U.S. Department of Labor

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

BRB No. 23-0047 BLA

JACKIE RAY WISE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY, LLC	)	
	)	
and	)	
	)	DATE ISSUED: 9/26/2023
Self-Insured Through ARCH COAL, INCORPORATED	)	
	)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2020-BLA-06071) rendered on a claim filed on August 15, 2018, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has forty-one years of coal mine employment, all of which the ALJ determined to be qualifying, and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The ALJ also found Employer failed to rebut the presumption and awarded benefits commencing August 2018, the month in which Claimant filed his claim.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and thus invoked the Section 411(c)(4) presumption.[2] Employer also argues the ALJ erred in finding the presumption unrebutted. Additionally, it challenges the date the ALJ determined that benefits should commence. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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, 362 (1965).

[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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least 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 4-5; Hearing Transcript at 15-16.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See*

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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[4] 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).

Employer contends the ALJ erred in finding Claimant established total disability based on the medical opinions and in consideration of the evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-12.

The ALJ considered five medical opinions regarding whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 8-12. Drs. Green, Raj, and Nader opined Claimant has a respiratory impairment that precludes him from performing his usual coal mine employment,[6] while Drs. Dahhan and Rosenberg opined he does not.

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 3; Hearing Transcript at 19-20, 25-26.

[4] 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).

[5] The ALJ found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). He found the preponderance of the pulmonary function studies are non-qualifying; the four blood gas studies are non-qualifying; and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 6-12. The ALJ also found Claimant did not establish complicated pneumoconiosis and thus was unable to 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). Decision and Order at 6.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's usual coal mine work as a foreman required moderate to heavy manual labor because it required

Director's Exhibits 22 at 4-5; 34 at 3-5; Claimant's Exhibits 1 at 6-7 (unpaginated); 4 at 6 (unpaginated).

The ALJ found the opinions of Drs. Green and Raj to be the most well-reasoned and concluded Claimant established total disability because they had an accurate understanding of Claimant's usual coal mine work and explained why his impairment would preclude him from performing moderate manual labor.[7] Decision and Order at 8-10 and n.33. Consequently, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 11-12.

Employer's primary assertion is the ALJ improperly credited the opinions of Drs. Green and Raj because they relied on non-qualifying objective studies. Employer's Brief at 6. It contends its experts' opinions must be credited because the regulations specify how objective tests may support a finding of total disability only when qualifying. *Id*. at 9-11. Specifically, Employer argues that "only when assessment of disability is based on medically acceptable clinical and laboratory diagnostic techniques **notwithstanding** non-qualifying pulmonary function tests and arterial blood-gas tests, is it possible to find disability." Employer's Brief at 10 (emphasis in original). It maintains Drs. Green's and Raj's opinions must be rejected because they did not use diagnostic criteria beyond the non-qualifying pulmonary function studies and arterial blood-gas tests, and thus their opinions cannot support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 8-10.

Contrary to Employer's assertion, and as the ALJ recognized, total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing, as non-qualifying testing may still render a miner incapable of performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *see 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); *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); Decision and Order at 18-19; Claimant's Brief at 4-6. Further, a medical opinion

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the regular lifting of 50 to 100 pounds. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5; Director's Exhibit 4; Hearing Transcript at 21-23.

[7] As Dr. Nader incorrectly referenced the January 20, 2021 pulmonary function study as qualifying for total disability in rendering his opinion, the ALJ gave it little probative weight, but the ALJ noted Dr. Nader's opinion did not weigh against a finding of total disability. The ALJ's reference to Dr. Raj instead of Dr. Nader in footnote thirty-three of the Decision and Order is a scrivener's error. *See* Decision and Order at 10 n.33.

may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a miner is unable to do his usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion*.") (emphasis added); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may infer total disability by comparing the severity of impairment or related physical limitations that a physician diagnoses with the exertional requirements of the miner's usual coal mine work). Thus, Employer's argument that the ALJ cannot credit medical opinions that cite to non-qualifying pulmonary function studies and arterial blood-gas tests without other clinical or laboratory diagnostic techniques to support their opinions is unavailing.

Employer also argues the ALJ failed to consider that Dr. Green did not review the two most recent pulmonary function studies, which had greater pre-bronchodilator FEV1 values than the values he obtained. Employer's Brief at 8. But an ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned and documented. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Here, the ALJ permissibly found Dr. Green's opinion reasoned and documented because he examined Claimant, obtained an accurate work history, recorded symptoms and physical findings, and opined the pulmonary function studies showed a significant degree of airflow obstruction, along with air trapping and hyperinflation, which compromised Claimant's lung function to the extent he could not perform moderate labor required by his usual coal mine employment. *See Cornett*, 227 F.3d at 578; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987); Director's Exhibits 22 at 4; 34 at 2-3. As the ALJ acted within his discretion in finding Dr. Green's opinion is reasoned and documented, and therefore sufficient to satisfy Claimant's burden of proof, we affirm his determination that it supports a finding of total disability. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

Additionally, Employer argues Dr. Raj did not explain what medical evidence supported his opinion of total disability. Employer's Brief at 8-9. However, the ALJ permissibly found Dr. Raj's opinion that Claimant is totally disabled credible because he explained that Claimant's January 20, 2021 and March 16, 2021 pulmonary function studies showed a reduction in the FEV1 values that would preclude Claimant from performing moderate manual labor. Decision and Order at 10; Claimant's Exhibit 4 at 4. We therefore affirm the ALJ's finding that Dr. Raj's opinion is adequately reasoned and documented, and that he had an accurate understanding of Claimant's usual coal mine

work, in concluding that Claimant is totally disabled. *See Cornett*, 227 F.3d at 578; *Rowe*, 710 F.2d at 255; *Fields*, 10 BLR at 1-21-22; Decision and Order at 10.

Regarding Employer's experts, we disagree that the ALJ did not adequately explain why they are not credible. The ALJ permissibly rejected both Dr. Dahhan's and Dr. Rosenberg's opinions because they relied on the non-qualifying nature of Claimant's objective tests without addressing the exertional requirements of Claimant's usual coal mine work in concluding Claimant is not totally disabled. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996); Decision and Order at 11; Director's Exhibit 29 at 2-3; Employer's Exhibit 7 at 3-4.

Accurately noting Dr. Rosenberg opined Claimant is not totally disabled from a pulmonary perspective "with appropriate treatment for hyperreactive airways," Director's Exhibit 29 at 3-4; Employer's Exhibit 7 at 4, the ALJ permissibly found Dr. Rosenberg's opinion unpersuasive because he conditioned his opinion that Claimant is not totally disabled upon Claimant taking medication, which is not the relevant inquiry. *See* 20 C.F.R. §718.204(b)(1); 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (DOL has cautioned against relying on post-bronchodilator pulmonary function testing results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis").

Employer's arguments on total disability are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in crediting the opinions of Drs. Green and Raj, we affirm his finding that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole.[8] 20 C.F.R. §718.204(b)(2); *see Banks*, 690 F.3d at 483; Decision and Order at 11-12.[9] We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 6, 11-12.

[8] Employer alleges the ALJ "confus[ed] the burden of proof" at total disability but we see no basis for that allegation and reject it. Employer's Brief at 10; *see* Decision and Order at 6 ("I must weigh all the evidence in determining whether the Claimant has established that he is totally disabled.") [footnote omitted], 12 ("Therefore, I find that the Claimant has established that he is totally disabled from a pulmonary or respiratory perspective.").

[9] To the extent that the ALJ did not consider, when weighing the evidence as a whole, whether the later pulmonary function testing diminished the weight to be accorded

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,[10] or that "no part 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 rebutted the presumption of clinical pneumoconiosis, but not legal pneumoconiosis, and failed to establish rebuttal of the presumption that no part of Claimant's total disability is caused by legal pneumoconiosis. Decision and Order at 14, 16-17.

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Rosenberg and Dahhan. Dr. Rosenberg opined that Claimant "may have a component" of legal pneumoconiosis, but that he would need to review his treatment records over time in order to make a full assessment.

Dr. Green's opinion, any error is harmless. *See* Employer's Brief at 8; Employer's Post-Hearing Brief at 23. The ALJ relied on Dr. Raj's opinion of total disability, which considered the most recent pulmonary function testing and accorded with Dr. Green's views. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant mut explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Exhibit 4 at 4. Moreover, Dr. Green provided a supplementary opinion, to the same effect, which took into account the more recent non-qualifying pulmonary function testing Dr. Dahhan conducted. Director's Exhibit 34.

[10] "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). The 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 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).

Employer's Exhibit 7 at 4. Dr. Dahhan opined Claimant has a "significantly reversible obstructive ventilatory impairment with [a] restrictive defect" caused by congestive heart failure and previous coronary bypass surgery but has no impairment caused or aggravated by his coal mine dust exposure. Director's Exhibit 29 at 2-3. The ALJ found neither opinion reasoned nor sufficient to satisfy Employer's burden of proof.[11] Decision and Order at 16.

Employer asserts the ALJ's legal pneumoconiosis finding was "adversely influence[d] by [his] finding of total disability" and that the ALJ "summarily dismissed" the opinions of Drs. Rosenberg and Dahhan. Brief at 11-12. Having rejected Employer's assertion that the ALJ erred in finding Claimant totally disabled, we reject Employer's contention. Additionally, the ALJ acted within his discretion in discrediting Dr. Rosenberg's opinion as equivocal because the physician conceded Claimant may have legal pneumoconiosis but was unsure without reviewing additional evidence. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87 (6th Cir. 1995) (ALJ may reject an equivocal medical opinion); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (same); Decision and Order at 15; Employer's Exhibit 7 at 4. We also affirm the ALJ's permissible finding that Dr. Dahhan did not adequately explain why he excluded coal mine dust exposure as a contributing factor to Claimant's obstructive impairment. *See Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 14; Director's Exhibit 29 at 2-3.

Because it is supported by substantial evidence, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

Disability Causation

The ALJ discredited the opinions of Drs. Rosenberg and Dahhan on disability causation for the same reasons he found them not credible on legal pneumoconiosis, and thus he found Employer did not rebut the Section 411(c)(4) presumption by establishing "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); *see Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 16-17. Because

[11] The ALJ also considered the opinions of Drs. Green, Nader, and Raj, but because they all diagnosed Claimant with legal pneumoconiosis, the ALJ found they did not assist Employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 15-16; Director's Exhibit 34; Claimant's Exhibits 1, 4.

Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's total disability is caused by legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-17.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The ALJ found the onset date of Claimant's total disability due to pneumoconiosis is not ascertainable from the record and awarded benefits commencing in August 2018, the month he filed his claim. Decision and Order at 17. Employer asserts the ALJ erred in awarding benefits from the date Claimant filed his claim because neither Dr. Green nor Dr. Raj indicated the date Claimant became totally disabled due to pneumoconiosis, and as the objective studies fail to establish total disability. Employer's Brief at 12-13. We disagree.

Contrary to Employer's contention, Drs. Green and Raj did not need to indicate the date Claimant became totally disabled due to pneumoconiosis because the regulation specifically provides that the filing date controls unless credible evidence establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b). Although the objective studies fail to establish total disability, they are not relevant to the date benefits commence because the ALJ did not credit them in finding that Claimant established total disability. *See* Decision and Order at 11-12.

Because the ALJ accurately found the medical evidence does not reflect the date Claimant became totally disabled due to pneumoconiosis and because substantial evidence supports that Claimant was disabled at least as of August 2018, we affirm the ALJ's conclusion that benefits commence in August 2018, the month in which Claimant filed his claim. 20 C.F.R. §725.503(b); *Owens*, 14 BLR at 1-49; Decision and Order at 17.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in an Initial Claim.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge