U.S. Department of Labor

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

BRB No. 20-0566 BLA

KELLIS C. BARTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 01/31/2022
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Kellis C. Barton, Haysi, Virginia.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Denying Benefits (2018-BLA-05152) rendered

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision on

on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case involves a miner's claim filed on January 20, 2017.

The ALJ found Claimant established 19.59 years of qualifying coal mine employment but did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and benefits were precluded under 20 C.F.R. Part 718.[2] Accordingly, the ALJ denied benefits.

On appeal, Claimant generally contends the ALJ erred in denying benefits. Employer responds in support of the ALJ's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the ALJ's Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the ALJ's findings if they are 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).

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

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Claimant's behalf, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] 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 impairment. 30 U.S.C. § 921(c)(4); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged, the ALJ's finding that Claimant established 19.59 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[4] Claimant performed his last coal mine employment in Virginia. Hearing Transcript at 33. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

(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 if certain conditions are met, but failure to establish any one of these elements precludes an award of benefits.[5] *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).

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). 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).

The ALJ correctly noted the five pulmonary function studies of record conducted on October 26, 2011, January 25, 2012, February 13, 2017, August 28, 2017, and December 19, 2017, are non-qualifying.[6] Decision and Order at 5-6 & n.6; Director's Exhibit 11; Employer's Exhibits 1, 3. Thus, we affirm the ALJ's finding that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); Decision and Order at 6.

There are three blood gas studies: Dr. Raj's February 13, 2017 resting study was qualifying and an exercise test was medically contraindicated, Dr. Sargent's December 19, 2017 study was non-qualifying at rest and with exercise, and Dr. Keen's July 31, 2018 resting study was nonqualifying and no exercise study was conducted. Director's Exhibits 11, Employer's Exhibits 1, 4. The ALJ found Dr. Keene's non-qualifying study does not comply with the quality standard at 20 C.F.R. §718.105(b); she therefore assigned it less

[5] Because the record contains no evidence of complicated pneumoconiosis, we affirm the ALJ's finding that Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); *see* 20 C.F.R. §718.304; Decision and Order at 3 n.4.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

weight.[7] Decision and Order at 7. Finding the results of the studies by Drs. Raj and Sargent in equipoise, the ALJ permissibly determined Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).[8] Decision and Order at 7; *see Ondecko*, 512 U.S. at 281.

In considering the medical opinion evidence, the ALJ initially found Claimant's last coal mine job as an electrician and repairman involved heavy exertion. Decision and Order at 4. She then weighed the opinions of Drs. Keene, Raj, and Sargent.

Dr. Raj performed the Department of Labor complete pulmonary examination; he diagnosed severe resting hypoxemia based on Claimant's February 2017 blood gas study, and "reduced physical capacity resulting from pulmonary impairment" based on Claimant's "short[ness] of breath after walking 100-200 feet . . . on level ground." Director's Exhibit 11 at 5. Dr. Raj further opined Claimant's reduced physical capacity precludes his performing the heavy exertion of his last coal mine job. *Id.*

Claimant's treating physician, Dr. Keene, noted Claimant suffers from coal workers' pneumoconiosis, "significant shortness of breath with activity," and "intermittent chest congestion with productive cough and recurring bronchitis." Claimant's Exhibit 5. Dr. Keene described Claimant's shortness of breath as limiting his physical activities and requiring him to rest frequently. *Id.* In addition, Dr. Keene indicated Claimant's February 13, 2017 blood gas study showed decreased oxygenation. *Id.*

Dr. Sargent conducted a records review and examined Claimant at Employer's request. Employer's Exhibit 1. He diagnosed exercise-induced "cough variant asthma" based on Claimant's "waxing and waning arterial blood gas abnormalities" and "severe cough [and dyspnea] with minimal exertion." *Id.* at 1-2. Despite noting Claimant's respiratory symptoms limit his exertional capacity,[9] Dr. Sargent opined Claimant does not

[7] As Dr. Keene's blood gas test appears to have been conducted in the course of treating Claimant, the quality standard at 20 C.F.R. §718.105(b) does not apply to it. *See* 20 C.F.R. §718.101(b); 65 Fed. Reg. 79927 (Dec. 20, 2000); 64 Fed. Reg. 54975 (Oct. 8, 1999). Any error the ALJ made in discounting Dr. Keene's non-qualifying study is harmless, however, because the study would only further support the ALJ's conclusion at 20 C.F.R. §718.204(b)(2)(ii), if she had assigned it full probative weight. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] Because the record contains no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure, the ALJ properly found Claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 7.

[9] Dr. Sargent administered an exercise blood gas test, during which Claimant walked on a treadmill at a speed of one mile per hour, that was prematurely terminated after 4 minutes and 41 seconds. Employer's Exhibit 1 at 1, 24. Dr. Sargent observed firsthand

have a respiratory impairment that precludes the heavy exertion of his last coal mine job; as support for this conclusion, Dr. Sargent relied on the absence of objective evidence of impairment with exertion. Employer's Exhibit 6 at 11. He explained Claimant's pulmonary function studies were normal and "[t]here is no evidence in this case of a gas exchange limitation to [Claimant's] exertional tolerance," as Claimant's moderate hypoxemia on blood gas testing improved to normal values with exercise. Employer's Exhibits 1 at 1-2, 6 at 11.

The ALJ found Dr. Keene's opinion merited no weight because she did not address whether Claimant is totally disabled from performing his last coal mine employment. Decision and Order at 9. Although the ALJ found the opinions of Drs. Raj and Sargent reasoned and documented, she credited Dr. Sargent's opinion that Claimant is not totally disabled because he reviewed Claimant's "most recent tests." *Id.* Thus, the ALJ found Claimant did not establish total disability based on the medical opinion evidence. *Id.*; 20 C.F.R. §718.204(b)(iv).

We vacate the ALJ's conclusion that Claimant is not totally disabled because she conducted only a limited analysis of the relevant evidence. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *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 (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 physician's impairment rating and any physical limitations due to that impairment with the exertional requirements of the miner's usual coal mine work); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (miner is totally disabled if he cannot perform the exertional requirements of his previous job).

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that Claimant "almost immediately developed severe coughing and dyspnea and had to stop exercising." *Id.* at 1; *see also* Employer's Exhibit 6 at 12, 14.

Dr. Raj opined Claimant's exertional shortness of breath precludes his ability to perform his last coal mine job. Director's Exhibit 11. Dr. Keene similarly opined that "Claimant's significant shortness of breath requires him to rest frequently and limit his activities." Claimant's Exhibit 5 at 1; *see Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894. Moreover, Dr. Sargent administered an exercise blood gas test, when Claimant walked on a treadmill at a speed of one mile per hour, but the test was terminated after 4 minutes and 41 seconds. Employer's Exhibit 1 at 1, 24. Dr. Sargent observed firsthand that Claimant "almost immediately developed severe coughing and dyspnea and had to stop exercising." *Id*. at 1.

The ALJ did not consider whether Dr. Sargent credibly explained how Claimant can perform heavy manual labor if his respiratory symptoms "almost immediately" forced him to stop an exercise blood gas test. *Id.; see Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894. Because the ALJ did not address whether Claimant's respiratory symptoms and physical limitations that all the physicians noted[10] preclude him from performing the heavy manual labor associated with his usual coal mine work, we vacate her determination that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894. We therefore vacate the ALJ's overall finding that Claimant is not totally disabled and did not invoke the Section 411(c)(4) presumption, and her denial of benefits.

On remand the ALJ must reconsider whether the medical opinion evidence establishes a totally disabling pulmonary or respiratory impairment. She must consider the physicians' opinions in conjunction with the exertional requirements of Claimant's usual coal mine employment and draw appropriate inferences. In determining whether Claimant is totally disabled, the ALJ must explain her findings as the Administrative Procedure Act requires.[11] 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).

[10] All the physicians note Claimant's respiratory symptoms of cough and shortness of breath are related to pulmonary disease. Drs. Raj and Keene attribute Claimant's symptoms to chronic bronchitis and pneumoconiosis. Director's Exhibit 11 at 5; Claimant's Exhibit 5 at 1. Dr. Sargent opined Claimant's "symptomatology [of severe coughing and dyspnea on exertion] is consistent with cough-variant asthma induced by exercise," which is "a recognized condition in pulmonary medicine." Employer's Exhibits 1 at 2, 6 at 13.

[11] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

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).