U.S. Department of Labor

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

BRB No. 20-0413 BLA

DANIEL L. HICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PARAMONT COAL COMPANY VIRGINIA, LLC	)	
	)	DATE ISSUED: 11/23/2021
Employer-Respondent	)	
	)	
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Daniel Hicks, St. Paul, Virginia.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Denying Benefits (2018-BLA-05192)

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Benefits Review Board review the ALJ's decision on

Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

rendered on a claim filed on August 31, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 38.21 years of underground coal mine employment. Because the evidence did not establish complicated pneumoconiosis at 20 C.F.R. §718.304, he found Claimant could not 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) (2018). Because Claimant further failed to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), the administrative law judge found he could not invoke 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), or affirmatively establish entitlement under 20 C.F.R. Part 718. He therefore denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial.[2] The Director, Office of Workers' Compensation Programs, did not file a response brief.

When a claimant files an appeal without the assistance of counsel, the Benefits Review Board considers whether substantial evidence supports the decision below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the ALJ's findings of fact and conclusions of law if they are 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 Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(4) Presumption—Total Disability

We initially affirm the ALJ's finding that Claimant did not establish he is totally disabled at 20 C.F.R. §718.204(b)(2) and therefore cannot invoke the Section 411(c)(4) presumption. A miner is totally disabled if his pulmonary or respiratory impairment,

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[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 38.21 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 20; Director's Exhibit 4 at 1.

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 of the relevant evidence and weigh the evidence supporting a finding of 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).

The ALJ considered three pulmonary function studies dated September 26, 2016, April 19, 2017, and August 15, 2018. Director's Exhibits 17, 25; Employer's Exhibit 4. The September 26, 2016 pulmonary function study produced qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values.[5] Director's Exhibit 17 at 13. The April 19, 2017 and August 15, 2018 studies produced non-qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 25 at 10; Employer's Exhibit 4 at 11. The ALJ permissibly determined the two non-qualifying pulmonary function studies outweigh the single qualifying pulmonary function study. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013); Decision and Order at 21-22. We therefore affirm his finding that the pulmonary function study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

We also affirm the ALJ's finding Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii), as none of the arterial blood gas studies[6] produced qualifying results, and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 22.

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[4] The ALJ found Claimant's usual coal mine work as a roof bolter and belt worker required heavy labor. Decision and Order at 24.

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The record contains three arterial blood gas studies conducted on September 26, 2016, April 19, 2017, and August 15, 2018. Director's Exhibits 17, 25; Employer's Exhibit 4. The September 26, 2016 and August 15, 2018 studies produced non-qualifying values at rest and during exercise. Director's Exhibit 17 at 9; Employer's Exhibit 4 at 25-26. The April 19, 2017 study produced non-qualifying values at rest, but exercise testing was not performed. Director's Exhibit 25 at 15.

We further affirm the ALJ's finding that the medical opinion evidence does not establish total disability. Dr. Ajjarapu opined that Claimant has a totally disabling respiratory or pulmonary impairment, while Drs. Fino and Sargent concluded he does not. Decision and Order at 23-24; Director's Exhibits 17, 25; Employer's Exhibits 2-5, 7. The ALJ permissibly discredited Dr. Ajjarapu's opinion because she based it primarily on the September 26, 2016 pulmonary function study and did not account for the subsequent non-qualifying pulmonary function studies.[7] *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 24; Director's Exhibits 17 at 2; 27 at 2.

The ALJ is entitled to determine the weight to be accorded the medical evidence of record. The Board is not empowered to reweigh it or substitute its judgment for that of the ALJ. *Lane v. Union Carbide Corp*., 105 F.3d 166 (4th Cir. 1997). As the ALJ permissibly rejected the only medical opinion of record that could support a finding of total disability, we affirm his finding Claimant failed to establish total disability by medical opinion at 20 C.F.R. §718.204(b)(2)(iv) as supported by substantial evidence. *Lane*, 105 F.3d 166; Decision and Order at 24.

Finally, we affirm, as supported by substantial evidence, the ALJ's finding that the medical evidence, weighed separately and together, fails to establish total respiratory or pulmonary disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 8. As Claimant failed to establish he has a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's determinations that he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) or establish an essential element of entitlement pursuant to 20 C.F.R. Part 718.

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

The ALJ erred, however, in finding Claimant did not prove he has complicated pneumoconiosis. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), establishes an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The ALJ must determine

[7] Dr. Ajjarapu submitted a supplemental opinion after reviewing Dr. Fino's non-qualifying pulmonary function study but simply reiterated, without further explanation, that she considered Claimant totally disabled based on the earlier, qualifying pulmonary function study. Director's Exhibit 27.

whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ erred when weighing the computed tomography (CT) scans performed on October 26, 2016, and August 31, 2017. Dr. Mullens diagnosed coal workers' pneumoconiosis on the October 26, 2016 CT scan due to the presence of "innumerable bilateral pulmonary nodules."[8] Claimant's Exhibit 5. Dr. Cobb interpreted the August 31, 2017 CT scan and performed a "comparison study" with the October 26, 2016 CT scan. He concluded the August 2017 scan showed "[coal workers' pneumoconiosis/silicosis with progressive massive fibrosis" due to the presence of "[n]umerous interstitial nodules throughout the lung fields" and "mild peripheral fibrotic lung changes." Claimant's Exhibit 9. He stated these results are "very similar to" and "unchanged from the prior [October 2016 comparison] study." *Id.* The ALJ found the CT scan evidence insufficient to establish complicated pneumoconiosis because neither interpretation specifically indicated the size of the opacities and because Dr. Cobb's "mere mention of 'progressive massive fibrosis' on the CT scan interpretation, without more, is insufficient" to establish complicated pneumoconiosis. Decision and Order at 20.

Contrary to the ALJ's finding, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that a diagnosis of progressive massive fibrosis is equivalent to a diagnosis of "massive lesions" for establishing complicated pneumoconiosis under 20 C.F.R. §718.304(b). *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (describing a diagnosis of massive lesions as "another statutory ground for application of the [Section 411(c)(3)] presumption"); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) ("Complicated pneumoconiosis . . . involves progressive massive fibrosis . . . ."). Therefore, "by statute or regulation, an opacity of sufficient size-if X-rayed, one centimeter; *if not, one that is* "*massive*" – becomes a proxy for the tissue mass characteristic of complicated pneumoconiosis." *Perry*, 469 F.3d at 364 (emphasis added). Because the ALJ erred in finding Dr. Cobb's opinion insufficient to meet the definition of complicated pneumoconiosis, we vacate the ALJ's

[8] Earlier in his report, Dr. Mullens described Claimant as having "[i]nnumerable small pulmonary nodules predominantly in the mid and upper lung zones" and "nodular pleural thickening bilaterally." Claimant's Exhibit 5.

finding that the CT scan evidence does not establish the disease.[9] Moreover, to the extent the ALJ's evaluation of the CT scan evidence may affect his consideration of the x-ray and medical opinion evidence, we vacate his determinations that Claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c).[10] Decision and Order at 19-20. Consequently, we vacate his finding that Claimant did not invoke the irrebuttable presumption.

Remand Instructions

On remand, the ALJ should first reconsider whether the CT scan evidence establishes complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). The ALJ must then weigh together all medical evidence relevant to the issue of complicated pneumoconiosis, after considering whether the weight to be accorded evidence from one

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[9] The ALJ also stated Dr. Cobb's diagnosis of progressive massive fibrosis on the August 2017 CT scan was inconsistent with the earlier October 2016 CT scan despite Dr. Cobb's assessment that the CT scans were "very similar" and "unchanged." Decision and Order at 20; Claimant's Exhibit 9. The ALJ did not, however, indicate whether he was discrediting Dr. Cobb on this basis; the ALJ immediately thereafter stated, errantly, that "extended discussion" of the CT scans was unnecessary because Dr. Cobb's opinion is facially insufficient to meet the definition of complicated pneumoconiosis. Regardless, to the extent Dr. Cobb based his August 2017 diagnosis on a "comparison study" with the earlier CT scan, the ALJ did not explain why Dr. Mullens's reading of the earlier study is necessarily more credible than Dr. Cobb's opinion that Claimant has complicated pneumoconiosis. Nor did the ALJ explain why the two CT scans conflict given his finding that Dr. Mullens "made no mention" of the size of the opacities. Decision and Order at 19-20.

[10] The ALJ considered eleven interpretations of five x-rays dated June 7, 2016, September 26, 2016, April 19, 2017, April 26, 2018, and August 15, 2018. Decision and Order at 6-7, 18-19. The ALJ found the readings of the June 7, 2016, April 19, 2017, April 26, 2018, and August 15, 2018 x-rays in equipoise as equally credentialed doctors gave conflicting readings of each x-ray. Decision and Order at 18-19. He further found the readings of the September 26, 2016 x-ray were "at best in equipoise" because two physicians read it as negative for complicated pneumoconiosis while one read it as positive. Decision and Order at 18. Turning to the medical opinion evidence, the ALJ discredited Dr. Ajjarapu's diagnosis of complicated pneumoconiosis because it is contrary to his finding that the x-rays and CT scans do not establish the disease. 20 C.F.R. §718.104(d)(5); Decision and Order at 20.

section is affected by evidence offered in another.[11] *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993). If the ALJ finds Claimant failed to establish complicated pneumoconiosis on remand, he may reinstate the denial of benefits.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

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[11] If reached, the administrative law judge should address whether the miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b). Because Claimant has greater than ten years of coal mine employment, the burden is on Employer to disprove that fact. *Id.*