U.S. Department of Labor

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

BRB No. 22-0122 BLA

DANNY VANHOOSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RHINO SERVICES, LLC	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 6/16/2023
	)	
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 Modification of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Denise Hall Scarberry and Paul Jones (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits on Modification (2020-BLA-06057) 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 request for modification of a claim filed on August 26, 2013.

In a June 27, 2019 Decision and Order Denying Benefits on Remand,[1] the ALJ found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). As Claimant did not establish an essential element of entitlement, the ALJ denied benefits.

Claimant timely requested modification and submitted an August 1, 2019 arterial blood gas study. Director's Exhibit 12. In his Decision and Order Awarding Benefits on Modification that is the subject of the current appeal, the ALJ found Claimant established thirty-seven years of underground coal mine employment or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The ALJ further found Employer did not rebut the presumption. He thus found Claimant established modification based on a change in conditions. 20 C.F.R. §725.310. In addition, he found granting modification would render justice under the Act. He therefore awarded benefits.

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[1] ALJ Alice M. Craft initially awarded benefits in an April 11, 2017 Decision and Order. Pursuant to Employer's appeal, the Benefits Review Board vacated the award of benefits because ALJ Craft erred in finding Claimant established a totally disabling respiratory or pulmonary impairment. *Vanhoose v. Rhino Services, LLC*, BRB No. 17-0422 BLA (May 31, 2018). On remand, the case was reassigned to ALJ Sellers because ALJ Craft retired.

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

On appeal, Employer asserts the ALJ erred in denying its request to strike the August 1, 2019 blood gas study from the record based on Claimant's failure to perform an exercise blood gas study at Employer's request. It contends the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. It argues he erred in finding it did not rebut that presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless requested to do so.

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.[4] 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).

Evidentiary Issue

We initially address Employer's evidentiary argument. Employer's Brief at 5-7. An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish that the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

On February 10, 2021, Employer filed a Motion to Compel Claimant to perform an exercise arterial blood gas study as part of Dr. Dahhan's examination. Feb. 10, 2021 Motion to Compel. In its motion, Employer explained "Claimant underwent an exam with Dr. Dahhan on March 12, 2020" and at that time he "performed a resting arterial blood gas, but refused to perform an exercise arterial blood gas [because he stated] he was unable to exercise due to his previous knee replacement." *Id.* at 1. The ALJ addressed Employer's request during an off the record discussion at the March 2, 2021 hearing. He then went on the record and summarized the discussion as follows:

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-seven years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

[4] 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); Director's Exhibit 1 at 405-412; Hearing Transcript at 6.

> As far as the new evidence, before I take submissions of the parties, we had some discussion off the record and let me see if I can summarize it succinctly. The Employer is seeking to have an exercise blood gas study performed originally under the auspices of Dr. Dahhan, but given the distance of traveling, the Employer has agreed to try and arrange for the test to be done at the Pikeville Medical Center and there was some uncertainty when that can be scheduled. [Claimant's attorney] has indicated the Claimant doesn't object, but [Claimant] is going to consult with his orthopedist to see if it is safe for him to undergo the test. He's had knee replacements and continues to have some pain. So, assuming he's able to perform the test and gets approval from his orthopedist, then I'm going to allow the record to remain open and I'm going to leave it open-ended as far as dates are concerned. I want, [Employer's attorney], [Claimant's attorney], for you both to let me know in writing the result of this discussion, whether the test is going to go forward, whether you want me to rule on it if you get a letter from [Claimant's] orthopedist saying it's contraindicated. So, just advise me as quickly as you can when you know more details about this test.

Hearing Tr. at 8. Neither party objected nor added any clarification to the ALJ's summary of the off the record discussion. *Id.* At the conclusion of Claimant's testimony, the ALJ reiterated Employer should timely advise him if Claimant's orthopedist determines the exercise blood gas study is medically contraindicated, stating as follows:

> All right, so again, there's some uncertainty about this arterial blood gas study. What I'm going to ask the parties to do is advise me in [thirty] days in writing where we are with that. If something comes up earlier, let's say there's a debate as to whether or not [Claimant] is capable of performing the test, then you'll let me know as soon as possible and then once I get that in writing from you and get a sense of when that test can be done if it's going to be done, I can set a date with some time frames and a briefing schedule, but right now, I think it's premature, all right?

Hearing Tr. at 37. Again, neither party raised any further issue, asked for clarification, or made a motion or objection. *Id.*

Thereafter, the parties submitted a Joint Status Report dated March 29, 2021 indicating Employer had scheduled Claimant to perform an exercise blood gas study on April 22, 2021 at Pikeville Medical Center. Joint Status Report at 1. The parties agreed that Employer would obtain supplemental reports from Drs. Jarboe, Rosenberg, and Dahhan after they reviewed the test results. *Id.* Employer anticipated the supplemental

reports would be produced within sixty-days after Claimant performed the study and, if more time was needed, it would "request such [time] via written motion." *Id*.

Claimant notified Employer on April 21, 2021 that his orthopedist advised him not to undergo an exercise blood gas study. Employer's Brief at 6. The next day Claimant performed a pulse oximetry test while walking for six-minutes at Pikeville Medical Center. Employer's Exhibits 2, 9. Employer submitted the results of the pulse oximetry test into the record on May 12, 2021. Employer's Exhibit 2. It also submitted a May 15, 2021 supplemental report from Dr. Dahhan, a May 25, 2021 supplemental report from Dr. Rosenberg, and a June 4, 2021 supplemental report from Dr. Jarboe. Employer's Exhibits 9-11. In their supplemental reports, all three doctors discussed the results of the pulse oximetry test when addressing whether Claimant is totally disabled. *Id*.

In its post-hearing brief, Employer argued that the ALJ should strike the August 1, 2019 blood gas study based on Claimant's failure to perform an exercise blood gas study at Pikeville Medical Center on April 22, 2021. Employer's Post-Hearing Brief at 8. The ALJ denied Employer's request as untimely because it first raised the issue in its post-hearing brief. Decision and Order on Modification at 7 n.4.

In challenging the ALJ's ruling, Employer states it had argued at the March 2, 2021 hearing that the ALJ should strike the August 1, 2019 blood gas study if Claimant ultimately failed to perform an exercise blood gas study at Employer's request. Employer's Brief at 6-7. It maintains that "[o]nly part of [the off the record discussion] was memorialized by the ALJ in the hearing record."[5] *Id*. We are not persuaded by this argument, however, because Employer did not raise any objection or otherwise challenge the ALJ's summary of the off the record discussion.

Moreover, as set forth above, the ALJ instructed Employer to promptly inform him if Claimant could not perform an exercise blood gas study so he could resolve any dispute before the record closed. Hearing Tr. at 8, 37. He stated Employer should specify in writing "whether the test is going to go forward," and whether Employer wanted him to rule on it if Claimant's orthopedist considered the test "contraindicated." Hearing Tr. at 8. Further, in the March 29, 2021 Joint Status Report, Employer acknowledged it would file a motion for additional time to submit supplemental evidence if necessary. Joint Status Report at 1. Employer did not advise the ALJ or file any motions after Claimant stated on April 21, 2021 that he could not perform an exercise blood gas study; rather, Employer

[5] The Board cannot consider the off the record discussion on appeal because we cannot consider new or additional evidence outside the record. *Berka v. N. Am. Coal Corp.*, 8 BLR 1-183, 1-184 (1985); 20 C.F.R. §802.301(a), (b).

submitted the results of the pulse oximetry test and pertinent supplemental medical opinions. Employer's Exhibits 2, 9. It waited until filing its post-hearing brief on August 16, 2021 to raise the issue. Given Employer's nearly four month delay, its failure to show any good cause for that delay, and the ALJ's prior discussions with the parties evidencing his desire for prompt notification, we reject Employer's argument the ALJ abused his discretion. *See Blake*, 24 BLR at 1-113; Decision and Order on Modification at 7 n.4.

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 miner 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). 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).

The ALJ found Claimant established total disability based on the blood gas studies, medical opinions, and the evidence as a whole.[6] 20 C.F.R. §718.204(b)(2)(ii), (iv). Other than arguing the ALJ should have stricken the August 1, 2019 study from the record, Employer does not challenge the ALJ's finding that the blood gas study evidence establishes total disability. We thus affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 7.

Employer argues the ALJ erred in finding Claimant totally disabled because he did not consider the results of the April 22, 2021 pulse oximetry or the opinions of Drs. Dahhan, Jarboe, and Rosenberg.[7] Employer's Brief at 7-8. We disagree.

[6] The ALJ found that the pulmonary function study evidence does 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 4, 9.

[7] The ALJ also considered the opinions of Drs. Shamma-Othman and Habre that Claimant is totally disabled and Dr. Klayton's opinion that he is not. Decision and Order at 9-12. He discredited the opinions of Drs. Shamma-Othman, Habre, and Klayton because they did not review the most recent objective testing. Decision and Order at 10, 12. We

The ALJ correctly found Drs. Jarboe and Rosenberg diagnosed total disability based on the results of exercise blood gas testing and neither doctor opined the results of the April 22, 2021 pulse oximetry negates a finding of total disability; thus their opinions support total disability. Decision and Order on Modification at 10-12. Specifically, Dr. Jarboe stated that the August 1, 2019 exercise blood gas study reflects Claimant "developed a significant impairment of gas exchange" which is "disabling." Employer's Exhibit 7 at 6. He acknowledged the pulse oximetry "documents that there is no significant, persistent fall in the oxygen saturation with exercise," but then noted that the test, "absent any other information, would not confirm or negate a disabling pulmonary impairment" because there must be associated resting and exercise blood gas study results. Employer's Exhibit 11 at 2. He thus concluded that the pulse oximetry "does not change the opinions expressed in my earlier reports." *Id*. at 3.

Dr. Rosenberg submitted a supplementary report in 2021 after the pulse oximetry test had been taken. Employer's Exhibit 10. He opined Claimant's "oxygenation has worsened over time and the blood gas with exertion as noted in 2019 is qualifying."[8] *Id*. at 4. Thus he concluded Claimant "appears to be disabled from a pulmonary perspective having developed a drop in his diffusing capacity as well as an oxygenation abnormality." *Id*.

The ALJ also correctly found that, in contrast, Dr. Dahhan excluded total disability based on the results of the pulse oximetry alone. Decision and Order on Modification at 10-11. Although Dr. Dahhan recognized the August 1, 2019 blood gas study "showed a drop in the pO2 to 62 and the pCO2 to 37," he concluded Claimant is not totally disabled because the April 22, 2021 pulse oximetry "showed no desaturation upon exercise leading [him] to conclude [Claimant] has no evidence of total or permanent pulmonary disability." Employer's Exhibit 9 at 3.

The ALJ found the opinions of Drs. Jarboe and Rosenberg outweigh Dr. Dahhan's opinion which he found was conclusory and inadequately reasoned. Decision and Order at 10-12. As Employer identifies no error in the ALJ's findings with respect to Drs. Jarboe, Rosenberg, and Dahhan, we affirm them. *See Cox v. Benefits Review Board*, 791 F.2d 445,

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affirm the ALJ's rejection of Dr. Klayton's opinion as unchallenged. *Skrack*, 6 BLR at 1-711.

[8] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

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).

Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Modification at 12-13. We also affirm his finding that all the relevant evidence, when weighed together, establishes total disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order on Modification at 12-13. We therefore affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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,[9] 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.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the 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. §§718.305(d)(1)(i)(B), 718.201(a)(1).

The ALJ found the x-rays, treatment records, and medical opinions insufficient to rebut the presumption of clinical pneumoconiosis. Decision and Order at 15-18. Employer

[9] "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).

challenges the ALJ's finding that the x-ray evidence does not disprove clinical pneumoconiosis. Employer's Brief at 8-9. We are not persuaded by its arguments.

The ALJ considered twelve interpretations of five x-rays dated October 2, 2013, May 8, 2014, May 11, 2015, June 10, 2016, and June 15, 2016. Decision and Order at 15-16. He noted all of the interpreting physicians are dually qualified as Board-certified radiologists and B-readers except Dr. Jarboe who is only a B-reader. *Id.* He permissibly assigned greater weight to the dually qualified radiologists as they have superior credentials. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 16.

Drs. Crum and Alexander read the October 2, 2013 x-ray as positive for clinical pneumoconiosis, whereas Dr. Shipley read it as negative for the disease. Director's Exhibit 1 at 274, 352; Claimant's Exhibit 7. Dr. Alexander read the May 8, 2014 x-ray as positive for clinical pneumoconiosis, but Drs. Kendall and Jarboe read it as negative for the disease. Director's Exhibit 1 at 218, 237; Employer's Exhibit 3. Dr. Crum read the May 11, 2015 and June 15, 2016 x-rays as positive for clinical pneumoconiosis, but Dr. Kendall read both x-rays as negative. Claimant's Exhibits 1, 2; Employer's Exhibits 1, 5. Drs. DePonte and Kendall read the June 10, 2016 x-ray as negative for clinical pneumoconiosis. Claimant's Exhibit 5; Employer's Exhibit 6.

The ALJ found the October 2, 2013 x-ray positive for pneumoconiosis because a greater number of dually-qualified radiologists read it as positive for the disease; the June 10, 2016 x-ray negative for pneumoconiosis because two dually-qualified radiologists read it as negative and their readings are unrebutted; and the remaining x-rays in equipoise because an equal number of dually-qualified radiologists read each x-ray as positive and negative for pneumoconiosis. Decision and Order at 16. Because one x-ray is positive, one x-ray is negative, and three x-rays are in equipoise, the ALJ found Employer did not rebut the presumption of clinical pneumoconiosis through x-ray evidence. *Id.*

Employer argues the ALJ erred in finding the May 8, 2014 x-ray inconclusive. Employer's Brief at 8-9. It asserts the ALJ should have found the reading from the B reader, Dr. Jarboe, buttresses the negative reading from a dually-qualified radiologist, Dr. Kendall, and thus outweighs the positive reading from the other dually-qualified radiologist, Dr. Alexander. *Id.* But the argument amounts to a simple request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the ALJ properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings and explained his basis for resolving the conflict in the evidence, we affirm his finding that the x-ray evidence does not rebut

the presumption of clinical pneumoconiosis. 20 C.F.R. §§718.305(d)(1)(i)(B); Decision and Order at 16.

As Employer does not challenge the ALJ's finding that the treatment records and medical opinions are insufficient to rebut the presumption of clinical pneumoconiosis, we also affirm this finding. *Skrack*, 6 BLR at 1-711; Decision and Order at 17-18. Therefore, we affirm the ALJ's finding that Employer did not disprove clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i).

Furthermore, we affirm as unchallenged the ALJ's finding that Employer failed to rebut the presumption by establishing no part of Claimant's total disability was caused by pneumoconiosis. *See Skrack,* 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Modification at 21. We thus affirm his finding that Employer did not rebut the Section 411(c)(4) presumption and Claimant established a change in conditions. 20 C.F.R. §725.310. In addition, as Employer does not challenge the ALJ's finding that granting modification would render justice under the Act, we affirm it. Decision and Order at 25-26; *see Skrack*, 6 BLR at 1-711.

[10] Because we affirm the ALJ's findings on clinical pneumoconiosis, we need not address Employer's arguments on legal pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9-10.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge