U.S. Department of Labor

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

BRB No. 21-0244 BLA

RONNIE BOWEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PILGRIM MINING COMPANY INCORPORATED, ANR INCORPORATED, C/O CONTURA ENERGY	)	
	)	
and	)	
	)	DATE ISSUED: 6/22/2022
SUMMITPOINT INSURANCE COMPANY	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

BOGGS, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2019-BLA-05567) rendered on a claim filed on November 16, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-two years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked 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).[1] The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the presumption, and that Employer did not rebut it. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Benefits Review Board to reject Employer's challenges to the ALJ's rebuttal findings regarding legal pneumoconiosis.[2]

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

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant is totally disabled due to pneumoconiosis if he establishes 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] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-two years of qualifying coal mine employment and had a smoking history of between nineteen and forty pack-years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4.

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 pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[4] 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 in consideration of the evidence as a whole. Decision and Order at 16. Employer alleges error regarding the ALJ's consideration of the conflicting pulmonary function studies and medical opinions.

Pulmonary Function Studies

The ALJ considered two pulmonary function studies. Decision and Order at 5, 12-13. The March 15, 2018 pulmonary function study was qualifying[5] before the administration of a bronchodilator but non-qualifying after the administration of a bronchodilator. Director's Exhibit 12. The November 12, 2018 pulmonary function study was non-qualifying before and after the administration of a bronchodilator. Director's Exhibit 16. The ALJ credited the results of the pre-bronchodilator studies and found them

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 4; Hearing Transcript at 13.

[4] The ALJ found Claimant did not establish total disability based on the pulmonary function and blood gas studies, there was no evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, and there was no evidence of complicated pneumoconiosis. 20 C.F.R. §§718.204(b)(2)(i)-(iii); 718.304; Decision and Order at 12, 13.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

"essentially contemporaneous" because they were "taken eight months apart." Decision and Order at 13. As the March 15, 2018 pre-bronchodilator study was qualifying and the November 12, 2018 pre-bronchodilator study was non-qualifying, the ALJ found the pulmonary function study evidence inconclusive as to whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 13.

Employer argues the pulmonary function studies are not inconclusive and that the ALJ erred in not giving more weight to the November 12, 2018 study because it is the most recent of record. Employer's Brief at 4-5. We disagree.

The ALJ permissibly found the conflicting studies "essentially contemporaneous" because they were conducted only eight months apart. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (affirming ALJ's finding that pulmonary function studies conducted within seven months were "sufficiently contemporaneous"). Thus, given the ALJ's rationale there is no "more recent" study and Employer's argument that the ALJ should have credited the most recent non-qualifying study is moot. We therefore affirm the ALJ's finding that the pulmonary function study evidence is inconclusive. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 13.

Medical Opinions and Evidence as a Whole

The ALJ considered three medical opinions. Dr. Shah examined Claimant on behalf of the Department of Labor on March 15, 2018. Director's Exhibit 12. She noted Claimant worked as a bulldozer operator, a position that required heavy and occasionally very heavy work.[6] *Id*. at 2. She opined Claimant has a disabling obstructive impairment that would preclude him from performing his usual coal mine work, taking into consideration both the March 15, 2018 qualifying pre-bronchodilator pulmonary function study she obtained and Dr. Tuteur's non-qualifying pulmonary function study. Director's Exhibits 12 at 4; 18 at 3; Claimant's Exhibit 2 at 11-12; Employer's Exhibit 2 at 20, 29.

[6] Dr. Shah testified that Claimant last worked as a bulldozer operator and that he "lifted different stuff," including a chain ratchet and a 150-pound roller on the bulldozer that he lifted with the help of two other men. Employer's Exhibit 2 at 8. She described his work as lifting fifty pounds frequently, which she stated was mostly heavy work and occasionally very heavy work. *Id*. We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's usual coal mine job as a bulldozer operator "required heavy and occasionally very heavy manual labor" and that Dr. Shah's description of Claimant's work requirements are consistent with his own findings. *See Skrack*, 6 BLR at 1-711; Decision and Order at 12, 14; Claimant's Exhibit 3 at 7-8.

Dr. Tuteur examined Claimant on November 12, 2018, and opined Claimant has a mild obstructive respiratory impairment that normalizes with a bronchodilator. Employer's Exhibit 4 at 1. He further opined that Claimant retains "the pulmonary capacity to perform the tasks of his last coal mining job." *Id.* Dr. Rosenberg reviewed Claimant's medical records on January 27, 2020, and opined that Claimant is not totally disabled, noting Dr. Shah's non-qualifying post-bronchodilator study and Dr. Tuteur's pulmonary function testing. Employer's Exhibit 5 at 4-5.

The ALJ found Dr. Shah's opinion more persuasive. Decision and Order at 15. He found, in part, that neither Dr. Tuteur nor Dr. Rosenberg "evince[d] an awareness of the physical requirements of the Claimant's coal mining job" and they "treated non-qualifying studies as precluding a finding of total disability." *Id.* Conversely, the ALJ found "Dr. Shah "provided a detailed analysis of the physical requirements of the Claimant's coal mine work" and "compared the level of the Claimant's impairment with his ability to perform such work." *Id.* at 15-16.

Employer asserts the ALJ failed to consider that Dr. Shah acknowledged Claimant's pre-bronchodilator values with Dr. Tuteur were non-qualifying for total disability.[7] Employer's Brief at 5-6. However, as the ALJ noted, Dr. Shah explained that Dr. Tuteur's testing did not change her opinion "because of normal variation of a patient's pulmonary function." Decision and Order at 13-14. Employer raises no error with regard to the ALJ's reliance on this aspect of Dr. Shah's opinion. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Moreover, Employer's argument fails to recognize a physician may conclude a miner is totally disabled despite a non-qualifying objective test. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000). Because it is supported by substantial evidence, we affirm the ALJ's finding that Dr. Shah's opinion is reasoned and sufficient to support a finding that Claimant is totally disabled.

We affirm, as unchallenged, the ALJ's findings that Dr. Tuteur did not evince an accurate understanding of the frequency of Claimant's lifting requirements[8] and Dr.

[7] We reject Employer's assertion that the ALJ overlooked that Drs. Tuteur and Rosenberg based their total disability assessments on both the pre-bronchodilator and post-bronchodilator values. Employer's Brief at 6. The ALJ accurately characterized their opinions, and we affirm the ALJ's conclusion that, to the extent Employer's experts relied on the post-bronchodilator values, their opinions are less credible. *See* Decision and Order at 13-15; 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (post-bronchodilator measurements "[do] not provide an adequate assessment of the miner's disability").

[8] Dr. Tuteur indicated Claimant worked as a rock and coal truck driver, timber cutter, and dozer operator and "[a]t times" had to lift 150 pounds with help. Director's Exhibit 16 at 1; Employer's Exhibit 4. However, the ALJ found Claimant's usual coal

Rosenberg did not discuss Claimant's work requirements. *See Skrack*, 6 BLR at 1-711; Decision and Order at 15. We therefore affirm the ALJ's finding that Claimant established total disability based on Dr. Shah's opinion at 20 C.F.R. §718.204(b)(2)(iv).[9] We further affirm, as supported by substantial evidence, the ALJ's overall conclusion that Claimant has a totally disabling respiratory impairment and thus invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018).

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,[10] 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. Employer challenges the ALJ's findings that it did not disprove legal pneumoconiosis or disability causation.[11]

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mine job required heavy labor, including "*regularly* lifting 150 pounds with the help of other men, and occasionally very heavy manual labor, including manhandling 400 to 500 pounds." Decision and Order at 15 (emphasis added).

[9] The ALJ also credited Dr. Shah's total disability opinion because she relied on Claimant's measured MVV value to determine his breathing reserve, while Drs. Tuteur and Rosenberg relied on a "routine calculation" of FEV1 multiplied by 40. Decision and Order at 13-16; Claimant's Exhibit 2 at 7-9; Employer's Exhibits 3 at 4; 5 at 4-5. Because Employer does not challenge these alternate findings, they are also affirmed. *See Skrack*, 6 BLR at 1-711.

[10] "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).

[11] The ALJ found that Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 18-19.

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 United States Court of Appeals for the Sixth Circuit requires Employer to show that [the miner's] "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-06 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 597-99, 600 (6th Cir. 2014)).

Employer relies on Drs. Tuteur's and Rosenberg's opinions to establish Claimant does not have legal pneumoconiosis. They each opined Claimant has chronic obstructive pulmonary disease (COPD) due entirely to Claimant's smoking history.[12] Employer's Exhibits 3 at 2-4; 5 at 4-5. The ALJ concluded their opinions were not sufficient to satisfy Employer's burden of proof. Decision and Order at 19-21.

Employer initially contends the ALJ applied the wrong legal standard by requiring its experts to effectively "rule out" coal mine dust exposure as a causative factor for Claimant's COPD. Employer's Brief at 8. We disagree.

The ALJ stated the correct standard as he observed Employer must establish Claimant does not have legal pneumoconiosis, defined as a respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 18-19; *see* 20 C.F.R. §718.201(a)(2), (b). Moreover, as explained below, the ALJ rejected the opinions of Drs. Tuteur and Rosenberg because he found their opinions insufficiently reasoned and not because they failed to satisfy a particular legal standard. Decision and Order at 19-21.

As the ALJ noted, Dr. Tuteur excluded coal mine dust exposure as a causative factor for Claimant's COPD by citing statistics regarding the percentages of smoking and non-smoking miners who develop the disease.[13] Employer's Exhibit 3 at 2-4. The ALJ

[12] Dr. Rosenberg also indicated asthma caused Claimant's respiratory condition. Employer's Exhibit 5 at 4-5.

[13] The ALJ correctly noted Dr. Tuteur relied on a "relative risk assessment." Employer's Exhibit 3 at 2-4. Dr. Tuteur explained that medical studies show "approximately [twenty percent] of lifelong never mining smoker[s] develop [COPD] with

permissibly discounted Dr. Tuteur's reasoning because it is based on generalities and not the specifics of Claimant's case. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 19-20; Employer's Exhibit 3 at 2-4.

The ALJ also permissibly found that while Drs. Tuteur and Rosenberg rely on Claimant's significant smoking history in opining Claimant does not have legal pneumoconiosis, they failed to adequately explain why Claimant's twenty-two years of coal mine dust exposure was not an additive factor along with smoking in causing his respiratory impairment. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 20-21; Employer's Exhibits 3 at 1; 5 at 4-5.

Furthermore, Drs. Tuteur and Rosenberg each opined Claimant does not have legal pneumoconiosis, in part, because his pulmonary function studies showed reversibility of his respiratory impairment with bronchodilators. Employer's Exhibits 3 at 4; 5 at 5. The ALJ permissibly found this rationale unpersuasive because they failed to explain why the fixed portion of Claimant's impairment is not caused by coal mine dust exposure. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 20-21; Employer's Exhibits 3 at 4; 5 at 5.

Finally, Employer generally asserts the ALJ erred in finding that it failed to rebut the presumption of legal pneumoconiosis because he failed to consider that Claimant has a lengthy smoking history but not clinical pneumoconiosis. Employer's Brief at 6-8. However, as the Director correctly states, "even if smoking is the primary cause of [Claimant's] pulmonary condition, legal pneumoconiosis remains established unless [Employer] proves that [Claimant's] coal mine dust exposure is not more than a de minimis factor." Director's Brief at 2, *citing Groves*, 761 F.3d at 598-99. Employer has neither alleged nor shown that Claimant's coal mine dust exposure played no more than a de minimis role in his respiratory impairment.

Moreover, contrary to Employer's assertion, Claimant is not required to have clinical pneumoconiosis as a prerequisite for having legal pneumoconiosis. 20 C.F.R.

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meaningful airflow obstruction." *Id*. at 3. Comparing "the [twenty percent] risk of COPD among smokers who never mined to the [one to two percent] risk among non[-]smoking miners," he concluded that the Claimant's COPD was "'uniquely' due to the Claimant's 'significant' smoking history." Decision and Order at 9, *quoting* Employer's Exhibit 3 at 3-4.

§718.202(a)(4) ("A determination of the existence of pneumoconiosis may also be made if a physician, . . . *notwithstanding a negative* [*x*]*-ray*, finds that the miner suffers or suffered from pneumoconiosis as defined in [20 C.F.R.] §718.201.") (emphasis added); *see also Cornett*, 227 F.3d at 576-77. "[C]linical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act." *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306 (6th Cir. 2005), *quoting Richardson v. Director, OWCP*, 94 F.3d 164, 166 n.2 (4th Cir. 1996). We thus affirm the ALJ's finding that Employer failed to disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

To disprove disability causation, Employer must establish "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). The ALJ rationally discredited Drs. Tuteur's and Rosenberg's opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 21-22. Further, the ALJ found the same reasons for which he discredited their opinions that Claimant does not have legal pneumoconiosis also undercut their opinions that Claimant's disabling respiratory impairment was not caused by the disease. Decision and Order at 22. Because we have affirmed the ALJ's findings at legal pneumoconiosis, we affirm his determination that Employer failed to prove no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I agree with the majority to affirm the ALJ's award of benefits. I write separately to more fully address Employer's assertion the ALJ erred in not crediting the most recent non-qualifying pulmonary function study. Whether or not the two studies are essentially contemporaneous is immaterial: the ALJ could not have credited the more recent study because of its recency since it shows an improvement in Claimant's condition, which is inconsistent with the regulatory recognition that pneumoconiosis can be a latent and progressive disease.

The United States Court of Appeals for the Sixth Circuit has held it irrational to credit evidence solely because of recency where the miner's condition has improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the court reasoned that a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id.* But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply": one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id.* An

ALJ must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id.*

Because the more recent non-qualifying pre-bronchodilator study does not show a worsening of Claimant's condition, I would specifically reject Employer's contention that it could be entitled to controlling weight based on its recency.

JONATHAN ROLFE
Administrative Appeals Judge