U.S. Department of Labor

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

BRB No. 21-0097 BLA

CHARLES E. SHAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY	)	
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	DATE ISSUED: 3/30/2022
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, Department of Labor.

Heather M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna L. Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2019-BLA-06089) rendered on a claim filed on April 19, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had 33.5 years of qualifying coal mine employment. However, the ALJ found Claimant failed to establish that he is totally disabled and therefore could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Because Claimant failed to establish an essential element of entitlement, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding Claimant failed to prove the existence of a totally disabling pulmonary or respiratory impairment, and therefore erred in finding he did not invoke the Section 411(c)(4) presumption. Employer and its Carrier (Employer) respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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.[2] 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability

[1] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has 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).

[2] We 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); Decision and Order at 2 n.3; Director's Exhibit 3.

causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing these elements when certain conditions are met, but failure to establish any one precludes an award of benefits.[3] *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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.[4] *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. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the 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). Claimant contends the ALJ erred in finding the medical opinion evidence does not establish total disability.[5] Claimant's Brief at 3-7.

The ALJ considered the medical opinions of Drs. Zlupko, Basheda, and Rosenberg. Director's Exhibits 14, 21; Employer's Exhibits 2-4, 7-8. Dr. Zlupko opined that Claimant is totally disabled. Director's Exhibits 14, 21. Dr. Basheda opined that Claimant has an uncontrolled obstructive lung disease, but concluded he could not determine if Claimant has a permanent totally disabling respiratory impairment until that disease is properly treated. Employer's Exhibits 3, 4, 7. He further opined that Claimant could not perform his usual coal mine employment

[3] The ALJ accurately found there is no evidence of complicated pneumoconiosis, and therefore Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 16 n.11.

[4] The ALJ determined Claimant's usual coal mine employment as a mechanic required heavy labor. Decision and Order at 5.

[5] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-10.

while his obstruction is uncontrolled, but that Claimant still is not disabled under the American Medical Association's guidelines for evaluating respiratory impairments. Employer's Exhibits 3, 4, 7. Dr. Rosenberg opined that Claimant is not disabled from a pulmonary or respiratory perspective. Employer's Exhibits 2, 8.

The ALJ gave little weight to Dr. Zlupko's opinion because he did not adequately address the exertional requirements of Claimant's usual coal mine employment or explain why Claimant is totally disabled in light of the non-qualifying test results. Decision and Order at 14. The ALJ found Dr. Basheda's opinion equivocal and inconsistent, and therefore gave it little weight. *Id*. Conversely, the ALJ found Dr. Rosenberg's opinion adequately documented and reasoned, and therefore found it entitled to some weight. *Id.* at 14-15. The ALJ therefore found the medical opinion evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 15.

Claimant contends the ALJ erred in her weighing of the medical opinion evidence. Claimant's Brief at 3-7. We disagree.

The ALJ initially determined Dr. Rosenberg was the most qualified physician and Dr. Zlupko the least qualified, and we affirm this determination as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

Contrary to Claimant's arguments, the ALJ did not mischaracterize Dr. Zlupko's opinion, nor did she discredit the physician's opinion as contradictory. Claimant's Brief at 4. The ALJ accurately noted that Dr. Zlupko opined Claimant is totally disabled based on the July 25, 2018 pulmonary function study. Decision and Order at 14; Director's Exhibits 14, 21. The ALJ found his opinion not well-reasoned as he did not explain how he determined Claimant is totally disabled and relied upon a non-qualifying test without addressing the exertional requirements of Claimant's usual coal mine employment.[6] Decision and Order at 14. As Claimant does not challenge these credibility determinations, we affirm them. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14.

[6] Dr. Zlupko opined Claimant "cannot walk or carry any weight." Director's Exhibit 14. However, the physician failed to discuss whether those limitations were related to Claimant's respiratory impairment or his hip and knee replacements. *Id*.

We further reject Claimant's argument that the ALJ mischaracterized Dr. Basheda's opinion in discrediting it as inconsistent. Claimant's Brief at 5. The ALJ accurately noted that Dr. Basheda diagnosed a variable obstructive impairment with an "acute" response to bronchodilators. Decision and Order at 12; Employer's Exhibit 3. She further accurately noted the physician opined Claimant could not perform the exertional requirements of his usual coal mine employment based on his uncontrolled obstructive lung disease, but then opined he could not accurately determine the extent of Claimant's impairment because it was not being properly treated. Decision and Order at 12-13; Employer's Exhibits 3, 4, 7. She also accurately noted Dr. Basheda's statement in his supplemental report that Claimant is not totally disabled even with uncontrolled obstructive lung disease. Employer's Exhibit 4.

The ALJ "has broad discretion to determine the weight accorded each doctor's opinion." *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *see also Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Here, the ALJ permissibly found Dr. Basheda's opinion to be internally inconsistent and inadequately explained given his conflicting statements. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155; Decision and Order at 14. Moreover, the ALJ acted in her discretion in finding Dr. Rosenberg's opinion to be more persuasive and better explained than the other opinions of record. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155; Decision and Order at 14-15.

We further reject Claimant's argument that the ALJ erred in not construing Dr. Rosenberg's opinion as one supporting a finding of total disability. Claimant's Brief at 6-7. While Claimant correctly notes Dr. Rosenberg opined Claimant had a disabling flare up of his asthma at the time of Dr. Basheda's examination, the ALJ accurately noted Dr. Rosenberg repeatedly opined Claimant did not have a totally disabling pulmonary impairment. Decision and Order at 14-15; Claimant's Brief at 6-7; Employer's Exhibits 1, 2, 8 at 32-33. The ALJ permissibly found Dr. Rosenberg's opinion was entitled to additional weight given his superior qualifications and his explanation of why the testing does not demonstrate total disability. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155; Decision and Order at 14-15.

We therefore affirm the ALJ's determination that Claimant failed to establish total disability based on the medical opinion evidence and the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 15. Claimant's failure to establish

total disability precludes an award of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, we affirm the ALJ's decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge