U.S. Department of Labor

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

BRB Nos. 23-0158 BLA
and 23-0158 BLA-A

JAMES E. VANHOOSE	)	
	)	
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
BIZZACK CONSTRUCTION, LLC	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	DATE ISSUED: 02/22/2024
	)	
Employer/Carrier- Respondents Cross-Petitioners	)	
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

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

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Benefits (2020-BLA-05892) rendered on a claim filed on November 30, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). He therefore found Claimant did not establish entitlement under 20 C.F.R. Part 718 and denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer responds in support of the denial. On cross-appeal, Employer challenges its designation as the responsible operator, arguing that the Black Lung Disability Trust Fund (Trust Fund) is liable for benefits. The Director, Office of Workers' Compensation Programs (the Director), urges the Benefits Review Board to decline to consider Employer's liability arguments because the ALJ made no findings regarding Employer's designation as the responsible operator.

[1] The ALJ relied on the postmark date, November 30, 2017, rather than the date the claim was received by the office of the district director, December 6, 2017, to determine when Claimant filed his miner's claim. Decision and Order at 2 n.4 (quoting 20 C.F.R. § 725.303(b) (a claim "submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark")); Director's Exhibit 2. Although Employer generally summarizes the claim as having been filed on December 6, 2017, it does not directly contest the ALJ's finding the claim was filed in November 2017; thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 2.

The 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 claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award 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).

Total Disability

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,[3] 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 did not establish total disability based on any category of evidence.[4] Decision and Order at 3-6, 17-18.

[2] 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. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10.

[3] 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).

[4] We affirm, as unchallenged on appeal, the ALJ's findings that the pulmonary function studies and arterial blood gas studies do not support a finding of total disability

Prior to weighing the medical opinion evidence, the ALJ addressed the physical requirements of Claimant's usual coal mine work. He found Claimant's usual coal mine work as a heavy equipment operator did not have any lifting requirements and required Claimant to "move between, climb into, and operate . . . often multiple different pieces of heavy equipment on the same day." Decision and Order at 11. He credited Claimant's testimony that he had to climb into different types of equipment, which sometimes involved climbing up "[p]robably eight steps" or crawling up three steps from an excavator track, and that his work did not "require manual labor or physical work." *Id*. at 10-11; Hearing Transcript at 21, 28-29. The ALJ concluded that Claimant's usual coal mine work was moderately strenuous. Decision and Order at 11.

The ALJ next weighed three medical opinions. Dr. Raj conducted the Department of Labor complete pulmonary evaluation of Claimant on March 20, 2018. Director's Exhibit 14. He opined the non-qualifying March 20, 2018 pulmonary function study results showed a moderate obstructive defect and the non-qualifying March 20, 2018 blood gas study results showed resting and exercise hypoxemia. *Id.* at 4-5. In addition, he noted Claimant's history of wheezing and coughing, worsening shortness of breath, and shortness of breath when walking approximately twenty-five feet uphill. *Id.* at 3-5. He opined Claimant would be unable to continue his usual coal mine work because it required lifting twenty-five pounds and climbing eight steps into equipment multiple times per day. *Id.* at 2, 5; Director's Exhibit 27; Claimant's Exhibit 2 at 13. In his September 7, 2021 supplemental report, Dr. Raj reiterated his opinion that Claimant is totally disabled and opined the May 13, 2021 blood gas study showed a "severe pulmonary impairment." Claimant's Exhibit 3.

Dr. Dahhan examined Claimant on September 5, 2018, and obtained non-qualifying pulmonary function and blood gas studies. Director's Exhibit 23 at 3. He opined Claimant is not totally disabled but noted Claimant has dyspnea with exertion, such as climbing stairs. *Id.* at 2-3. In his April 24, 2021 supplemental report, Dr. Dahhan opined that Claimant has a "mild obstructive ventilatory impairment" that is not totally disabling. Employer's Exhibit 3 at 6-7.

Dr. Broudy examined Claimant on September 17, 2018, and obtained invalid pulmonary function study results and non-qualifying blood gas study results, which indicated "mild or slight hypoxemia." Director's Exhibit 22 at 2-3. He noted that Claimant "was able to do his work, but was short of breath," and that Claimant had "dyspnea on

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and that there is no evidence of complicated pneumoconiosis or cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 4-6.

exertion with *minimal exertion*, such as walking across [Dr. Broudy's] parking lot" on the day of the examination. *Id.* at 2 (emphasis added). In his July 17, 2020, April 12, 2021, and November 15, 2021 supplemental reports, Dr. Broudy opined Claimant is not totally disabled. Employer's Exhibits 4-6. He noted that "at most" Claimant has a mild to moderate obstructive impairment. Employer's Exhibit 5.

The ALJ found Dr. Raj did not have an accurate understanding of the exertional requirements of Claimant's work since Dr. Raj thought Claimant had to lift twenty-five pounds, contrary to the ALJ's determination that his job required no lifting. Decision and Order at 12, 17. Consequently, the ALJ found Dr. Raj's opinion insufficient to satisfy Claimant's burden of proof because, according to the ALJ, Dr. Raj did not otherwise indicate whether Claimant could perform his job if no lifting was required. *Id.* at 17. The ALJ gave some probative weight to Dr. Dahhan's opinion, although he noted it was unclear if Dr. Dahhan had an accurate understanding that Claimant's job required no lifting. *Id.* In contrast, the ALJ credited Dr. Broudy's opinion that Claimant is not totally disabled because he clearly understood that Claimant was not required to lift anything in performing his job duties. *Id.* Thus, the ALJ found Claimant failed to establish total disability based on the medical opinions and the evidence as a whole.[5] *Id.* at 17-18; *see* 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that the ALJ erred in focusing on whether his job required lifting and did not properly consider Dr. Raj's opinion that Claimant is unable to climb into the equipment he was required to operate as a part of his usual coal mine work. Claimant's Brief at 1-2 (unpaginated). We agree, in part.

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 indicate a miner is 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). Further, a medical opinion 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

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's treatment records do not support a finding of total disability. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6.

(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).

The ALJ found Claimant's usual coal mine work required "mov[ing] between, climb[ing] into, and operat[ing] . . . often multiple different pieces of heavy equipment on the same day," and specifically credited Claimant's description that his job sometimes involved climbing as many as eight steps, multiple times a day, to get into the cab of the machine he was operating. Decision and Order at 10-11. However, the ALJ inexplicably concluded that "Claimant's testimony that his work *did not require manual labor or physical work* to mean that it did not require the type of strenuous physical work that would cause him difficulty from a pulmonary or respiratory perspective, such as lifting heavy objects or walking or *climbing* certain distances." *Id.* at 11 (emphasis added). The ALJ determined that "although [Claimant] needed *help getting into the equipment* . . . he was able to nevertheless operate the equipment." *Id.* (emphasis added). The ALJ's analysis is off point.

All of the physicians indicated Claimant had at least a mild impairment and respiratory symptoms that impacted his ability to walk uphill or climb stairs. Director's Exhibits 14, 22, 23, 27; Employer's Exhibits 3-6; Claimant's Exhibits 2, 3. Claimant testified that he was unable to climb into the equipment at his last job. Hearing Transcript at 21-22. Dr. Raj specifically testified that "taking eight steps multiple times . . . a day should be a lot of work for someone who has a lung problem[,]" which Dr. Raj described as severe; Dr. Broudy also acknowledged that Claimant has dyspnea on exertion and experiences dyspnea with activity such as walking across a parking lot. Claimant's Exhibits 2 at 21-22; 3 at 2; Director's Exhibit 22 at 2-3.

Although the ALJ concluded Claimant's job required no lifting and that he was capable of operating the machinery once inside the cab, the ALJ failed to adequately address whether Claimant's impairment and respiratory symptoms would preclude him from the climbing required by his usual coal mine work. Decision and Order at 10-17; *see* 30 U.S.C. §923(b) (ALJ must address all relevant evidence); *Cornett*, 227 F.3d at 578; *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) ("When the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case . . . rather than attempting to fill the gaps in the ALJ's opinion."). Because the ALJ did not discuss all the relevant evidence and conduct the proper analysis, we vacate the ALJ's finding that Claimant failed to establish total disability at 20 C.F.R.

§718.204(b)(2)(iv) and in consideration of the evidence as a whole.[6] Decision and Order at 17-18. We therefore vacate the ALJ's denial of benefits.

Employer's Cross-Appeal - Responsible Operator

In its cross-appeal, Employer alleges it is not the responsible operator liable for benefits. Employer and the Director correctly point out that even though it was a contested issue, the ALJ failed to make a determination regarding Employer's designation as the

[6] Our dissenting colleague asserts the ALJ rationally found that Dr. Raj "consistently tied" his total disability opinion to only his erroneous belief that Claimant's job required him to lift twenty-five pounds, citing to the ALJ's finding that Dr. Raj did not opine whether Claimant could perform his job duties if there was no lifting requirement. *See* Decision and Order at 17. Specifically, our colleague infers that Dr. Raj's testimony that having to take eight steps multiple times a day "*and then*" lifting twenty-five pounds, *see* Claimant's Exhibit 2 at 21-22 (emphasis added), indicates that Dr. Raj "consistently tied" his total disability opinion to only his erroneous belief that Claimant's job required him to lift twenty-five pounds. But it is for the ALJ to draw such inferences, *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-77 (6th Cir. 2013); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002), and it is not for the Board to substitute its inferences for those of the ALJ. *Anderson*, 12 BLR at 1-113.

While ALJ did find that Dr. Raj did not opine whether Claimant could perform his job duties if there was no lifting requirement, the ALJ previously credited Claimant's description that his job also involved climbing as many as eight steps multiple times a day, *see* Decision and Order at 10-11. Thus, as noted, the ALJ did not adequately address or explain the fact that Dr. Raj indicated Claimant was unable to continue his usual coal mine work because it required lifting twenty-five pounds as well as climbing eight steps multiple times per day and, therefore, did not adequately address or explain why Claimant's impairment and respiratory symptoms would not also preclude him from that climbing. As it is not for the Board to make such factual findings or inferences, nor fill in gaps in the ALJ's opinion and analysis, "the proper course for the Board is to remand the case" for the ALJ to do so. *See Rowe*, 710 F.2d at 255.

In addition, contrary to our dissenting colleague's assertion, the majority opinion does not point to any other errors in the ALJ's consideration of the medical opinions, and specifically those of Drs. Dahhan and Broudy, other than noting that Dr. Broudy acknowledged that Claimant has dyspnea on exertion and with activity such as walking across a parking lot.

responsible operator.[7] Employer's Brief at 25-44; Director's Brief at 1. Because the question of Employer's liability requires findings of fact that the ALJ must make in the first instance, we decline to address, as premature, Employer's arguments on cross-appeal that Kokosing Construction, Incorporated should have been designated as the responsible operator and that liability should thus transfer to the Trust Fund. *See Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018) (ALJ must make a "de novo determination of the operator's liability" after a fair hearing); *Rowe*, 710 F.2d at 255; Employer's Brief at 25-44.

Remand Instructions

On remand, the ALJ must reconsider the physicians' descriptions of Claimant's pulmonary impairment, symptoms, and physical limitations, in conjunction with his findings with respect to the climbing requirements of Claimant's usual coal mine employment. *See Cornett*, 227 F.3d at 578; *Budash*, 9 BLR at 1-51-52. In rendering his credibility findings, 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 Rowe*, 710 F.2d at 255. After reweighing the medical opinions, the ALJ must weigh the evidence as a whole to determine whether Claimant is totally disabled. *See* 20 C.F.R. §718.204(b)(2); *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988). If the ALJ again finds Claimant is not totally disabled, he may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

If the ALJ finds Claimant established total disability, he must also determine the length of his coal mine employment and whether it was performed in underground mines or in substantially similar conditions at surface mines. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i). If Claimant establishes both fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, he will invoke the Section 411(c)(4) presumption, in which case the ALJ would have to consider whether Employer rebutted it. 20 C.F.R. §718.305(d)(1).[8] If Claimant establishes total disability,

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[7] Employer contested its designation as the responsible operator before both the district director and the ALJ. Director's Exhibits 32, 33, 36, 47, 65; Hearing Transcript at 41-44; Employer's Corrected Brief to the ALJ at 18-42.

[8] 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); 20 C.F.R. §718.305(b).

but not fifteen years of qualifying employment, the ALJ must address Claimant's entitlement pursuant to 20 C.F.R. Part 718.

If the ALJ determines Claimant is entitled to benefits, he must also consider the parties' arguments and all relevant evidence regarding Employer's designation as the responsible operator. 20 C.F.R. §725.495(c). The ALJ must set forth his findings in detail and explain his rationale in accordance with the Administrative Procedure Act.[9] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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[9] 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).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to remand this claim for further consideration of the medical opinion evidence. Claimant raises a single, narrow argument on appeal: Even if Dr. Raj based his total disability opinion on an inaccurate understanding that Claimant had to lift twenty-five pounds as a heavy equipment operator, "a fair reading of Dr. Raj's testimony would indicate that even if he did not have to lift [twenty-five] pounds, he could not climb into the equipment [eight] times per day at the present time." Claimant's Brief at 2.

The majority agrees, interpreting Dr. Raj's opinion that Claimant lacks the respiratory capacity to climb into equipment as separate and distinct from his belief that Claimant also could not lift twenty-five pounds. However, as the ALJ rationally found, Dr. Raj consistently tied his total disability opinion to his erroneous belief that Claimant's job required him to lift twenty-five pounds. Decision and Order at 17; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322 (4th Cir. 2013) (ALJ's findings must be affirmed if supported by substantial evidence); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1068 (6th Cir. 2013) (same); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (Board cannot substitute its inferences for the ALJ's).

Dr. Raj testified that Claimant could not perform a job "where [he had] to lift[] [twenty-five] pounds *and* he ha[d] to take eight steps multiple times a day." Claimant's Exhibit 2 at 13 (emphasis added). Later, when given the opportunity to say specifically whether "those eight steps are the reason" Claimant is disabled, Dr. Raj again tied his opinion to an erroneous belief that Claimant also had to lift twenty-five pounds:

> Yeah. If he had to take eight steps multiple times a day *and then* this lifting [twenty-five] pounds also, yes, I feel that at least this is a moderate level of exertion, taking eight steps multiple times a day. Yes, if it was one time a day, yes, then not, but he is taking eight steps multiple times a day *and then* lifting [twenty-five] pounds, I think it's a level of exertion; yeah.
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> . . .
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> [I]f someone has a – some lung impairment, then [twenty-five pounds] could be a lot *and then* taking eight steps multiple times—times a day would be a lot of work for someone who has a lung problem; yes.

Claimant's Exhibit 2 at 21-22 (emphasis added).

Claimant has not offered any argument to justify overturning the ALJ's rational finding that Dr. Raj "did not opine whether Claimant could perform his job duties if there was no lifting." Decision and Order at 17. Thus, I would affirm it.

While the majority identifies other errors in the ALJ's consideration of the medical opinions, including those of Drs. Dahhan and Broudy, none of the alleged errors were raised by Claimant. 20 C.F.R. §802.211(a)-(b) (petition for review and brief must identify the "specific issues to be considered on appeal," present "an argument with respect to each issue presented with references to transcripts, pieces of evidence and other parts of the record to which the petitioner wishes the Board to refer," and set forth "the precise result the petitioner seeks on each issue"). I therefore would decline to raise them *sua sponte*. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("in the first instance and on appeal," the principle of party presentation dictates that courts "rely on the parties to frame the issues for decision").

With no other issues raised, I would affirm the ALJ's denial of benefits.

GREG J. BUZZARD
Administrative Appeals Judge