U.S. Department of Labor

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

BRB No. 21-0010 BLA

DONALD R. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CENTRE CROWN MINING, LLC	)	
	)	
and	)	
	)	
ARGONAUT GREAT CENTRAL INSURANCE COMPANY	)	DATE ISSUED: 02/16/2022
	)	
Employer/Carrier-Respondents	)	
	)	
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 Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

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

Julie A. Webb (Craig & Craig, LLC), Mt. Vernon, Illinois, for Employer and its Carrier.

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

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Angela F. Donaldson's Decision and Order Denying Benefits (2019-BLA-06011) rendered on a claim filed August 24, 2017, pursuant to Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had at least thirty years of underground coal mine employment. However, she found the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant did 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),[1] and failed to establish a required element of entitlement. She therefore denied benefits.

On appeal, Claimant argues the ALJ erred in weighing the pulmonary function studies and medical opinion evidence to find he is not totally disabled. Employer and its Carrier (Employer) respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response. Claimant has filed a reply reiterating his arguments.

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.[2] 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).

To be entitled to benefits under the Act, 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. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR

[1] Section 411(c)(4), provides a rebuttable presumption of total disability due to pneumoconiosis if the Miner had at least fifteen years of underground or substantially similar surface coal mine employment and has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

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).

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 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 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).

The ALJ found Claimant did not establish total disability based on any category of evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). Claimant alleges the ALJ failed to adequately explain her weighing of the pulmonary function studies and medical opinions.[3] Claimant's Brief at 10-24; Claimant's Reply Brief at 2-10.

Pulmonary Function Studies

The ALJ considered six[4] pulmonary function studies. 20 C.F.R. §718.204(b)(i); Decision and Order at 6, 20. The parties designated two of these studies, obtained on August 9, 2012 and October 9, 2017, as affirmative evidence. Employer's Exhibit 7; Director's Exhibit 14; Employer's Evidence Summary Form; Claimant's Evidence Summary Form. The remaining studies, obtained on January 24, 2018, February 27, 2018, August 28, 2018, and an unknown date, were contained within Claimant's treatment records. Claimant's Exhibit 8 at 24, 35-37. The ALJ accurately determined the February

[3] We affirm, as unchallenged on appeal, the ALJ's findings that the arterial blood gas studies do 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)(ii), (iii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20.

[4] The ALJ references seven pulmonary function studies; however, she lists the January 24, 2018 study twice in her summary of the evidence. Decision and Order at 6.

27, 2018 pre-bronchodilator study was the only qualifying study of record.[5] Decision and Order at 20. The ALJ found the qualifying February 27, 2018 pre-bronchodilator study was not sufficient to establish total disability, as it was not qualifying after the administration of bronchodilators, it was the only qualifying study, and the three most recent studies were non-qualifying. *Id*.

Claimant argues that the ALJ erred in her analysis of the pulmonary function studies and did not adequately explain her findings. Claimant's Brief at 20-23. We agree.

Initially we note, contrary to the ALJ's findings, at most only two non-qualifying studies post-date the qualifying February 27, 2018 study – the August 28, 2018 study and *possibly* the study with an unknown date.[6] Decision and Order at 20. Moreover, the ALJ did not adequately explain the basis on which she established their relative probative value. S*ee Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Further, in weighing the pulmonary function studies the ALJ did not consider evidence as to their validity and reliability.[7] Claimant's Brief at 22-23. Dr. Chavda stated that the January 24, 2018 testing lacked a sufficient number of tracings and thus "for legal purpose[s]" does not meet the American Thoracic Society standards.[8] Claimant's Exhibit

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[6] It appears from the context of the treatment records that the undated pulmonary function study may have been obtained sometime after June 2018. Claimant's Exhibits 8; 13 at 26.

[7] The quality standards applicable to pulmonary function studies are set forth at 20 C.F.R. §718.103 and Appendix B of 20 C.F.R. Part 718. Section 718.103 states, in pertinent part, that "no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part." 20 C.F.R. §718.103(c). Section 718.101(b) provides "…Any clinical test or examination subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered…."

[8] The pulmonary function studies in Claimant's treatment records and not developed by a party in connection with a claim are not subject to the quality standards. 20 C.F.R.718;101(b); *see J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008). Nevertheless, they must be found sufficiently reliable to support a finding of total disability. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000) ("Despite the

13 at 34-35. He also indicated that the February 27, 2018 study was not valid because not all the trials were provided. *Id.* at 32-33. Dr. Chavda also could not validate the results of the August 28, 2018 study because there was only one trial and he could not verify that it was "repeatable or reproducible." *Id.* at 31-32. Finally, as the ALJ noted, Dr. Chavda could not validate the undated study. *Id.* at 26-27. Dr. Rosenberg opined the January 24, 2018 study was valid; however, he indicated he could not determine if the February 27, 2018 and August 28, 2018 studies were valid based on the data provided. Employer's Exhibit 5 at 13-14. Moreover, the ALJ failed to consider the December 19, 2011 study obtained by Dr. Paul, which Claimant appears to have designated as affirmative evidence, and was admitted into the record. Claimant's Exhibit 14; Claimant's Evidence Summary Form. Consequently, the ALJ must make a determination as to the admissibility of this pulmonary function study, the category of evidence in which it is to be considered, and the weight to give it. *See* 30 U.S.C. §923(b) (the fact finder must address all relevant evidence); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Finally, in finding the February 27, 2018 study was not sufficient to establish total disability, the ALJ noted that it was only qualifying before the administration of bronchodilators. Decision and Order at 20. While it is unclear what weight the ALJ gave to the non-qualifying post-bronchodilator study, the Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "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." 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

Consequently, the ALJ did not properly consider the evidence, and did not adequately explain the basis for her findings of fact and conclusions of law, as required by the Administrative Procedure Act (APA).[9] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a)); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the ALJ's determination that the pulmonary function study evidence does not establish total disability. *Wojtowicz v.*, 12 BLR at 1-165; Decision and

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inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.").

[9] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by 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).

Order at 20. On remand, the ALJ must determine the reliability of each study, and then consider and weigh all the pulmonary function studies of record to determine if they support a finding of total disability.[10] S*ee J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008).

Medical Opinions

The ALJ considered the medical opinions of Drs. Paul, Istanbouly, Chavda, Selby, and Rosenberg. Decision and Order at 20-23. Drs. Paul, Istanbouly, and Chavda opined that Claimant was totally disabled, while Drs. Selby and Rosenberg found he was not totally disabled. Director's Exhibit 14; Claimant's Exhibits 9-10, 13-14; Employer's Exhibits 1, 5-7. The ALJ found Dr. Paul's opinion worthy of limited weight because it was reliant on a pulmonary function study not in the record, and because it only reflected his recommendation that Claimant not return to coal mining work as opposed to an assessment of his respiratory capabilities. Decision and Order at 22. Conversely, the ALJ credited the opinions of Drs. Rosenberg and Selby that Claimant is not totally disabled because they "reviewed all the medical records, and acknowledged that while the Claimant has a restrictive impairment, considering the totality of the objective testing, including the pulmonary function and arterial blood gas studies, Claimant is able, from a respiratory or pulmonary standpoint, to perform his previous coal mine work." *Id.* at 22-23. Consequently, she found the medical opinion evidence did not establish total disability. *Id.* at 23.

Claimant argues that the ALJ erred in her weighing of the medical opinion evidence. Claimant's Brief at 10-20. We agree.

Initially, we agree with Claimant that the ALJ erred in failing to consider the opinions of Drs. Istanbouly and Chavda that Claimant is totally disabled. Claimant's Brief at 17-19. While the ALJ summarized their opinions, she made no determination as to their credibility and therefore her findings do not satisfy the APA. 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 (1989); Decision and Order 20-23.

[10] We decline to instruct the ALJ, as Claimant suggests, to find the February 27, 2018 study had enough trials to be reliable. Claimant's Brief at 23. The ALJ must consider and weigh the evidence regarding its reliability and make findings in the first instance. *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990); *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007).

Moreover, as Claimant argues, the ALJ erroneously discredited Dr. Paul's opinion because he relied upon a pulmonary function study not of record. Claimant's Brief at 10; Decision and Order at 22. As discussed above, a December 19, 2011 pulmonary function study performed and considered by Dr. Paul is of record, a fact which Employer acknowledges. Claimant's Exhibit 14; Employer's Response at 22. Moreover, we reject Employer's argument that this error is harmless, because the ALJ could not find Dr. Paul's opinion that Claimant should not be exposed to further coal mine dust exposure is sufficient to establish total disability.[11] Employer's Response at 23. As Claimant notes, while Dr. Paul indicated he would recommend Claimant not be further exposed to coal mine dust to prevent further progression of his impairment, he responded to questioning from Claimant's counsel by indicating Claimant could only perform light work. Claimant's Exhibit 14 at 18-19. Because the ALJ failed to consider the entirety of Dr. Paul's opinion and erroneously found his opinion was based upon evidence not in the record, the ALJ must reconsider Dr. Paul's opinion as to the issue of Claimant's total disability. *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007).

We further agree with Claimant that the ALJ erred in stating that Dr. Selby considered all the evidence of record. Claimant's Brief at 13. Dr. Selby's most recent opinion was obtained at a 2015 deposition. Employer's Exhibit 7. Thus, contrary to the ALJ's findings, Dr. Selby considered none of the evidence obtained after that date, including the examination report by Dr. Istanbouly and the treatment records and multiple pulmonary function studies.[12] *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 22; Director's Exhibits 14, 16; Claimant's Exhibit 8. Moreover, the ALJ's determination regarding the pulmonary function studies may have affected her weighing of the medical

[11] A recommendation against further dust exposure is not a diagnosis of a totally disabling respiratory or pulmonary impairment. *See Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296, 13 BLR 2-418, 2-425 (7th Cir. 1990).

[12] Claimant argues that Dr. Rosenberg was unaware of two x-ray readings and thus based his conclusions on the premise that there was no clinical pneumoconiosis present. Claimant's Brief at 14. However, given such evidence did not address the presence of complicated pneumoconiosis, which is presumed totally disabling, it is irrelevant to the issue of total disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

opinions, and we therefore must vacate her weighing of the medical opinions.[13] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22.

We therefore vacate the ALJ's determinations that the medical opinion evidence did not establish total disability, 20 C.F.R. §718.204(b)(2)(iv), and the evidence as a whole does not establish total disability. 20 C.F.R. §718.204(b)(2). Consequently, we vacate the denial of benefits.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. She must initially reconsider whether the pulmonary function study evidence considered in isolation would support finding Claimant totally disabled, including determining which studies are valid and reliable, undertaking a qualitative and quantitative analysis of the evidence, and providing an adequate rationale for how she resolves conflicts in relevant evidence. *Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.204(b)(2)(iv). The ALJ must then determine the exertional requirements of Claimant's last usual coal mine employment and whether the medical opinion evidence supports finding him totally disabled. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000). She must consider and weigh the medical opinions on total disability, taking into account 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 as to her determinations, including how she has resolved conflicts among the opinions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

She must then weigh all the relevant evidence together to determine whether Claimant is totally disabled and thus can invoke 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.

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must address whether Employer can rebut it. 20 C.F.R. §718.305(d)(1); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Alternatively, if the ALJ again finds Claimant is not totally disabled, she must deny benefits as Claimant will have failed to establish an essential element of entitlement. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[13] Moreover, in coming to her conclusions, the ALJ failed to make a finding regarding the exertional requirements of Claimant's usual coal mining work. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

GREG J. BUZZARD
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues that the ALJ's weighing of the pulmonary function studies and medical opinions require remand for the reasons identified. 20 C.F.R. §718.204(b)(2)(i). Given the ALJ ostensibly credited the three most recent non-qualifying studies over the qualifying study because of the dates they were performed, however, I would further clarify on remand this was error and she cannot credit them based on their recency. Decision and Order at 20; Above at 4. The only two circuits to consider the question have held it irrational to credit evidence because of recency where the miner's condition has improved. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also*, *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993).

In explaining the rationale behind the "later evidence rule," the *Adkins* Court reasoned that "a later test or exam is a more reliable indicator of the [a]miner's condition than an earlier one" where "a miner's condition has *worsened*" given the progressive nature of pneumoconiosis. *Adkins*, 958 F.2d at 51-52 (emphasis added). Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id*. at 52.

But if "the tests or exams" show the miner's condition has *improved*, the reasoning "simply cannot apply": one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Adkins*, 958 F.2d at 51-52. An ALJ must therefore

resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id.; see also Woodward*, 991 F.2d at 319-20.

No circuit court has held otherwise. It thus would be error for the ALJ on remand to give more credit to the most recent non-qualifying studies based on the dates they were performed. *Adkins*, 958 F.2d at 51 ("Later is better is not a reasoned explanation[].") In all other respects, I concur with the holding to vacate the denial of benefits and remand this case for further consideration.

JONATHAN ROLFE
Administrative Appeals Judge