at 17. Rather, Employer'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, 1-113 (1989).

We also reject Employer's argument that the ALJ erred in finding the non-qualifying pre- and post-bronchodilator results of the January 29, 2020 pulmonary function study entitled to less weight because they did not contain MVV values. Employer's Brief at 6-7. The ALJ has discretion to weigh the evidence, draw appropriate inferences, and

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[9] As Employer does not challenge the ALJ's weighing of the non-qualifying pre-bronchodilator values of the December 21, 2018 pulmonary function study, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17.

[10] Employer suggests that the ALJ erred in crediting the August 25, 2020 study because, in general reference to Claimant's objective test results, Dr. Raj stated "Claimant does not quite meet the Federal Black Lung standards for total disability." Employer's Brief at 6. Contrary to Employer's argument, the inquiry at 20 C.F.R. §718.204(b)(2)(i) is whether the pulmonary function study produces values that qualify for total disability as set forth in the tables at Appendix B to 20 C.F.R. Part 718. Notwithstanding Dr. Raj's statement, the ALJ accurately found the pre-bronchodilator results of the August 25, 2020 pulmonary function study qualify for total disability. Decision and Order at 17. Moreover, as discussed below, Dr. Raj specifically opined that the results of Claimant's pulmonary function studies and blood gas studies "represent[] [a] significant level of pulmonary impairment and gas exchange abnormality" that renders him incapable of performing his previous coal mine work and thus "totally disabled." Claimant's Exhibit 5.

determine credibility. *See Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 756 (4th Cir. 1999)*; Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 530 (4th Cir. 1998)*; Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 439-40 (4th Cir. 1997). Here, he recognized "a physician has the discretion to test for MVV values when administering a pulmonary function test," and acted within his discretion in finding "Dr. Zaldivar's lack of explanation for not testing Claimant's MVV values" unreasoned because "Claimant's other pulmonary function studies . . . [have] qualifying MVV values, . . . he was the only physician not to test for MVV values[,] and . . . Claimant's cooperation was not questioned." Decision and Order at 17; *see Mays,* 176 F.3d at 756*; Hicks,* 138 F.3d at 530*; Akers,* 131 F.3d at 439-40. Because Employer raises no further argument, we affirm the ALJ's finding that the pulmonary function studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 18.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Agarwal, Werchowski, Raj, Zaldivar, and Spagnolo. Decision and Order at 18-19. Drs. Agarwal, Werchowski, and Raj opined Claimant has a totally disabling pulmonary or respiratory impairment, and Drs. Zaldivar and Spagnolo opined he does not. Director's Exhibit 17 at 5; Claimant's Exhibits 4 at 8; 5 at 5-6; Employer's Exhibits 3 at 4; 9 at 13; 13 at 24; 14 at 26-27. The ALJ found Drs. Werchowski's and Raj's opinions well-reasoned and well-documented. Decision and Order at 19. He found Dr. Agarwal's opinion unpersuasive because it is based on MVV values that do not "conform" to the regulatory quality standards, and Drs. Zaldivar's and Spagnolo's opinions unpersuasive because they did not adequately consider Claimant's qualifying pulmonary function studies. *Id.* Thus, he found the medical opinion evidence supports a finding of total disability based on Drs. Werchowski's and Raj's opinions. *Id.*

Employer argues the ALJ inaccurately characterized Dr. Raj as opining that Claimant is totally disabled "based on the [pulmonary function] testing . . . [he conducted] when he did not." Employer's Brief at 6. We disagree. Although Dr. Raj stated that Claimant "does not quite meet the Federal Black Lung standards for total disability," he specifically opined Claimant's "[pulmonary function test] and exercise [blood gas test] still represent[] [a] significant level of pulmonary impairment and gas exchange abnormality" that prevents him from "meet[ing] the exertion requirement of his last job" and renders him "totally disabled." Claimant's Exhibit 5 at 5. Thus, contrary to Employer's argument, the ALJ correctly stated "Dr. Raj opined that Claimant was totally disabled from a pulmonary standpoint based on his abnormal chest x-ray, pulmonary function test revealing moderate obstructive defect, and abnormal arterial blood gases showing hypoxemia." Decision and Order at 19; Claimant's Exhibit 5 at 5. Therefore, he permissibly found Dr. Raj's opinion well-reasoned and well-documented. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

We also reject Employer's argument that the ALJ erred in crediting the opinions of Drs. Werchowski and Raj because they "did not review all the medical evidence of record." Employer's Brief at 10. Contrary to Employer's assertion, an ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner and objective test results. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

Further, we reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Zaldivar and Spagnolo because "they did not adequately consider the pulmonary function study evidence . . . , [given that] they are the only two experts who considered all testing in determining whether a total respiratory impairment exists." Employer's Brief at 10-11. Contrary to Employer's argument, the ALJ permissibly found the doctors "did not adequately consider Claimant's *qualifying* pulmonary function studies." Decision and Order at 19 (emphasis added); *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. As discussed, the ALJ found the August 13, 2020 pulmonary function study produced qualifying pre- and post-bronchodilator FEV_1 and MVV values, and the August 25, 2020 pulmonary function study produced qualifying pre-bronchodilator FEV_1 and MVV values. Decision and Order at 17. He noted Dr. Zaldivar "based his [total disability] determination on Claimant's pulmonary function studies that showed mild restriction of forced vital capacity, fully corrected by bronchodilators," and "Dr. Spagnolo opined that Claimant had no objective evidence of a totally disabling lung condition" and his "lung function was essentially normal." *Id.* at 19. While Drs. Zaldivar and Spagnolo considered Claimant's FEV_1 and FVC and FEV_1/FVC ratio values of the August 13, 2020 and August 25, 2020 studies, they did not address Claimant's qualifying MVV values. Employer's Exhibits 13 at 19-24; 14 at 22-25. Thus the ALJ permissibly found their conclusions regarding the August 13, 2020 and August 25, 2020 pulmonary function studies inadequately explained. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 19.

Finally, Employer generally argues the ALJ should have credited the opinions of Drs. Zaldivar and Spagnolo because they are reasoned and documented, and reviewed all of Claimant's medical records. Employer's Brief at 9-11. This argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established 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. *See* 20 C.F.R. §718.204(b); *Rafferty*, 9 BLR at 1-232; *Shedlock,* 9 BLR at 1-198; *see also Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984) (non-qualifying pulmonary function tests do not undermine qualifying blood gas evidence because the studies measure

different types of impairment); Decision and Order at 18-20. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305, 725.309(c); Decision and Order at 16, 20.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[11] 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.[12]

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

The ALJ considered the medical opinions of Drs. Zaldivar and Spagnolo.[13] Decision and Order at 10-13, 17, 19. Dr. Zaldivar opined Claimant does not have legal

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[11] "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).

[12] The ALJ found Employer failed to disprove the existence of clinical pneumoconiosis. Decision and Order at 28.

[13] The ALJ also considered the medical opinions of Drs. Agarwal, Werchowski, and Raj that Claimant has legal pneumoconiosis. Decision and Order at 28. He found their opinions well-documented and reasoned. *Id.* As the ALJ's weighing of their opinions is unchallenged, it is affirmed. *See Skrack*, 6 BLR at 1-711.

pneumoconiosis but has asthma, bronchospasm, and emphysema due to smoking, and unrelated to his coal mine dust exposure. Employer's Exhibit 14 at 25, 28-29. Similarly, Dr. Spagnolo opined Claimant does not have legal pneumoconiosis but has asthma unrelated to his coal mine dust exposure. Employer's Exhibit 13 at 25-28. The ALJ found their opinions not well-reasoned and therefore insufficient to satisfy Employer's burden on rebuttal. Decision and Order at 28-29.

Employer argues the ALJ erred in discrediting the opinions of Drs. Zaldivar and Spagnolo. Employer's Brief at 14-15. Drs. Zaldivar and Spagnolo excluded coal mine dust exposure as a cause of or contributing factor to Claimant's asthma and emphysema. Employer's Exhibits 3 at 3-4; 9 at 12-13; 13 at 19-23, 27; 14 at 25, 28-29. While Dr. Spagnolo did not render an opinion on what caused Claimant's asthma, Dr. Zaldivar opined Claimant's smoking caused his asthma and emphysema. Employer's Exhibit 14 at 29. The ALJ permissibly found the physicians failed to adequately explain why Claimant's history of coal mine dust exposure did not significantly contribute, along with his smoking, to his asthma and emphysema. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74, n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (ALJ permissibly discredited physicians who failed to adequately explain why the miner's lung disease was not "significantly related to, or substantially aggravated by," his coal mine dust exposure); 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 28-29.

We consider Employer's general arguments that the ALJ should have found the opinions of Drs. Zaldivar and Spagnolo well-documented and reasoned to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; Employer's Brief at 11-15. Because the ALJ acted within his discretion in rejecting both opinions, we affirm his finding Employer did not disprove legal pneumoconiosis. We therefore affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 29.

Disability Causation

The ALJ next considered whether Employer established "no part of [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); Decision and Order at 32-35. Contrary to Employer's argument, the ALJ permissibly discredited the disability causation opinions of Drs. Zaldivar and Spagnolo because they failed to diagnose legal pneumoconiosis, contrary to his finding Employer did not disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 30-31; Employer's Brief at 15. Thus, we affirm

the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge