U.S. Department of Labor

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

BRB No. 22-0387 BLA

GARY D. ADKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEN COAL CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND c/o SMART CASUALTY CLAIMS	)	DATE ISSUED: 9/28/2023
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2021-BLA-05221) rendered on a subsequent claim filed on May 21, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-nine years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). Further, she found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. It further argues she

[1] Claimant filed five previous claims for benefits. Director's Exhibits 1-5. The district director denied his prior claim on January 19, 2016, because he failed to establish any element of entitlement. Director's Exhibit 5.

[2] 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.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of the current claim. *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c).

erred in finding it did not rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to respond.

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.[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 (1965).

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 and comparable gainful work.[6] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[7] pulmonary function studies 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 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).

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[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-nine years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 8-10.

[5] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21.

[6] As it is unchallenged, we affirm the ALJ's finding that Claimant's usual coal mine employment as a maintenance foreman involved "heavy labor." Decision and Order at 5; *see Skrack*, 6 BLR at 1-711.

[7] A "qualifying" pulmonary function study or blood gas study yields results that are 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 that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

The ALJ found total disability based on the medical opinion evidence and the evidence as a whole.[8] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13-21. Employer contends the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 5-12. We disagree.

The ALJ considered the medical opinions of Drs. Jaworski and Werntz that Claimant is totally disabled from his usual coal mine employment and the contrary opinions of Drs. Zaldivar and Basheda that he is not. 20 C.F.R. §718.204(b)(2)(iv); Director's Exhibits 20, 22; Employer's Exhibits 1, 4-6; Claimant's Exhibit 4.

The ALJ found Dr. Jaworski's opinion "reasoned and adequately documented but is entitled to slightly less weight because he did not have the opportunity to review the more recent" pulmonary function and arterial blood gas testing. Decision and Order at 21. She found Dr. Werntz's opinion "entitled to significant weight based on his thorough and persuasive explanations." *Id*. Regarding the contrary opinions, she found Dr. Zaldivar's opinion "adequately" reasoned and documented, and Dr. Basheda's opinion "adequately documented." *Id*. at 20-21. However, she found the criticisms Dr. Zaldivar and Dr. Basheda identified with respect to Dr. Werntz's opinion unpersuasive. *Id*. Because she found Dr. Werntz's opinion entitled to the most weight, and Drs. Zaldivar and Basheda did not persuasively undermine Dr. Werntz's rationale for diagnosing total disability, she concluded the preponderance of the medical opinions support total disability. *Id*.

Employer argues the ALJ erred in crediting Dr. Werntz's opinion. Employer's Brief at 9-12. We disagree.

Dr. Werntz noted Claimant performed an arterial blood gas test on July 26, 2021, at Cabin Creek Health that produced a resting pO2 of seventy-four and pCO2 of thirty-six. Claimant's Exhibit 4 at 2. Claimant then exercised on a treadmill with a target heart rate of 129 beats per minute. Claimant's Exhibit 6. The study was stopped at five minutes and twenty-four seconds because Claimant experienced dyspnea and fatigue. *Id*. Dr. Werntz noted Claimant was able to exercise up to 6.1 metabolic equivalents (METs), and a blood gas test taken when the study was stopped produced a pO2 of seventy-eight and a pCO2 of thirty-six. Claimant's Exhibit 4 at 2.

Dr. Werntz explained the "slight increase in pO2 and stable PCO2" when the study was stopped "suggest[s] that [Claimant] could sustain the demonstrated 6.1 METs." Claimant's Exhibit 4 at 2. He then calculated the METs level that Claimant's usual coal

[8] The ALJ found the pulmonary function study and arterial blood gas study evidence does 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 10-13.

mine employment required. *Id*. As the mine foreman work Claimant performed required lifting "heavy electric motors and parts [weighing] 100 pounds [and] carrying oxygen tanks weighing [sixty to seventy] pounds," Dr. Werntz opined Claimant's work fell within the "heavy aerobic demand category." *Id*. at 3. Citing the 2011 *Compendium of Physical Activities: Tracking Guide*, he stated the "lifting and carrying tasks . . . likely require[d] about [eight] METs." *Id*. Because Claimant could achieve only 6.1 METs on the July 26, 2021 exercise arterial blood gas study before experiencing dyspnea and fatigue, Dr. Werntz opined the study "suggests" Claimant "does not have adequate aerobic capacity to meet the aerobic demands of his last coal mine employment." *Id*. The ALJ permissibly found his opinion well-reasoned and documented. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 20-21.

Employer contends Dr. Werntz's use of the words "suggests," "about," and "likely" all indicate he was equivocal on whether Claimant is totally disabled. Employer's Brief at 9-11. Contrary to Employer's argument, Dr. Werntz's use of these words does not render his opinion equivocal. *See Mays*, 176 F.3d at 763 (opinion that pneumoconiosis "could be" a complicating factor in miner's death was not equivocal); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) ("refusal to express a diagnosis in categorical terms is candor, not equivocation").

Next, Employer asserts the ALJ erred in crediting Dr. Werntz's opinion "by crediting his reliance on an outside source in order to find disability." Employer's Brief at 10. Employer has not set forth what outside source Dr. Werntz relied on and thus this argument is unpersuasive. Regardless, Employer did not argue before the ALJ that Dr. Werntz's opinion should be discredited because he relied on a source outside of the record, and thus it has forfeited the argument.[9] *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*],

[9] Nor would we find merit to Employer's argument to the extent it is arguing the ALJ cannot credit Dr. Werntz's rationale for calculating the METs level of Claimant's usual coal mine employment and comparing that level to his blood gas study results. Claimant can establish total disability "if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques," concludes that his respiratory or pulmonary condition prevents him from performing his usual coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(iv). The ALJ permissibly credited Dr. Werntz's opinion over the contrary opinions based on the rationale the doctor set forth. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995); Employer's Post-Hearing Brief.

Employer further contends the ALJ erred in crediting Dr. Werntz's opinion because it is based on non-qualifying objective testing. Employer's Brief at 11-12. Contrary to Employer's contention, a physician may conclude a miner is disabled even if the objective studies are non-qualifying. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); 20 C.F.R. §718.204(b)(2)(iv).

We next reject Employer's argument that the ALJ did not adequately set forth why the opinions of Drs. Basheda and Zaldivar do not undermine Dr. Werntz's credible opinion. Employer's Brief at 11-12. In a supplemental report, Dr. Basheda indicated he reviewed Dr. Werntz's opinion along with the July 26, 2021 blood gas study. Employer's Exhibit 5. He questioned whether walking on a treadmill as Claimant did when performing the exercise blood gas study can accurately simulate the exertional requirements of Claimant's usual coal mine employment. *Id.* The ALJ permissibly found this criticism unpersuasive because she found walking on a treadmill underestimates, not overestimates, the heavy labor Claimant's usual coal mine employment required, including "lifting and carrying up to" one-hundred pounds. Decision and Order at 20-21; *see Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40. In addition, as a basis for not finding total disability, Dr. Basheda stated that exercising up to 6.1 METs is a good exercise tolerance level for an individual such as Claimant, who is in his sixties. Employer's Exhibit 5. The ALJ permissibly found this basis unpersuasive because the doctor did not indicate whether an individual in his sixties with this peak exercise tolerance would be able to perform Claimant's usual coal mine employment, which required heavy labor. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 21.

Dr. Zaldivar testified in his deposition that he reviewed Dr. Werntz's opinion and the July 26, 2021 blood gas study. Employer's Exhibit 6 at 10. When asked about the accuracy of the 6.1 METs figure Dr. Werntz used, based on Claimant's walking on a treadmill, he stated it "may or may not be accurate" because it was a calculated figure from the treadmill and not a measured figure. *Id.* at 41. The ALJ permissibly found Dr. Zaldivar's criticism does not undermine Dr. Werntz's opinion because Dr. Zaldivar provided "no further explanation as to whether" the 6.1 METs figure "was indeed accurate . . . ." Decision and Order at 20-21; *see Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40. The ALJ also permissibly found as unpersuasive Dr. Zaldivar's opinion that the July 26, 2021 blood gas study only establishes that Claimant was limited by his heart condition and

not a lung impairment. Decision and Order at 21. 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* 20 C.F.R. §718.204(b), (c); *Bosco v. Twin Pines Coal Co*., 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11 (May 26, 2023).

Because the ALJ summarized all the relevant evidence, weighed the evidence, and sufficiently explained her credibility determinations in accordance with the Administrative Procedure Act (APA),[10] we affirm her finding that Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); *see Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (explaining duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why she did it); Decision and Order at 21.

We further affirm the ALJ's finding that Claimant established total disability based on all relevant evidence. 20 C.F.R. §718.204(b)(2); Decision and Order at 21. Thus we affirm her determinations that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309; Decision and Order at 21, 28.

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,[11] or that "no part

[10] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include a statement of "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).

[11] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the

of [his] 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), (ii). The ALJ found Employer failed to rebut the presumption by either method.[12] Decision and Order at 25-26.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the medical opinions of Drs. Zaldivar and Basheda.[13] Decision and Order at 25-26. Both diagnosed an obstructive lung impairment due to cigarette smoking and asthma, and unrelated to coal mine dust exposure. Director's Exhibit 22; Employer's Exhibit 1. The ALJ found their opinions unpersuasive. Decision and Order at 25-26.

Employer argues the ALJ erred in weighing the opinions of Drs. Zaldivar and Basheda. Employer's Brief at 12-14. We disagree.

When asked to define legal pneumoconiosis, Dr. Zaldivar stated "any inhalation injury in the mines not due to retention of dust is a form of legal pneumoconiosis." Employer's Exhibit 6 at 29. In addressing whether Claimant's asthma constitutes legal pneumoconiosis, Dr. Zaldivar testified coal and silica dust do not cause asthma. *Id*. at 16. However, he stated other exposures present in mines, including limestone used to suppress dust and industrial glue, can cause industrial asthma as allergic agents. *Id*. at 16-17. The ALJ noted that legal pneumoconiosis is defined as "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 25. Because Dr. Zaldivar misstated the definition of legal pneumoconiosis and did not set forth whether Claimant's asthma was significantly related to or substantially aggravated by coal mine

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lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[12] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 26.

[13] The ALJ found Dr. Werntz did not address legal pneumoconiosis. Decision and Order at 25. This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711

dust exposure, the ALJ permissibly rejected Dr. Zaldivar's opinion. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 25.

Dr. Basheda noted that every pulmonary function study of record evidenced an obstructive impairment because they all resulted in an FEV1/FVC ratio below seventy-percent. Employer's Exhibit 4 at 19, 33. He also noted "variability in [pulmonary function testing] over a period of time," as the studies show a "significant decline" in breathing capacity "from 2016 to 2018, and then a subsequent improvement . . . from 2018 to 2020." *Id*. at 19-20. Further, he testified cigarette smoke and asthma result in a "variable form of obstructive lung disease." *Id*. at 24. He opined coal mine dust-induced obstruction is fixed and will not vary or improve over time. *Id*. at 24-25; *see* Employer's Exhibit 5. Thus he attributed any obstructive impairment to cigarette smoking and asthma. *Id*.

The ALJ noted that, even if Claimant's pulmonary function testing evidenced a variable obstructive impairment, "by Dr. Basheda's own definition, Claimant shows some fixed obstruction because he shows some amount of persistent obstruction" on every pulmonary function study. Decision and Order at 26 (internal quotations omitted). She permissibly found Dr. Basheda did not "adequately address why he excluded coal mine dust as a cause in Claimant's fixed obstruction, especially in light of his own opinion that coal mine dust causes a 'fixed disorder.'" *Id*.; *see Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40.

Because the ALJ acted within her discretion in rejecting the opinions of Drs. Zaldivar and Basheda, we affirm her finding that Employer did not disprove the existence of legal pneumoconiosis. Decision and Order at 26. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 26.

Disability Causation

The ALJ next addressed whether Employer established no part of Claimant'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)(ii); Decision and Order at 27-28. Contrary to Employer's argument, the ALJ permissibly discredited the opinions of Drs. Zaldivar and Basheda because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 28. We therefore affirm the ALJ's conclusion that Employer failed to establish no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

JONATHAN ROLFE
Administrative Appeals Judge