U.S. Department of Labor

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

BRB No. 24-0057 BLA

MARK O. DOTSON Claimant-Petitioner v. A & M COAL CORPORATION, INCORPORATED and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 04/08/2025 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Mark O. Dotson, Jonesville, Virginia.

William A. Lyons (Lewis and Lewis Law Office), Hazard, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2022-BLA-05417) rendered on a subsequent claim[2] filed on September 15, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with more than fifteen years of qualifying coal mine employment based on the parties' stipulation. However, she found Claimant did not establish a totally disabling respiratory or pulmonary impairment and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Because Claimant failed to establish an essential element of entitlement, she denied benefits.

[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 she does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant previously filed a claim which the district director denied for failure to establish total disability. Director's Exhibit 1. No further action was taken.

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 he 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 the district director denied Claimant's prior claim for failure to establish total disability, he had to submit new evidence establishing this element to warrant review of his current claim on the merits. *White*, 23 BLR at 1-3; Director's Exhibit 1.

[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.[4] The Acting Director, Office of Workers' Compensation Programs, did not respond.

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, 1-86 (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.[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, 362 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(i). 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[6] 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)

[4] We affirm, as unchallenged, the ALJ's finding that Claimant established more than fifteen years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[5] 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 Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11, 23.

[6] 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).

(en banc). The ALJ found Claimant failed to establish total disability by any method.[7] 20 C.F.R. §718.204(b)(2); Decision and Order at 9.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated February 27, 2020, January 15, 2021, May 17, 2021, and June 16, 2021. Decision and Order at 5; Director's Exhibits 17, 24, 26, 27. Noting differences in Claimant's recorded height, the ALJ first permissibly resolved the conflict by averaging the recorded heights to find Claimant's height is 68.5 inches. *See Carpenter v. GMS Mine & Repair Maint. Inc.*, 26 BLR 1-33, 1-38-39 (2023); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 5. Using this height in assessing the pulmonary function study results, she found all the pulmonary function studies are non-qualifying. Decision and Order at 5. As none of the pulmonary function studies qualify for total disability,[8] substantial evidence supports her determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005). Thus, we affirm the ALJ's finding that the pulmonary function studies do not support a finding of total disability. Decision and Order at 5.

Medical Opinions

Total disability can be established with a reasoned medical opinion notwithstanding non-qualifying objective testing. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). Thus, the ALJ considered the medical opinion of Dr. Harris, who ultimately opined Claimant is totally disabled, and those of Drs.

[7] The ALJ considered the three arterial blood gas studies of record, dated January 15, 2021, May 17, 2021, and June 16, 2021. Decision and Order at 6. She accurately observed none produced qualifying values. *Id.*; Director's Exhibits 17, 26, 27. Therefore, we affirm her finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 6. Further, the ALJ correctly found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 6; 20 C.F.R. §718.204(b)(2)(iii).

[8] We note the February 27, 2020 and January 15, 2021 studies both produced qualifying FEV1 values but the studies failed to qualify for total disability under 20 C.F.R. §718.204(b)(2)(i) because they did not produce an additional qualifying value under 20 C.F.R. §718.204(b)(2)(i)(A), (B), or (C). Appendix B of 20 C.F.R. Part 718; Director's Exhibits 17 at 9; 24 at 2.

Fino and Tuteur, who opined that Claimant is not totally disabled. Decision and Order at 6-9; Director's Exhibits 17, 18, 26, 27, 29; Employer's Exhibits 2, 4.

Dr. Harris examined Claimant on behalf of the Department of Labor (DOL). Director's Exhibit 17. The doctor noted Claimant had dyspnea with exertion and could walk about 200 yards before stopping due to shortness of breath. *Id.* at 7. Dr. Harris diagnosed restrictive lung disease, which he stated is "significant" but "does not meet federal standards to be considered totally disabled." *Id.* at 8. In supplemental reports, he clarified that Claimant has a totally disabling pulmonary impairment, noting that three of the pulmonary function studies "meet the DOL standards for disability" while two do not[9] and, "given the severity" of his impairment, opined Claimant would be unable to perform the exertional requirements of "any coal mining job." Director's Exhibits 18 at 2; 29 at 6.

Dr. Fino explained Claimant has a mild restrictive abnormality, no obstruction, and normal oxygenation. Director's Exhibit 26 at 10; Employer's Exhibit 4 at 6-7, 9. He understood that Claimant's last coal mine job as a supervisor involved "fifty percent" light labor, with the remainder constituting manual labor which required moderate to very heavy exertion. Director's Exhibit 26 at 3; Employer's Exhibit 4 at 11-12. He opined Claimant had sufficient oxygenation and lung function to perform his usual coal mine employment. Director's Exhibit 26 at 10; Employer's Exhibit 4 at 11-13.

Dr. Tuteur opined that Claimant has a mild restrictive abnormality without obstruction and no impairment of oxygenation. Director's Exhibit 27 at 3, 5; Employer's Exhibit 2 at 2. He understood Claimant's usual coal mining job as a foreman required him to lift 100 pounds "at times." Director's Exhibit 27 at 2. He concluded that Claimant has the pulmonary capacity to perform coal mining work. *Id.* at 4.

After summarizing the medical opinions, the ALJ assigned "each [opinion] some weight" and found "the overall medical opinion evidence" does not support total disability.

[9] In addition to the pulmonary function study obtained during his examination, at the request of the district director, Dr. Harris also considered pulmonary function studies dated February 27, 2020, May 17, 2021, June 16, 2021, and November 25, 2014. Director's Exhibit 29 at 2-3, 6. The November 25, 2014 study is qualifying under the regulations. Director's Exhibits 24 at 5-6. Dr. Fino also references the November 25, 2014 study in his deposition. Employer's Exhibit 4 at 10. While the 2014 study was submitted before the district director, neither party designated it as evidence before the ALJ. *See* Claimant's Evidence Summary Form; Employer's Evidence Summary Form; Employer's Response at 4; Employer's Closing Brief at 3.

Decision and Order at 9. We are unable to affirm the ALJ's analysis of the medical opinion evidence.

While the ALJ summarily found "[a]ll three medical experts opined that the Claimant was not totally disabled," all the medical opinions are "reasoned and supported," and all those opinions are accorded "some weight," she did not explain the bases for her findings. Decision and Order at 9. The ALJ failed to address Dr. Harris's opinions that Claimant has a "significant" restrictive lung disease that "does not meet federal standards to be considered totally disabled," Director's Exhibit 17 at 8, but clarified in supplemental reports that Claimant has a totally disabling pulmonary impairment. Director's Exhibits 18, 29. Nor did she address the contrary opinions of Drs. Fino and Tuteur. Director's Exhibits 26, 27; Employer's Exhibits 2-4. Thus, she erred by failing to critically analyze any of the physicians' opinions or otherwise explain why she found their opinions credible as the Administrative Procedure Act (APA)[10] requires. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (it is the duty of the ALJ to weigh the evidence, draw inferences and determine credibility); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In addition, the ALJ did not explain why she found Drs. Tuteur's and Fino's opinions outweigh Dr. Harris's opinion. The ALJ's unexplained finding that all the medical opinions are entitled to "some weight" and thus her apparent reliance on a head count of contrary opinions is an insufficient basis to find Claimant failed to meet his burden to establish total disability. Decision and Order at 9; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Wojtowicz*, 12 BLR at 1-165.

Thus, we vacate the ALJ's finding that Claimant failed to establish total disability based on the medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 9. We therefore also vacate her finding that Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and the denial of benefits.

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

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. In weighing the medical opinion evidence, she must first determine the exertional requirements of Claimant's usual coal mine employment[11] and consider the medical opinions, taking into account those requirements. *See Cornett*, 227 F.3d at 578 (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to the miner's work capabilities).

In reaching her credibility determinations, the ALJ must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983). She must set forth her findings in detail and explain her rationale in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must further determine whether Claimant is totally disabled based upon the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Shedlock*, 9 BLR at 1-198. If Claimant fails to establish total disability, the ALJ may reinstate the denial of benefits. *See 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).

[11] A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). Although the ALJ indicated Claimant worked as a mine superintendent and equipment operator, she did not make findings regarding his usual coal mine employment or the exertional requirements of this work. Decision and Order at 3-4. Thus, she erred by failing to make necessary factual findings and must do so on remand. *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

However, if Claimant establishes total disability and thus invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption.[12] 20 C.F.R. §718.305(d)(1)(i), (ii).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[12] While the ALJ considered whether Claimant established pneumoconiosis absent the presumption, Decision and Order at 9-12, if Claimant invokes the presumption on remand, then the burden shifts to Employer to rebut the presumption. 20 C.F.R. §718.305(d). Thus, the ALJ must reassess the pneumoconiosis and causation evidence if the presumption is invoked on remand.