U.S. Department of Labor

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

BRB No. 23-0147 BLA

DENNIS L. MCCRACKEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RIVER HILL COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 03/11/2024
	)	
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2022-BLA-05171) rendered on a claim filed on August 5, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established at least twenty-five years of underground coal mine employment 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.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and total disability necessary to invoke the Section 411(c)(4) presumption.[2] It further argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. In a letter dated May 17, 2023, the Director, Office of Workers' Compensation Programs, declined to file a brief but in a footnote asserted that Claimant's coal mine employment qualifies to invoke the Section 411(c)(4) presumption.

[1] 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); 20 C.F.R. §718.305.

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

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.[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, 361-62 (1965).

Invocation of the Section 411(c)(4) Presumption – Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 302-03 (6th Cir. 2018); *Freeman United Coal Min. Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

The ALJ found Claimant established at least twenty-five years of aboveground, qualifying employment at an underground coal mine.[4] In support of that finding, he cited Claimant's employment history form (Director's Exhibit 3), a work history attached to Dr. Celko's medical opinion (Director's Exhibit 12 at 4), and Claimant's hearing testimony (Hearing Tr. at 19). Decision and Order at 5.

Employer argues the ALJ failed to consider relevant evidence establishing that Claimant worked at a surface coal mine and that he did not adequately explain the basis for his finding Claimant worked aboveground at an underground mine.[5] Employer's Brief at

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4.

[4] The type of mine (underground or surface), rather than the location of where the miner worked (below ground or aboveground), determines whether a miner is required to show substantially similar conditions. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011). Thus, a miner who worked aboveground at an underground mine site need not otherwise establish that his working conditions were substantially similar to those in an underground mine. *Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29.

[5] There is a conflict in the record as to whether Claimant worked aboveground at an underground mine or at a surface coal mine. In an employment history form dated

19-23. It thus contends his coal mine employment finding does not satisfy the explanatory requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[6] *Id.*

While the ALJ did not address relevant evidence indicating Claimant may have worked at a surface coal mine or explain his finding that all of Claimant's employment took place at an underground mine, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); Decision and Order at 5, any error in this regard is harmless because the unrebutted evidence establishes Claimant was regularly exposed to coal mine dust for all twenty-five years of his coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer does not dispute that all of Claimant's coal mine employment was at a coal preparation plant. Decision and Order at 5-6; Director's Exhibits 3, 4, 12, 40; Employer's Exhibit 5; Hearing Tr. at 15-18. Claimant testified that his major duties at the plant were working the crusher, dryer, front end loader, and coal filter; loading trains; and driving trucks onsite. Hearing Tr. at 16; *see also* Director's Exhibits 4, 12 at 4. He testified that all of his jobs were dusty but some exposed him to the most dust: working the crusher, which crushes coal into smaller pieces; operating the dryer, which "spun coal [around] to dry"; and changing coal filters, which contain "water out of spun coal." Hearing Tr. at 16. Further, he stated he was "regularly exposed to coal dust at the prep plant," Hearing Tr. at 16, and rated "his exposure to coal and rock dust as a [seven to eight] on a ten-point scale, with ten representing the worst conditions," Director's Exhibit 12 at 4.

December 27, 2019, that Claimant signed on May 20, 2020, he stated that from "1978 through 2004, [he] worked as a laborer at the [preparation] plant at [a] surface coal mine that was owned by the Riverhill Coal Company." Director's Exhibit 4. However, on another employment history form also dated December 27, 2019, and provided to Dr. Celko, Claimant stated that from "1977 through 2004, [he] worked as a laborer at the [preparation] plant at an *underground* coal mine that was owned by the Riverhill Coal Company." Director's Exhibit 12 (emphasis added).

[6] The Administrative Procedure Act provides that 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Given this uncontradicted evidence, Claimant has satisfied his burden to establish the conditions of his aboveground coal mine employment, even if it was at a surface coal mine, were substantially similar to those in an underground mine. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015) ("uncontested lay testimony" regarding dust conditions "easily supports a finding" of regular dust exposure); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions throughout his employment were "very dusty" met his burden to establish he was regularly exposed to coal mine dust); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 n.17 (10th Cir. 2014) (claimant's testimony that he was exposed to "pretty dusty" conditions "provided substantial evidence of regular exposure to coal mine dust"); *Summers*, 272 F.3d at 473 (ALJ "was bound to find similarity" due to the claimant's uncontested testimony delineating the dusty conditions at a surface mine "for one cannot rationally ignore credible, uncontested evidence"); 20 C.F.R. §718.305(b)(2). We therefore affirm the ALJ's finding Claimant established at least twenty-five years of qualifying coal mine employment. Decision and Order at 6.

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. 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 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 20, 25-26.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated December 27, 2019, December 14, 2020, March 7, 2022, and April 18, 2022. Decision and Order at 19-20;

[7] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies, and the record contains 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 21.

Director's Exhibits 12 at 11, 40 at 15; Claimant's Exhibit 5; Employer's Exhibit 5 at 21. All four studies produced qualifying values[8] before and after the administration of a bronchodilator. Director's Exhibits 12 at 11, 40 at 15; Claimant's Exhibit 5; Employer's Exhibit 5 at 21. The ALJ found that all of the studies are valid, and that the April 18, 2022 study, whose validity was not challenged, is entitled to the most weight because it is the most recent. Decision and Order at 20. Thus he found the pulmonary function study evidence supports a finding of total disability. *Id.*

Employer argues the ALJ erred by not addressing Dr. Fino's opinion that the December 27, 2019 study is invalid.[9] Employer's Brief at 23-24; Director's Exhibit 37 at 12. We disagree. The ALJ acknowledged Dr. Fino's opinion that Claimant's pulmonary function study results are invalid,[10] but the ALJ further noted that "Drs. Go and Gaziano validated Claimant's December 27, 2019 testing results." Decision and Order at 20. Noting that Drs. Fino and Go have similar qualifications, the ALJ found that, weighing Dr. Fino's opinion against Dr. Go's opinion, Dr. Fino's opinion is insufficient to meet Employer's burden, as the party challenging the validity of a study, to establish the results are unreliable. *See Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984); Decision and Order at 20. Because Employer identifies no error in the ALJ's finding, we affirm it.

Moreover, regardless of the validity of the December 27, 2019 study, the ALJ's findings that all four pulmonary function studies are qualifying and that the most recent study from April 18, 2022, whose validity was not challenged, is the most probative are

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

[9] Employer also argues the ALJ erred in not considering that the comments with the March 7, 2022 pulmonary function study indicate the test does not meet the American Thoracic Society (ATS) criteria for validity. Employer's Brief at 24. Contrary to Employer's contention, the comments with the study only state "ATS criteria not met for [carbon monoxide diffusion capacity (DLCO)]." Claimant's Exhibit 5. As the study is qualifying based on the FEV1 and FVC values, we see no error in the ALJ's finding the study is valid for purposes of determining total disability at 20 C.F.R. §718.204(b)(2)(i). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 20.

[10] Specifically, Dr. Fino found the results of the December 14, 2020 pulmonary function study he administered were invalid due to the effects of a stroke, Director's Exhibit 40 at 11, 15; he also determined the December 27, 2019 pulmonary function study is invalid for various reasons, Director's Exhibit 37 at 12.

permissible and unchallenged; thus we affirm them. *See Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 12 n.14 (Nov. 17, 2023) ("a factfinder may, consistent with the progressive nature of pneumoconiosis, credit newer evidence showing a deterioration in a miner's condition over older evidence based on chronological order if enough time has passed for the disease to have progressed"); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 20. Consequently, we affirm the ALJ's finding the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ next weighed the medical opinions of Drs. Celko, Sood, Go, Fino, and Basheda. Decision and Order at 22-25. Drs. Celko, Sood, and Go opined Claimant is totally disabled based on his qualifying pulmonary function studies. Director's Exhibit 12 at 1-2; Claimant's Exhibits 1 at 9, 1a at 6-7, 3 at 7, 3a at 4-5. Dr. Fino opined Claimant has a "restrictive lung defect" based on his pulmonary function study results and that his stroke caused an inability to breathe properly. Director's Exhibit 40 at 11-12; Employer's Exhibit 8 at 12. Dr. Basheda opined Claimant's most recent pulmonary function study, conducted on April 18, 2022, is qualifying and demonstrates a "Class IV (51-100%) impairment of the whole person." Employer's Exhibits 5 at 14, 7 at 16.

The ALJ credited the opinions of Drs. Celko, Sood, and Go as they are consistent with the weight of the pulmonary function studies. Decision and Order at 25. He found the opinions of Drs. Fino and Basheda not reasoned and gave them no weight. *Id.* Thus the ALJ found the medical opinion evidence supports a finding of total disability. *Id.*

Employer argues the ALJ erred in crediting the opinions of Drs. Celko, Sood, and Go and in discrediting the opinions of Drs. Fino and Basheda. Employer's Brief at 24-26. Drs. Celko, Sood, and Go opined Claimant is totally disabled consistent with the qualifying pulmonary function study evidence. Director's Exhibit 12 at 1-2; Claimant's Exhibits 1 at 9, 1a at 6-7, 3 at 7, 3a at 4-5. Thus their opinions do not constitute contrary probative evidence at 20 C.F.R. §718.204(b)(2).

Dr. Basheda also opined Claimant's pulmonary function studies are qualifying and that he meets "the level of disability through a variety of standards." Employer's Exhibits 5 at 13-14, 7 at 16-17. Dr. Fino opined the pulmonary function studies demonstrate a restrictive lung defect and that he is clearly disabled due to his stroke, "which caused his inability to breath in and out properly." Director's Exhibit 40 at 11; Employer's Exhibit 8 at 10, 12.

While Drs. Basheda and Fino opined Claimant's impairment is caused by his stroke and not a pulmonary condition,[11] they did not refute the qualifying April 18, 2022 pulmonary function study, which the ALJ found is the most probative of Claimant's current condition, or explain how Claimant is capable of performing his usual coal mine employment despite the qualifying study. Director's Exhibit 40; Employer's Exhibits 5, 7, 8. Further, as discussed above, the April 18, 2022 study establishes total disability at 20 C.F.R. §718.204(b)(2)(i). *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Employer's Exhibit 5; Decision and Order at 20.

Consequently, all five medical opinions support a finding of total disability and do not constitute probative evidence undermining the qualifying pulmonary function study evidence.[12] 20 C.F.R. §718.204(b)(2). We thus reject Employer's argument that the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.305; Decision and Order at 25-26. Those findings are affirmed.

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, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in

[11] We note Employer admits "Drs. Fino and Basheda fully acknowledge that Claimant's pulmonary function studies were abnormal," but it emphasizes that the cause of the abnormality is his stroke. Employer's Brief at 26. However, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

[12] The ALJ's error in determining the opinions of Drs. Fino and Basheda undermine a finding of total disability is harmless given that he nevertheless found Claimant established total disability. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004) (ALJ's findings must be supported by substantial evidence, "defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *Larioni*, 6 BLR at 1-1278; Decision and Order at 25.

[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.[13]

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).

Employer's sole challenge to the ALJ's finding that it failed to rebut the presumption of clinical pneumoconiosis is that he erred in determining Claimant invoked the Section 411(c)(4) presumption. Employer's Brief at 27-28. Because we have affirmed the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption, we reject Employer's argument. 20 C.F.R. §718.305(d)(1)(i)(B). As Employer raises no further challenge to the ALJ's finding it failed to rebut the presumption of clinical pneumoconiosis, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16.

Disability Causation

After determining Employer failed to disprove the existence of clinical pneumoconiosis, the ALJ next considered whether Employer rebutted the Section 411(c)(4) presumption by showing that "no part of the miner'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)(i)(B), (ii); Decision and Order at 17, 26-29. The ALJ rationally discredited the disability causation opinions of Drs. Fino and Basheda because they did not diagnose clinical pneumoconiosis, contrary to his finding that Employer failed to disprove the disease.[14] *See Soubik*, 366 F.3d at 234; *see also Hobet Mining, LLC v. Epling*, 783 F.3d

[13] The ALJ found Employer disproved legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 17, but then subsequently, and inconsistently, stated that it failed to rebut the existence of legal pneumoconiosis, Decision and Order at 26.

[14] Because the ALJ found Employer failed to rebut that Claimant's total disability is due to clinical pneumoconiosis, we need not address Employer's argument the ALJ was "inconsistent in finding whether or not [it] rebutted the presumption of legal pneumoconiosis." *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 27-28.

498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 29; Director's Exhibit 40; Employer's Exhibits 5, 7, 8. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's total disability is due to pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

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

MELISSA LIN JONES
Administrative Appeals Judge