U.S. Department of Labor

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

BRB No. 22-0450 BLA

MICHAEL COMBS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARBON RIVER COAL CORPORATION	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 03/14/2024
	)	
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[1] of Willow Eden Fort, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

[1] While the title of the ALJ's Decision and Order indicates a denial of benefits, she awarded benefits. On July 8, 2022, the ALJ issued an errata order amending the Decision and Order's title to reflect an award.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.[2]

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Willow Eden Fort's Decision and Order Awarding Benefits (2020-BLA-05343) rendered on a claim filed on August 18, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established more than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). She 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 thus invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

[2] Employer was previously represented by Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), who filed Employer's Petition for Review and Supporting Brief. After briefing, but prior to a decision in the case, Jones & Jones moved to withdraw as Employer's counsel and requested an extension of all pending deadlines. On the same day, Ferreri Partners, PLLC filed their Entry of Appearance and Notice of Representation. The Benefits Review Board grants Jones & Jones's motion to withdraw but denies its request for an extension of deadlines as moot.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner is total 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.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established more than fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9.

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, 362 (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)(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.[6] 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 arterial blood gas studies, medical opinions, and the evidence as a whole.[7] Decision and Order at 19-20.

Arterial Blood Gas Studies

The ALJ considered four arterial blood gas studies performed on September 11, 2017, October 17, 2018, November 6, 2018, and April 24, 2019. Decision and Order at 14-16; Director's Exhibits 15, 19, 22, 65. All of the studies at rest, except for the September

[5] This case arises within the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 26.

[6] The ALJ found Claimant's usual coal mining work as a preparation plant worker required "very heavy" manual labor. Decision and Order at 10-11. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[7] The ALJ found the pulmonary function studies do not support 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 11, 13. These findings are affirmed as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

11, 2017 test, produced qualifying[8] results. Director's Exhibits 15 at 22-23; 19 at 12-13; 22 at 22-23; 65 at 8. The only exercise study was obtained on October 17, 2018, and is non-qualifying. Director's Exhibit 19 at 12-13. The ALJ declined to accord the exercise study greater weight than the qualifying resting studies and determined that the weight of the arterial blood gas evidence supports a finding of total disability. Decision and Order at 16.

Employer argues the ALJ erred in not "accord[ing] probative weight" to the only exercise study without a valid explanation in violation of the Administrative Procedure Act (APA).[9] Employer's Brief at 5-8. We disagree.

Contrary to Employer's argument, the ALJ did not find the exercise blood gas study was not probative. Rather, she determined it was not worthy of *increased* weight,[10] but did accord the same weight to it as she accorded to the other reliable studies.[11] Decision and Order at 15-16. While the ALJ may permissibly give an exercise study increased weight, she was not required to do so. Rather, she acted permissibly in according the studies equal weight (except for the nonqualifying studies taken by Dr. Rosenberg that she found might

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

[9] The APA provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[10] An ALJ may credit an exercise study over a resting study if the evidence supports such a finding. *See Coen v. Director, OWCP*, 7 BLR 1-30, 31-32 (1984) (ALJ permissibly credited exercise study over resting study); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980) (ALJ permissibly credited resting study over exercise study). Here, the ALJ found the October 17, 2018 exercise study was "informative" but not entitled to more weight than the resting studies because although Dr. Dahhan relied on the test and explained that Claimant met his target heart rate during exercise, the physician did not adequately address the study's probative value in light of the fact that exercise was terminated due to shortness of breath. Decision and Order at 15, 18; Director's Exhibit 19 at 12, 16.

[11] The ALJ accorded the November 6, 2018 study "slightly" less weight than the other studies as Dr. Rosenberg indicated Claimant received treatment for potential respiratory issues shortly prior to the examination, but there was no evidence it was an "acute" illness. Decision and Order at 15.

not be reliable and whose weight is not challenged on appeal). We therefore affirm the ALJ's finding that the blood gas evidence supports a finding that Claimant is totally disabled.[12] 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 16.

Medical Opinions

The ALJ next weighed the medical opinions of Drs. Raj, Dahhan, and Rosenberg. Decision and Order at 16-19; Director's Exhibits 13, 15, 19, 22; Employer's Exhibit 2. Dr. Raj opined that Claimant is totally disabled based on the blood gas studies showing severe hypoxemia and hypercapnia, and the abnormal pulmonary function study showing moderate restriction. Director's Exhibits 13, 15. Dr. Rosenberg agreed Claimant is disabled from a pulmonary perspective based on his blood gas exchange abnormalities. Director's Exhibit 22. Dr. Dahhan acknowledged Claimant has moderate restriction, hypoxemia at rest, and "borderline" oxygenation with exercise, but he opined there is no evidence of total disability. Director's Exhibit 19; Employer's Exhibit 2 at 12, 16.

The ALJ accorded greatest weight to Dr. Raj's opinion as well-supported and well-reasoned. Decision and Order at 19. She provided some weight to Dr. Rosenberg's opinion, finding that although the doctor underestimated the "very heavy" exertional requirements of Claimant's usual coal mine employment, he nonetheless found Claimant totally disabled based on the "severe" gas exchange abnormalities. *Id.* at 19. Finally, she discredited Dr. Dahhan's opinion, finding he did not understand the exertional requirements of Claimant's usual coal mine employment and did not explain why Claimant could perform this work given the abnormalities he acknowledged were present on pulmonary function and blood gas testing. *Id.* at 17-19. Thus, the ALJ found the medical opinion evidence supports a finding that Claimant is totally disabled. *Id.* at 19.

Employer argues the ALJ erred in crediting Dr. Raj's opinion without adequately explaining how it is well-reasoned, in violation of the APA, particularly given the non-

[12] Although Employer generally identifies as an "Issue Presented" whether the ALJ erred in relying on Dr. Alam's September 11, 2017 Department of Labor testing "when Dr. Alam had previously treated the Claimant," it raises no specific argument to support this contention. Employer's Brief at 2. We therefore decline to consider Employer's argument as inadequately briefed. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

qualifying exercise blood gas study Dr. Raj administered. Employer's Brief at 8-9. It also contends the ALJ erred in discrediting Dr. Dahhan's opinion.[13] *Id.* at 9-11. We disagree.

The ALJ permissibly credited Dr. Raj's opinion because he had an accurate understanding of the exertional requirements of Claimant's usual coal mine employment, noted Claimant's exertional limitations of being unable to climb one flight of stairs, and explained Claimant's abnormal pulmonary function and blood gas study results precluded him from performing the heavy exertion required of his job. *See Crisp*, 866 F.2d at 185; Decision and Order at 16; Director's Exhibit 15. Contrary to Employer's contention, total disability can be established based on reasoned medical opinion, notwithstanding non-qualifying objective testing. 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); Employer's Brief at 9. Therefore, the ALJ adequately explained her findings and we affirm, as supported by substantial evidence, her crediting of Dr. Raj's opinion.[14] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 17, 19.

Finally, given our affirmance of the ALJ's determination that the non-qualifying exercise study Dr. Dahhan relied upon is probative but outweighed by the qualifying resting studies, we affirm the ALJ's determination to give his diagnosis of no total disability less weight than Drs. Raj's and Rosenberg's contrary opinions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Moreover, because we have affirmed the ALJ's crediting of Drs. Raj's and Rosenberg's opinions, Employer has failed to explain how, even if Dr. Dahhan's opinion were also credited, it could outweigh their conflicting opinions, particularly as the ALJ specified that even if she were to give all three physicians' opinions equal weight, she would still find the weight of the evidence supports total disability. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how

[13] We affirm, as unchallenged on appeal, the ALJ's decision to accord some weight to Dr. Rosenberg's total disability diagnosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 19.

[14] Given our affirmance of the ALJ's findings that the overall weight of the resting blood gas studies supports a finding of total disability, we reject Employer's argument that Dr. Raj's total disability diagnosis should have been discredited because he "disregarded the only exercise study of record." Employer's Brief at 9. Further, as the ALJ provided permissible reasons for crediting Dr. Raj's opinion, we need not address Employer's additional contentions of error regarding her consideration of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

the "error to which [it] points could have made any difference"); Decision and Order at 20 n.62. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19.

As Employer raises no other arguments as to the weighing of the evidence, we also affirm the ALJ's determination that the evidence as a whole establishes total disability and thus that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b); *Rafferty*, 9 BLR at 1-232; Decision and Order at 20. Finally, we affirm the ALJ's finding that Employer failed to rebut the presumption as unchallenged. 20 C.F.R. §718.305(d); *see Skrack*, 6 BLR at 1-711; Decision and Order at 28-29.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge