U.S. Department of Labor

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

BRB No. 21-0128 BLA

RICHARD E. POLLARD, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 8/15/2022
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Denying Benefits (2019-BLA-05472) in a claim filed pursuant to the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification[1] of a subsequent claim filed on October 5, 2016.[2]

The ALJ accepted the parties' stipulation that Claimant had eighteen years of underground coal mine employment. However, he found Claimant did not establish a totally disabling pulmonary or respiratory 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); 20 C.F.R. §718.305. As Claimant did not establish an essential element of entitlement, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability, and therefore erred in finding he did not invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office

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[1] This case involves Claimant's request for modification of a district director's denial of benefits. Director's Exhibit 50. In a case involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

[2] This is Claimant's fourth claim for benefits. Director's Exhibits 2, 3. He withdrew his third and most recent prior claim. Director's Exhibit 3. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b). On May 15, 2006, the district director finally denied Claimant's second claim for failure to establish any element of entitlement. Director's Exhibit 2. 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); *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 failed to establish any element of entitlement in his second claim, he had to submit new evidence establishing at least one element to warrant a review on the merits of his claim. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

[3] Section 411(c)(4) 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).

of Workers' Compensation Programs, has not filed a response brief. In a reply brief, Claimant reiterates his previous contentions.

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 (1965).

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

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 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). 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). Claimant contends the ALJ erred in finding the pulmonary function studies, medical opinions, and the evidence as a whole do not establish total disability.[5] Claimant's Brief at 6-20.

Pulmonary Function Study Evidence

The ALJ considered three pulmonary function studies conducted on December 10, 2010, November 4, 2016, and June 15, 2017. Decision and Order at 6, 14. He determined

[4] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 29; Director's Exhibit 7.

[5] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

that each of the studies was non-qualifying.[6] *Id*. at 6. He therefore found the pulmonary function study evidence does not establish total disability. *Id.* at 14.

Claimant contends the ALJ erred in finding the November 4, 2016 pulmonary function study non-qualifying based on Claimant's average height. Claimant's Brief at 17-18. Instead, Claimant believes the ALJ should have found the study was qualifying before the administration of bronchodilators based upon Claimant's reported height at the time of the examination. *Id*. We disagree.

Because there are conflicting heights for Claimant in the record, the ALJ was required to resolve these discrepancies and determine his height for purposes of determining if the studies are qualifying at 20 C.F.R. Part 718, Appendix B. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) ("If there are substantial differences in the recorded heights among all the studies, the [ALJ] must make a factual finding to determine [C]laimant's actual height."). The ALJ permissibly averaged the reported heights for Claimant to find his actual height is 71.4 inches; and, as it falls between 71.3 and 71.7 inches in the table at Appendix B of Part 718, he permissibly used the closest greater height of 71.7 inches in determining the study was non-qualifying. *Toler*, 43 F.2d at 116 n.6 (noting the Office of Workers' Compensation Programs Procedure Manual specifically mandates using the closest greater height when a miner's actual height falls between heights listed in the table); *J.M.* [*Meade*] *v. Clinchfield Coal Co*., 24 BLR 1-40, 1-44 (2008); Decision and Order at 6.

Consequently, the ALJ permissibly found the November 4, 2016 pulmonary function study non-qualifying before and after the administration of bronchodilators based on Claimant's age at the time the study and his actual height of 71.4 inches. *See Toler*, 43 F.3d at 114; *Protopappas*, 6 BLR at 1-223; *Meade*, 24 BLR at 1-44; Decision and Order at 6. We therefore affirm the ALJ's determination that all of the pulmonary function studies are non-qualifying. Decision and Order at 6. Thus, the ALJ rationally found they do not establish total disability.[7] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6, 14.

[6] A "qualifying" pulmonary function study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] Claimant contends the ALJ erred in falling to consider the parties' arguments that the November 4, 2016 and June 15, 2017 pulmonary function studies are invalid. Claimant's Brief at 23-24. Regardless of the validity of these tests, there are no qualifying pulmonary function studies and therefore any error in failing to consider this issue at 20

Medical Opinion Evidence

The ALJ further considered the medical opinions of Drs. Chavda, Selby, and Tuteur. Decision and Order at 14-16. Dr. Chavda submitted several medical reports and testified via deposition. He most recently opined Claimant is totally disabled from a respiratory standpoint. Director's Exhibits 14, 22, 28; Claimant's Exhibit 3. Drs. Selby and Tuteur opined he is not totally disabled. Director's Exhibits 25, 26, 30; Employer's Exhibits 1, 2, 4, 5. The ALJ found Drs. Selby's and Tuteur's opinions well-reasoned and supported by the objective evidence, and therefore accorded them "substantial weight." Decision and Order at 15. Conversely, he found Dr. Chavda's opinion inconsistent and inadequately explained, and therefore accorded it little weight. *Id*.

Claimant contends the ALJ erred in his weighing of the medical opinion evidence. Claimant's Brief at 6-20, 23-33. Claimant's arguments have some merit.

After his initial examination of Claimant on December 10, 2010, Dr. Chavda diagnosed Claimant with a mixed moderate obstructive and restrictive respiratory impairment that would render him totally disabled from performing his usual coal mine employment.[8] Director's Exhibit 22. After examining Claimant for a second time on November 4 2016, Dr. Chavda again diagnosed a moderate mixed obstructive and

C.F.R. §718.204(b)(2)(i) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Brief at 23-24. However, as discussed below, the ALJ erred in his determination that the medical opinion evidence did not establish total disability and must reconsider the physicians' opinions. To the extent the experts who provided medical opinions relied on the November 4, 2016 and June 15, 2017 pulmonary function studies to make determinations as to total disability, the validity of these tests is relevant to the weighing of their opinions, and therefore the ALJ erred in failing to consider this evidence. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Claimant's Brief at 23-24; Employer's Response Brief at 11. On remand, the ALJ must consider the validity of the November 4, 2016 and June 15, 2017 pulmonary function studies prior to weighing the medical opinion evidence. *Id*.

[8] Dr. Chavda noted Claimant's December 10, 2010 pulmonary function study, although non-qualifying, reflected a significant loss of lung function and Claimant therefore would not be able to perform his usual coal mine employment as he would not be able to walk for eight hours a day. Director's Exhibit 22.

restrictive respiratory impairment, but now opined Claimant is not totally disabled based on the study's non-qualifying post-bronchodilator values.[9] Director's Exhibit 14.

Dr. Chavda reconsidered his opinion after the district director asked him to address the pre-bronchodilator results from the November 4, 2016 pulmonary function study, which were qualifying based on Claimant's age and recorded height at the time of the study. Director's Exhibit 28. Considering the post-bronchodilator results to be "the best value," Dr. Chavda opined that based on these values, Claimant "does not meet disability criteria." *Id.* Dr. Chavda agreed, however, that if the pre-bronchodilator values "can be considered a value for disability establishment he does have total pulmonary disability," but concluded that "is up to the Department of Labor." *Id.* Further, Dr. Chavda opined in a July 27, 2017 report that Claimant's November 4, 2016 pulmonary function study demonstrates an "impairment" and he has a "total pulmonary disability." Director's Exhibit 30. During a September 20, 2019 deposition, Dr. Chavda clarified that Claimant would be considered totally disabled from performing his usual coal mine employment based on the pre-bronchodilator values from the November 4, 2016 pulmonary function study. Claimant's Exhibit 3 at 23-25.

The ALJ found Dr. Chavda "was never clear about whether [the] pulmonary function testing was totally disabling" and did not "indicate" the basis for the change in his opinion regarding total disability. Decision and Order at 15. Claimant correctly notes, however, the ALJ did not address Dr. Chavda's deposition testimony in making this credibility determination. Claimant's Brief at 9-10; Decision and Order at 15; Claimant's Exhibit 3.

In his deposition testimony, Dr. Chavda explained that Claimant's pre-bronchodilator values from the November 4, 2016 pulmonary function studies are "low" and would prevent Claimant from performing his usual coal mine employment requiring him to spray equipment, do prep work, and walk. Claimant's Exhibit 3 at 25. He explained that "if [Claimant] has to work continuously . . . for six, seven hours in the day whether it's two or three hours in a day and take a break, still I think he would feel short of breath and then is not able to fulfill the duty . . . he needs to do." *Id.* Further, he explained the relief that a bronchodilator provides is only a "temporary fix," while Claimant's pre-bronchodilator testing reflects "his [permanent] lung condition." *Id.* at 23-25.

[9] Dr. Chavda opined Claimant's post-bronchodilator pulmonary function study results represented the "best" values and, as they were non-qualifying, Claimant "has normal enough lung capacity" to work in coal mining. Director's Exhibit 14.

Because the ALJ failed to consider the entirety of Dr. Chavda's opinion when assessing its credibility, we must vacate his determination that Dr. Chavda did not provide a rationale for why he relied on the pre-bronchodilator results from the November 4, 2016 pulmonary function study to conclude Claimant is totally disabled. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). We therefore vacate the ALJ's determination that the medical opinion evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 15-16.

Moreover, we agree with Claimant that the ALJ determined the opinions of Drs. Selby and Tuteur are well-reasoned and supported by the objective evidence without providing any analysis or explanation for why their opinions are credible. Thus, the ALJ's determination does not satisfy the Administrative Procedure Act (APA).[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165; Claimant's Brief at 15-17, 19-20. We therefore vacate his determination that their opinions are well-reasoned and documented and entitled to greater weight than Dr. Chavda's opinion. Decision and Order at 15-16.

On remand, the ALJ must first determine the exertional requirements of Claimant's usual coal mine work and consider them in conjunction with the medical opinions assessing the extent of his impairment. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578 (6th Cir. 2000). Claimant's usual coal mine work 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). The ALJ must then reconsider the medical opinions in light of the exertional requirements, including the entirety of Dr. Chavda's opinion and deposition testimony.[11] *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total

[10] The Administrative Procedure Act provides every adjudicatory decision must 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).

[11] Contrary to Claimant's argument, Dr. Chavda's diagnosis of a totally disabling respiratory impairment does not create a presumption that he is totally disabled. Claimant's Brief at 12-15. Rather, Claimant bears the burden to establish total disability. *See* 20 C.F.R. §718.204(a)-(b). Once Claimant meets that burden, a prima facie case for total disability exists and Employer bears the burden of proving Claimant is able to perform comparable and gainful employment. *Taylor v. Evans & Gambrel Co*., 12 BLR 1-83, 1-86-87 (1988).

disability despite non-qualifying objective tests); *Cornett,* 227 F.3d at 577 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Claimant's Exhibit 3. In doing so, the ALJ must consider the physicians' qualifications, their understanding of the exertional requirements of Claimant's usual coal mine employment, the explanations given for their findings, the documentation underlying their judgements, and the sophistication of, and bases for, their diagnoses, and provide an explanation for his determinations, including how he resolves conflicts among the opinions. *See Director, OWCP v. Rowe,* 710 F.2d 251, 255 (6th Cir. 1983).

He must then weigh all the relevant evidence together to determine whether Claimant is totally disabled and thus invokes the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987).

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must address whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1). Alternatively, if the ALJ again finds Claimant is not totally disabled, he must deny benefits as Claimant will have failed to establish an essential element of entitlement.[12] *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).

[12] Contrary to Claimant's arguments, if he cannot establish total disability, the ALJ need not consider whether he has established the existence of pneumoconiosis, as benefits are nevertheless precluded. *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); Claimant's Brief at 20-22.

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

SO ORDERED.

GREG J. BUZZARD

Administrative Appeals Judge

JONATHAN ROLFE

Administrative Appeals Judge

DANIEL T. GRESH

Administrative Appeals Judge