

U.S. Department of Labor

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



BRB Nos. 23-0112 BLA
and 23-0112 BLA-A

OMER M. JACKSON)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
A&G COAL CORPORATION)	
)	
and)	
)	
AMERICAN INTERNATIONAL)	DATE ISSUED: 10/05/2023
SOUTH/AIG)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Omer M. Jackson, Norton, Virginia.

H. Brett Stonecipher and Samantha Steelman (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Amanda Torres (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, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,¹ and Employer cross-appeals Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Denying Benefits (2021-BLA-05138) rendered on a claim filed on November 1, 2019,² pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and thus 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); 20 C.F.R. §718.304. Additionally, although she found Claimant established thirty-three years of surface coal mine employment in conditions substantially similar to those in an underground mine and simple pneumoconiosis, she also found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a), 718.204(b)(2). Therefore, she found Claimant 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).³ Because Claimant failed to establish a requisite element of entitlement, the ALJ denied benefits.

¹ Courtney Hughes, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the Administrative Law Judge's (ALJ) decision on Claimant's behalf, but Ms. Hughes is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

² This is Claimant's second claim for benefits. He withdrew his first claim. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

³ 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); *see* 20 C.F.R. §718.305.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (Director), has not filed a response brief. On cross-appeal, Employer argues the district director lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.⁴ It also contends the ALJ erred in finding Claimant established at least fifteen years of "qualifying" coal mine employment necessary to invoke the Section 411(c)(4) presumption.⁵ The Director has filed a response to Employer's cross-appeal, urging the Board to reject its Appointments Clause challenges.

In an appeal filed without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). 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.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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

⁴ Article II, Section 2, Clause 2, sets forth the appointing powers:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

⁵ We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established thirty-three years of coal mine employment and simple pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 9, 11, 13-14; Hearing Tr. at 20.

⁶ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2; Director's Exhibit 4; Hearing Tr. at 12.

totally disabling respiratory or pulmonary impairment); and disability 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 a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *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)(3) Presumption - Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides 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 one or more opacities 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 yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether a claimant has invoked the irrebuttable presumption, the ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. 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 correctly found the x-ray, treatment record, and medical opinion evidence⁷ contain no diagnosis of complicated pneumoconiosis, and the record contains no biopsy evidence. 20 C.F.R. §718.304(a)-(c); Decision and Order at 9, 13-14.

⁷ Dr. Forehand diagnosed “coal workers’ pneumoconiosis” and opined that “Claimant’s exposure to coal mine dust substantially contributed to his coal workers’ pneumoconiosis.” Director’s Exhibit 3 at 10-14. The ALJ concluded Dr. Forehand’s opinion “supports a finding that Claimant has simple coal workers’ pneumoconiosis. Decision and Order at 13. However, she also stated the doctor’s opinion supports “a finding . . . that the complicated pneumoconiosis was caused by coal mine employment.” Decision and Order at 13. Immediately before referring to “complicated pneumoconiosis,” the ALJ stated in the same sentence that Dr. Forehand’s opinion supports “the presence of coal workers’ pneumoconiosis.” *Id.* Additionally, in paragraphs before and after the sentence in which she referred to “complicated pneumoconiosis,” the ALJ noted the doctor opined Claimant has simple pneumoconiosis. *Id.* at 12-13. Moreover, Dr. Forehand did not refer to complicated pneumoconiosis in his report. Director’s Exhibit 3 at 10-14. Therefore, the context of the ALJ’s analysis and the record makes clear that this

The ALJ also considered two readings of the February 24, 2020 computed tomography (CT) scan and one reading of Claimant's September 21, 2020 treatment record CT scan. Decision and Order at 10-11; Director's Exhibits 23, 25; Claimant's Exhibit 3; Employer's Exhibit 1. Dr. DePonte read the September 21, 2020 treatment record CT scan as revealing findings of "[i]nterstitial nodularity . . . in the upper lobes . . . consistent with simple coal workers (sic) pneumoconiosis," identifying a "13 mm opacity . . . in the periphery of the left upper lobe," and noting "[t]he largest right upper lobe opacity is approximately 14 mm." Claimant's Exhibit 3 at 1; Employer's Exhibit 1 at 2-3. Dr. DePonte read the February 24, 2020 CT scan as showing "[l]ung parenchyma interstitial nodularity predominately in the upper lung zones subpleural nodularity typical for simple coal workers (sic) pneumoconiosis" and "[m]ultiple simple wires consistent with complicated coal workers' pneumoconiosis." Director's Exhibit 23 at 3. Dr. Meyer read the February 24, 2020 CT scan as revealing "findings consistent with simple coal workers' pneumoconiosis," identifying subpleural "perilymphatic nodules" and noting "no regions of conglomerate fibrosis," "no emphysema," and "no pleural effusion or pleural plaque." Director's Exhibit 25 at 2. Dr. Tuteur reviewed Dr. DePonte's reading of the February 24, 2020 CT scan and stated he "suspect[ed] that [the reference to complicated coal workers' pneumoconiosis] is a misinterpretation from . . . the voice recognition computer application used to develop the [CT scan] report," given there is "[n]o such description" in the report, the isolated statement is "uninterpretable," and "[t]he wires may be related to the pacemaker implantation." Employer's Exhibit 2 at 3 (emphasis in original). The ALJ permissibly found Dr. DePonte's interpretation of the February 24, 2020 CT scan unpersuasive because of its "inconsistency." See *Milburn Colliery 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 11. Thus, we affirm the ALJ's finding that the CT scan evidence does not support a finding of complicated pneumoconiosis.

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant did not establish the existence of complicated pneumoconiosis. See *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33; 20 C.F.R. §718.304; Decision and Order at 14.

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)(i). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone,

discrepancy was a "scrivener's error." *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

prevents him from performing his usual coal mine work or comparable gainful work.⁸ See 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying⁹ pulmonary function or 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 the arterial blood gas study and medical opinion evidence does not establish total disability.¹⁰ 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 15-17. Therefore, she found Claimant did not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 17.

Arterial Blood Gas Study

The ALJ considered the results of an arterial blood gas study dated January 13, 2020, and accurately found it did not produce qualifying results. Decision and Order at 16; Director’s Exhibit 22 at 7. Thus we affirm her finding that the blood gas study evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 16.

⁸ The ALJ found Claimant’s usual coal mine employment as a dozer operator required “heavy exertion” based on the Department of Labor’s Dictionary of Occupational Titles. Decision and Order at 7. This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711.

⁹ A “qualifying” pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A “non-qualifying” study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

¹⁰ The ALJ accurately found there is no pulmonary function study evidence, or evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 15-16. In a ventilatory study report form dated January 13, 2020, Dr. Forehand stated, “No [pulmonary function test] due to aneurysm.” Director’s Exhibit 22 at 6.

Medical Opinions

The ALJ considered Dr. Forehand's opinion. Decision and Order at 12-13, 17. She correctly found Dr. Forehand opined Claimant does "not have a measurable respiratory impairment, as the [January 13, 2020] arterial blood gas study did not meet the disability standard and the ventilatory study was contraindicated." *Id.* at 17; Director's Exhibit 22 at 4. However, she did not consider Dr. Tuteur's report in which the doctor concluded "[a]vailable data do not allow [him] to assess the presence or absence of ventilatory impairment or disability" and Claimant has "no impairment of oxygen gas exchange" based on his "arterial blood gas analysis." Employer's Exhibit 2 at 3. Because Dr. Tuteur's opinion does not support a finding of total disability, any error the ALJ made in failing to consider it is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As there is no medical opinion of record supporting a finding of total disability, we affirm the ALJ's finding that Claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13, 17. Further, as it is supported by substantial evidence, we affirm the ALJ's finding that Claimant did not establish total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 17. We therefore affirm the ALJ's findings that Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2018), and failed to prove a necessary element of entitlement.¹¹ *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; Decision and Order at 17.

¹¹ Because we affirm the ALJ's denial of benefits, we need not address Employer's Appointments Clause challenges on cross-appeal or its argument that the ALJ erred in finding Claimant established at least fifteen years of "qualifying" coal mine employment necessary to invoke the Section 411(c)(4) presumption. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 7-8 (unpaginated).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge