U.S. Department of Labor

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

BRB No. 21-0213 BLA

JAMES B. DUTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COW CREEK 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 Sean M. Ramaley, Administrative Law Judge, United Stated Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC) South Williamson, Kentucky, for Claimant.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Denying Benefits (2019-BLA-05827) rendered on a subsequent claim filed on

August 15, 2018,[1] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has nineteen years of underground coal mine employment and found he established legal pneumoconiosis and a change in an applicable condition of entitlement.[2] 20 C.F.R. §725.309(c). However, because Claimant did not establish a totally disabling respiratory or pulmonary impairment, the ALJ found he could not 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) (2018),[3] or establish entitlement under 20 C.F.R. Part 718.[4] 20 C.F.R. §718.204(b)(2). Accordingly, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding the pulmonary function study and medical opinion evidence insufficient to establish total disability, and thus erred in

[1] The district director denied Claimant's prior claim, filed on October 10, 1996, because he did not establish any element of entitlement. Director's Exhibits 1, 44.

[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). The district director denied Claimant's prior claim because he did not establish any element of entitlement; therefore, he had to submit new evidence establishing at least one of the elements of entitlement in order to have his claim reviewed on the merits. 20 C.F.R. §725.309(c).

[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); *see* 20 C.F.R. §718.305.

[4] The ALJ also concluded Claimant does not have complicated pneumoconiosis and thus he could not 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). 20 C.F.R. §718.304.

concluding he did not invoke the Section 411(c)(4) presumption.[5] Employer did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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.[6] 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 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). 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).

Pulmonary Function Studies

The ALJ considered two pulmonary function studies, which provided different heights for Claimant. Dr. Ammisetty's October 10, 2018 study, conducted as part of the Department of Labor's complete pulmonary evaluation, recorded Claimant's height as 70 inches. Director's Exhibit 20 at 9. Dr. Jarboe's August 29, 2019 study recorded Claimant's height as 66.3 inches. Employer's Exhibit 1 at 12. Claimant was over the age of 71 when both studies were conducted. The ALJ averaged the two heights and found Claimant's height is 68.1 inches. Decision and Order at 7 n.5. Comparing Claimant's FEV1, FVC,

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established nineteen years of underground coal mine employment and a change in an applicable condition of entitlement but that the evidence is insufficient to establish complicated pneumoconiosis. *See* 20 C.F.R. §§725.309, 718.304; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

[6] Because Claimant performed his most recent coal mine employment in West Virginia, 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); Decision and Order at 4; Director's Exhibit 4; Hearing Transcript at 12-13.

and MVV values to the table values at Appendix B for a miner who is 71 years of age and 68.1 inches tall, the ALJ concluded that both studies were non-qualifying.[7] Thus, the ALJ found Claimant did not establish total disability based on the pulmonary function study evidence. *Id*. at 6, 16; *see* 20 C.F.R. §718.204(b)(2)(i).

Claimant asserts the ALJ failed to properly consider the treatment records in determining his actual height. Claimant's Post-Hearing Brief at 9.[8] Claimant notes the treatment records include seven height measurements of 70 inches and three at 68 inches. *Id*. Claimant asserts Dr. Jarboe's measurement is the outlier and that either 70 inches is his correct height or the ALJ must find an average height of 69 inches, based on the average between the preponderant treatment record heights of 68 and 70 inches. Claimant correctly notes neither study is qualifying based on a height of 68.1 inches; however, if either 70 or 69 inches is used, Dr. Jarboe's study is qualifying.[9] Claimant's Brief at 6, 11. Claimant made this argument in his post-hearing briefing before the ALJ; however, the heights

[7] 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). For a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce *both* a qualifying FEV1 value *and* either an FVC value or MVV value equal to or less than the values appearing in the tables set forth in Appendix B or an FEV1 to FVC ratio equal to or less than 55 percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). In the absence of contrary probative evidence, pulmonary function studies performed by a miner who is over the age of 71 must be treated as qualifying if the values produced would be qualifying for a 71-year-old. *K.J.M.* [*Meade*] v. *Clinchfield Coal Co.*, 24 BLR 1-41, 1-47 (2008).

[8] Claimant's height was recorded as 68 inches on three occasions, as 69.8 inches once, and as 70 inches on seven occasions in treatment records dating from February 1, 2008 to June 7, 2019. Claimant's Exhibit 3 at 1; Employer's Exhibits 4 at 2, 4, 17, 22, 41, 53.

[9] Claimant argues that when applying the tables values at Appendix B for a miner who is 70.1 inches tall and age 71, Dr. Jarboe's August 29, 2019 pulmonary function study would be qualifying because the recorded FEV1 values of 1.77 and 1.43, respectively, and the recorded MVV values of 35.42 and 19.15, respectively, are less than or equal to the disability standards for the FEV1 at 1.88 and the MVV at 75. Claimant also argues, applying the table height of 68.9 inches and age 71, the August 29, 2019 pulmonary function study would be qualifying because the recorded FEV1 and MVV values are less than or equal to the disability standards for the FEV1 at 1.79 and the MVV at 72.

recorded in the treatment notes were not addressed by the ALJ in establishing the height he used for purposes of determining whether the pulmonary function studies' results were qualifying. We agree with Claimant that the ALJ erred in failing to discuss the treatment notes when determining the appropriate height to use in considering whether the pulmonary function study evidence is qualifying.[10] *Id.* at 5-7.

The United States Court of Appeals for the Fourth Circuit and the Board have held that where there are substantial differences in the recorded heights among the pulmonary function studies of record, the ALJ must make a factual finding to determine the miner's actual height. *See Toler v. E. Associated Coal Co*., 43 F.3d 109, 114 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Because the ALJ's decision did not discuss his consideration of the treatment note heights submitted by Claimant, his decision fails to satisfy the Administrative Procedure Act (APA).[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). We therefore vacate the ALJ's finding that Claimant did not establish total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions[12]

There are two medical opinions. Dr. Ammisetty opined Claimant is totally disabled from performing his usual coal mine work. Director's Exhibit 20 at 6; Employer's Exhibit 1 at 9. Dr. Jarboe examined Claimant and opined he is not totally disabled. Employer's Exhibit 1 at 9. The ALJ accorded less weight to Dr. Ammisetty's opinion because he relied

[10] We make no finding as to the credibility of the heights recorded in the treatment notes nor the weight they should receive; the credibility and weight to be accorded such evidence is within the ALJ's discretion. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997).

[11] The APA requires every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[12] We affirm, as unchallenged on appeal, the ALJ's findings that the blood gas studies are non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2) (ii), (iii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15, 16.

on a non-qualifying pulmonary function study and blood gas study. Decision and Order at 17. Because we have vacated the ALJ's weighing of the pulmonary function studies, which served as the basis for his discrediting of Dr. Ammisetty's opinion, we vacate the ALJ's conclusion that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Wojtowicz*, 12 BLR at 1-165.

Remand Instructions

The ALJ must determine Claimant's height, based on all the relevant evidence and must reconsider whether the pulmonary function study evidence is supportive of a finding of total disability. 20 C.F.R. §718.204(b)(2)(i). He then must reweigh the medical opinions and determine whether they are sufficient to establish that Claimant is totally disabled from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). In rendering his credibility findings on remand, the ALJ should address 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 Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The ALJ must also be mindful that a physician may conclude a miner is totally disabled even if the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). The relevant inquiry is whether Claimant has a respiratory or pulmonary impairment that precludes the performance of his usual coal mine work. *Cornett* 227 F.3d at 578 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

After determining whether the medical opinions support a finding of total disability, 20 C.F.R. §718.204(b)(2)(iv), the ALJ must weigh all of the evidence together and reach an overall determination regarding whether Claimant has established a totally disabling respiratory or pulmonary impairment and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If Claimant invokes the Section 411(c)(4) presumption, he must then determine whether Employer has rebutted it. If Claimant is unable to establish total disability, benefits are precluded. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). In reaching his conclusions on remand, the ALJ must explain the bases for all of his credibility

determinations and findings of fact as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge