U.S. Department of Labor

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

BRB Nos. 23-0493 BLA and
23-0493 BLA-A

GARY L. COLLINS

Claimant-Respondent
Cross-Petitioner

v.

NINE MILE MINING, INCORPORATED

and

NEW HAMPSHIRE INSURANCE/AIG

Employer/Carrier-
Petitioners
Cross-Respondents

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 02/28/2025

DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits in a Subsequent Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

Sarah Y. M. Himmel and Joseph N. Stepp (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer and its Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges:

PER CURIAM:

Claimant appeals[1] and Employer and its Carrier (Employer) cross-appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Denying Benefits in a Subsequent Claim (2020-BLA-05866) rendered on a claim filed on November 6, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[3]

The ALJ accepted the parties' stipulation to at least forty years of underground coal mine employment. However, he found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant did not establish a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c)(3), and did not invoke the rebuttable presumption of total disability due to

[1] Due to a clerical error, Employer's cross-appeal was docketed prior to Claimant's appeal of the ALJ's Decision and Order. As such, Claimant was designated as the "respondent" and "cross-petitioner" for the purposes of appeal. However, as Claimant is the non-prevailing party before the ALJ, we will address his arguments first.

[2] Claimant filed two prior claims. Director's Exhibits 1, 70. On October 20, 2015, the district director denied his first claim, which he filed on February 9, 2015, for failure to establish total disability. Director's Exhibit 1. Claimant withdrew his second claim. It is therefore "considered not to have been filed." 20 C.F.R. §725.306(b).

[3] 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 Claimant did not establish total disability in his prior claim, he had to submit new evidence establishing that element of entitlement to obtain review of the claim on the merits. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Director's Exhibit 1.

pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] Moreover, because Claimant failed to establish an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he is not totally disabled. Employer responds in support of the denial of benefits; on cross-appeal, it argues the ALJ erred in crediting Dr. Shah's medical opinion. Claimant has not filed a response to Employer's cross-appeal. The Acting Director, Office of Workers' Compensation Programs, has not filed a response to either appeal.

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

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

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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)

[4] 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.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15; Director's Exhibit 4.

(en banc). Claimant argues the ALJ erred in finding that the medical opinion evidence does not establish total disability.[6] Claimant's Brief at 5-8.

Before weighing the medical opinions, the ALJ found Claimant's usual coal mine work was as an underground electrician or repairman and his work required heavy manual labor. Decision and Order at 6-7. We affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7.

The ALJ then considered Drs. Shah's, Dahhan's, and McSharry's medical opinions. Decision and Order at 9-13. Dr. Shah opined Claimant has a totally disabling respiratory impairment, while Drs. Dahhan and McSharry opined he is not disabled from a pulmonary perspective. Director's Exhibits 13, 19, 20, 62; Employer's Exhibits 5, 6. The ALJ found each physician's opinion well-reasoned and well-documented. Decision and Order at 9-13. He concluded that, "when reviewing all the medical opinion evidence together, I find that Claimant has not established total [disability] based on a preponderance of the medical opinion evidence" because "[a]ll three physicians provided well-reasoned and well-documented reports" and "Claimant did not provide additional evidence beyond the department sponsored examination." *Id.* at 13.

As Claimant argues, the ALJ erred by failing to resolve the conflict in the medical opinion evidence and explain his findings as the Administrative Procedure Act (APA) requires. Claimant's Brief at 2-3; Decision and Order at 13. The APA requires the ALJ to consider all relevant evidence in the record, and to set forth his "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Moreover, the ALJ has a duty to resolve any conflicts in the evidence and explain his basis for doing so. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must still conduct an appropriate analysis of the evidence to support his or her conclusion and render necessary credibility findings); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998). While the ALJ summarized the opinions of Drs. Shah, McSharry, and Dahhan, he did not resolve the differences in their opinions or analyze the bases for their opinions.

Dr. Shah examined Claimant on February 28, 2019, and opined that he has a mild impairment based on his mild loss of lung function on his diffusion capacity testing, noting

[6] We affirm, as unchallenged on appeal, the ALJ's findings that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-8.

that this testing is generally accepted by the medical community for diagnosing pulmonary impairments under the American Medical Association and American Thoracic Society guidelines. Director's Exhibit 1 at 6. She explained that Claimant's oxygen consumption at peak exercise (VO2) is reduced to the point that he cannot perform sustained levels of heavy and very heavy labor as required by his usual coal mine employment, noting that at most he could perform light to moderate work for eight-hour shifts. *Id.* Dr. Shah reviewed additional evidence, including Dr. Dahhan's December 19, 2019 examination of Claimant, but stated her opinion did not change based on this evidence. Director's Exhibit 19. She explained that Dr. Dahhan's diffusion capacity test was moderately reduced, further supporting her finding of total disability. *Id.* at 4-5, 8-9.

Dr. Dahhan disagreed, opining that the diffusion capacity test could be influenced by "various mechanisms" as it "is a very sensitive test." Employer's Exhibit 6 at 3. He did not believe that there was any evidence of total disability as the pulmonary function studies and arterial blood gas studies were normal. Director's Exhibit 20 at 19; Employer's Exhibit 6 at 9-10. Dr. McSharry also disagreed with Dr. Shah, opining that there is no pulmonary impairment as the pulmonary function studies and blood gas studies are normal. Employer's Exhibit 5 at 3-4. He further opined that the diffusion capacity test "is the most subject to variation for non-pulmonary causes" and, as it is not affecting the blood gas studies, it does not indicate the presence of a respiratory impairment. *Id.* at 3-4. He added that Dr. Shah's opinion that Claimant may be totally disabled based on his oxygen consumption level at peak exercise "may be correct," but that this impairment would be cardiac in nature. *Id.* at 4.

As the ALJ provided no analysis of the physicians' opinions and failed to resolve the conflict in the evidence, his findings are not in compliance with the APA. *Wojtowicz*, 12 BLR at 1-165. We therefore vacate the ALJ's determination that the medical opinion evidence and the evidence as a whole does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 8-13.

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). In assessing the probative weight to which the medical opinions are entitled, the ALJ must consider the physicians' qualifications, the documentation underlying their medical judgments, all relevant portions of their opinions, and the sophistication of and bases for their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441(4th Cir. 1997).

We note that the results of medically acceptable tests or procedures not specifically addressed in 20 C.F.R. Part 718 may be submitted and given consideration provided they meet certain regulatory requirements. 20 C.F.R. §718.107.[7] Further, in order for a physician's opinion to establish total disability under the Act and regulations, the physician must exercise "reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques . . . ." 20 C.F.R. §718.204(b)(2)(iv). As it did before the ALJ, Employer argues that Dr. Shah did not base her opinion on diagnostic techniques shown to be medically acceptable, and that the requirements of the regulations have not been met. Employer's Brief at 7-13; Defendant's Closing Brief at 8-13. On remand, the ALJ must address Employer's arguments, including whether the VO2 test that Dr. Shah relied upon is a medically acceptable and relevant procedure for establishing total disability, and whether Dr. Shah exercised reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques. Employer's Brief at 7-19; 20 C.F.R. §§718.107, 718.204(b)(2)(iv). In rendering his findings, the ALJ must explain his determinations in compliance with the requirements of the APA. 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165.

If the ALJ determines the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), he must then weigh all the relevant evidence together to determine if Claimant has established a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, he will have established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and will have invoked the Section 411(c)(4) presumption, 20 C.F.R. §718.305(c)(1). The ALJ must then determine whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(1). If the ALJ determines the medical opinion evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv) or, on weighing all the relevant evidence together, that Claimant has not established total disability at 20 C.F.R. §718.204(b)(2), Claimant will have failed to establish a change in an applicable condition of entitlement and the ALJ may reinstate his denial of benefits. In rendering his conclusions, the ALJ must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[7] The party submitting the test or procedure bears the burden to demonstrate that it is medically acceptable and relevant to establishing or refuting entitlement to benefits. 20 C.F.R. §718.107(b).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge