U.S. Department of Labor

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

BRB No. 24-0349 BLA

JOHN I. AKERS, JR.

Claimant-Respondent

v.

SLAB FORK COAL COMPANY

and

WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND

Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 09/11/2025

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Cameron S. Blair (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Chris M. Green, Wes A. Shumway, and Isaiah Robinson (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

Before: ROLFE and JONES, Administrative Appeals Judges, and ULMER, Acting Administrative Appeals Judge.
PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits (2022-BLA-05175) rendered on a claim[1] filed on July 7, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 7.19 years of underground coal mine employment and thus could not invoke 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] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis, but not clinical pneumoconiosis,[3] as well as a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). Thus, she awarded benefits. 20 C.F.R. §718.204(c).

On appeal, Employer challenges the ALJ's findings regarding the length of Claimant's coal mine employment, legal pneumoconiosis, and total disability. Claimant responds in support of the award of benefits. Employer replied, reiterating its contentions.

[1] Claimant filed a prior claim on March 11, 2019, but withdrew it on September 25, 2019. Director's Exhibits 1; 44 at 11. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] "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).

The Acting Director, Office of Workers' Compensation Programs, declined to file a response.

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.[4] 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).

Length of Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The dates and length of employment may be established by any credible evidence, and the Board will uphold an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). The regulations permit an adjudicator to rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year . . . ." 20 C.F.R. §725.101(a)(32)(iii).

The ALJ considered Claimant's hearing testimony, Employment History Form (CM-911a), Description of Coal Mine Work Form (CM-913), and Social Security Administration (SSA) earnings record. Decision and Order at 7-12; Director's Exhibits 4, 5, 7; Hearing Transcript at 13-28, 39-41. Relying on three different methods of calculation, she found Claimant established 2.83 years of coal mine employment between the years of

[4] 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 38; Director's Exhibit 4.

1975 and 1977, and 4.26 years of coal mine employment between 1978 and 1984, for a total of 7.19 years of coal mine employment.[5] Decision and Order at 10-11.

For the years of 1978 through 1984, the ALJ initially determined Claimant was continuously employed in coal mine employment for the full calendar years of 1978 through 1981,[6] and that he worked in coal mine employment for less than a calendar year in 1982 and 1984. Decision and Order at 11 (citing Director's Exhibits 4; 7 at 2-3). Applying the method of calculation at 20 C.F.R. §725.101(a)(32)(iii) to ascertain the number of days Claimant worked, she divided Claimant's yearly earnings, as reported in his SSA earnings record, by the average daily earnings from Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. *Id.* at 11-12. If Claimant's earnings reflected 125 or more working days in a given year, the ALJ credited him with one year of coal mine employment. *Id.* If Claimant had fewer than 125 working days, she credited him with a fractional year based on the ratio of the actual number of days worked to 125. *Id.* Based on this method of calculation, the ALJ credited Claimant with 4.26 years of coal mine employment for the period beginning in 1978. *Id.*

Employer asserts the ALJ erred in using "the 125-day rule" to calculate Claimant's length of coal mine employment because the Board and United States Court of Appeals for the Fourth Circuit have held that this "rule applies exclusively to identifying a responsible operator." Employer's Brief at 22-23 (citing *Armco v. Martin*, 277 F.3d 468 (4th Cir. 2002); *Soulsby v. Consolidation Coal Co.*, 3 BLR 1-565 (1981); *Fletcher v. Director, OWCP*, 2 BLR 1-911, 1-914 (1980)); Employer's Reply Brief at 3. We disagree.

The regulations specifically provide that, "if the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment *for all purposes under the Act*." 20 C.F.R. §725.101(a)(32)(i) (emphasis added). Thus, contrary to Employer's argument, the regulatory definition of working in coal mine employment is the same for purposes of identifying the responsible operator and determining the applicable presumptions under the Act. *See* 65 Fed. Reg. 79,920, 79,951

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 2.83 years of coal mine employment between 1975 and 1977. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-11.

[6] We affirm, as unchallenged, the ALJ's finding that Claimant was continuously employed in coal mine employment for the full calendar years of 1978 through 1981. *See Skrack*, 6 BLR at 1-711; Decision and Order at 11.

(Dec. 20, 2000) (20 C.F.R. §725.101(a)(32) contains a "single definition with general applicability"). Employer's reliance on *Martin*, *Soulsby*, and *Fletcher* is likewise misplaced, as each of these cases applied a prior version of the regulations.[7] 277 F.3d at 475 (noting the Department of Labor issued new regulations defining a "year" while the appeal was pending, but that those new regulations did not bind the court's interpretation of the regulations applicable to the case before it); 3 BLR 1-565; 2 BLR 1-911, 1-914.

Employer raises no other allegation of error with respect to the ALJ's calculation of the length of Claimant's coal mine employment. Thus, because the ALJ committed no reversible error in calculating the length of Claimant's coal mine employment and provided the bases for her calculations, we affirm her finding that Claimant established 7.19 years of coal mine employment. *See Mitchell*, 479 F.3d at 334-36; *Muncy*, 25 BLR at 1-26; *Clark*, 22 BLR at 1-280; Decision and Order at 12.

Entitlement under 20 C.F.R. Part 718

Without the benefit of any presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a 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. Failure to establish any one of these elements 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 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has 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). The Fourth Circuit has held a miner can establish legal pneumoconiosis by showing coal mine dust exposure contributed "in part" to his respiratory or pulmonary impairment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309, 314 (4th Cir. 2012); *see also Arch on the Green v.*

[7] Moreover, contrary to Employer's contention, in *Martin*, the Fourth Circuit did not hold the "125-day rule" may be used only in identifying the responsible operator. Employer's Brief at 23. Rather, the court noted that, even under the prior regulations, the term "one year" as used in provisions establishing whether a miner could invoke various presumptions and as used in determining the responsible operator should be given the same meaning. *Armco, Inc. v. Martin*, 277 F.3d 468, 474 n.2 (4th Cir. 2002).

Groves, 761 F.3d 594, 598-99 (6th Cir. 2014) (miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment").

The ALJ considered the medical opinions of Drs. Habre, Green, Basheda, and Zaldivar. Decision and Order at 31-40. Dr. Habre diagnosed Claimant with legal pneumoconiosis in the form of chronic bronchitis due to both smoking and coal mine dust exposure, and Dr. Green diagnosed Claimant with legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal dust exposure and cigarette smoking. Director's Exhibit 13 at 7-8; Claimant's Exhibit 2 at 7-10. Dr. Basheda diagnosed obstructive lung disease due to cigarette smoking and asthma, not coal mine dust exposure. Director's Exhibit 20 at 13-14; Employer's Exhibits 1 at 13-14; 7 at 22. Dr. Zaldivar diagnosed emphysema and asthma due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 6 at 7-10; 8 at 28-42. Crediting Drs. Green's and Habre's opinions over those of Drs. Basheda and Zaldivar, the ALJ found the weight of the medical opinion evidence supports a finding of legal pneumoconiosis. Decision and Order at 36-40.

Employer contends the ALJ erred in discrediting Drs. Basheda's and Zaldivar's medical opinions.[8] Employer's Brief at 10-20; Employer's Reply Brief at 3-6. We disagree.

Dr. Basheda diagnosed an asthmatic form of reversible obstructive lung disease either in the form of persistent asthma or asthma superimposed with tobacco-induced obstructive lung disease and unrelated to coal mine dust exposure. Director's Exhibit 20 at 13-15; Employer's Exhibits 1 at 11; 7 at 21-22. He explained COPD induced by coal mine dust exposure produces a different "clinical picture" than does COPD caused by asthma or smoking. Employer's Exhibit 7 at 26. The ALJ permissibly discredited this aspect of Dr. Basheda's opinion because he did not adequately explain how COPD induced by coal mine dust exposure could not occur in conjunction with COPD induced by smoke exposure. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557-58 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 37-38. Dr. Basheda further opined that, had coal mine dust exposure triggered Claimant's symptoms, then Claimant's symptoms would have prevented him from working in coal mining, and that occupational lung impairments usually resolve when the person leaves the occupational environment. Employer's Exhibit 7 at 24. The ALJ permissibly found this rationale unpersuasive because it fails to explain

[8] We affirm, as unchallenged, the ALJ's crediting of Drs. Habre's and Green's legal pneumoconiosis opinions. *See Skrack*, 6 BLR at 1-711; Decision and Order at 39-40.

why Claimant could not be the rare or unusual case in which coal-mine-induced disease persists after he left the mines. *See Owens*, 724 F.3d at 555; *Looney*, 678 F.3d at 312-14; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 38.

Dr. Zaldivar diagnosed emphysema and asthma caused solely by smoking and unrelated to coal mine dust exposure. Employer's Exhibits 6 at 7-10; 8 at 28-42. He explained that legal pneumoconiosis occurs because of "some inhalation injury in the mines separate from coal," and that, for occupational asthma to constitute legal pneumoconiosis, it would have to be due to the inhalation of a substance like a fungus, and there is no evidence that Claimant suffered such an exposure. Employer's Exhibit 8 at 28-29. The ALJ permissibly found this reasoning to be inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b); *Looney*, 678 F.3d at 311-12. The ALJ further permissibly discredited Dr. Zaldivar's opinion because it fails to address the possibility that the effects of smoking and coal mine dust exposure can be additive. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); 65 Fed. Reg. at 79,940; Decision and Order at 39. The ALJ further permissibly discredited both Drs. Basheda's and Zaldivar's opinions because, while both physicians explained why they believed Claimant's obstructive impairment was caused by smoking and asthma, they failed to adequately explain why coal mine dust exposure could not have contributed to or aggravated his condition.[9] *See Stallard*, 876 F.3d at 673-74 n.4; *Owens*, 724 F.3d at 558; *Looney*, 678 F.3d at 318; *Hicks*, 138 F.3d at 533; Decision and Order at 38.

Employer's arguments ultimately amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Cochran*, 718 F.3d at 322-23; *Looney*, 678 F.3d at 314.

Total Disability

A miner is totally disabled if a 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

[9] Because the ALJ provided valid reasons for discrediting Drs. Basheda's and Zaldivar's opinions that Claimant does not have legal pneumoconiosis, we need not address Employer's remaining arguments concerning the ALJ's weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 10-20; Employer's Reply Brief at 3-6.

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 opinion evidence, and evidence as a whole.[10] Decision and Order at 19, 24, 26.

The ALJ considered four pulmonary function studies dated May 7, 2013, August 11, 2020, April 23, 2021, and February 23, 2022. Decision and Order at 17-19. The May 7, 2013, August 11, 2020, and April 23, 2021 studies all produced qualifying values before and after the administration of bronchodilators,[11] while the February 23, 2022 study produced non-qualifying values before the administration of bronchodilators and qualifying values after. Director's Exhibits 13 at 13; 20 at 18; Claimant's Exhibit 1 at 5; Employer's Exhibit 3 at 4. The ALJ credited Dr. Gaziano's opinion that the August 11, 2020 study was valid over Dr. Zaldivar's contrary opinion. Decision and Order at 18; Director's Exhibit 18; Employer's Exhibits 6 at 3; 18 at 21. She also took note of Dr. Zaldivar's opinion that the April 23, 2021 study produced invalid lung-volume values but valid diffusion values, and that the pre-bronchodilator February 23, 2022 study was invalid, and thus gave the April 23, 2021 and February 23, 2022 studies "less than full probative weight." Decision and Order at 18-19; Employer's Exhibits 6 at 5-6; 18 at 20-21. She nevertheless found the April 23, 2021 and February 23, 2022 studies "constitute credible evidence of Claimant's pulmonary function." Decision and Order at 19. Thus, weighing the studies together, the ALJ found the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 19.

Employer argues remand is required because the ALJ failed to explain her rationale for crediting Dr. Gaziano's opinion that the August 11, 2020 pulmonary function study is valid over Dr. Zaldivar's opinion to the contrary. Employer's Brief at 20-22; Employer's Reply Brief at 5. We are not persuaded.

[10] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies and there is 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 17 n.16, 20.

[11] A "qualifying" pulmonary function study yields results that are equal to or less than the applicable table values listed in Appendix B 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).

Employer does not challenge the ALJ's findings that the May 7, 2013, April 23, 2021, and February 23, 2022 studies produced qualifying values or that the April 23, 2021 and February 23, 2022 studies, while entitled to "less than full probative weight," nevertheless "constitute credible evidence of Claimant's pulmonary function." Decision and Order at 19. Employer has thus failed to meet its burden to explain how the ALJ's alleged error regarding the validity of the August 11, 2020 pulmonary function study could make a difference in the outcome. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer raises no further argument regarding the pulmonary function study evidence, and we thus affirm the ALJ's finding that the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 19. We further affirm, as unchallenged on appeal, her finding that the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), and that Claimant established total disability based on the record as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 24, 26. Moreover, as Employer raises no specific allegations of error regarding disability causation, we further affirm the ALJ's finding that Claimant established his total respiratory disability is due to legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(c); Decision and Order at 42.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge