U.S. Department of Labor

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

BRB No. 22-0121 BLA

EDMOND A. ROSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 01/25/2023
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 Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Edmond A. Rose, Cleveland, Virginia.

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

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2019-BLA-05427) rendered on a claim filed on November 20, 2017,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had 26.91 years of surface coal mine employment in conditions substantially similar to those in an underground mine. However, she found Claimant did not establish a totally disabling respiratory or pulmonary impairment, and therefore could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. She also found Claimant did not establish pneumoconiosis, 20 C.F.R. §718.202(a)(1)-(4), and denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, argues the ALJ erred in finding the pulmonary function study evidence does not establish total disability.[4]

In an appeal filed without representation, the Benefits Review Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with

[1] Bradley Johnson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but he does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed two prior claims that he withdrew. Director's Exhibit 1. A withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b).

[3] 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); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 26.91 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

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 (1965).

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

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, 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 and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[6] pulmonary function studies or 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 found Claimant did not establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 5, 6, 8.

Pulmonary Function Studies

The ALJ considered the results of five pulmonary function studies dated January 8, 2018, August 22, 2018, September 12, 2018, November 4, 2020, and February 16, 2021. Decision and Order at 4-5; Director's Exhibits 17, 20; Claimant's Exhibits 5, 6; Employer's Exhibit 3. The January 8, 2018 study produced qualifying pre-bronchodilator results but non-qualifying post-bronchodilator results. Director's Exhibit 17. The September 12, 2018 and February 16, 2021 studies produced qualifying pre-bronchodilator results and did not include a post-bronchodilator study. Claimant's Exhibits 5, 6. The August 22, 2018 and November 4, 2020 studies produced non-qualifying pre- and post-bronchodilator results. Director's Exhibit 20; Employer's Exhibit 3. Although the ALJ noted the results

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 10-11.

[6] 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).

of three of the five pre-bronchodilator studies, including the most recent, qualify for total disability, she ultimately found the pulmonary function study evidence does not establish total disability because "only three of the eight testing results meet the [Department of Labor (DOL)] standards for total disability." Decision and Order at 5, *citing* 20 C.F.R. §718.204(b)(2)(i).

We agree with the Director that the ALJ failed to conduct the requisite qualitative and quantitative analysis in weighing the pulmonary function studies because she simply "totaled all pre- and post-bronchodilator values" to find "Claimant failed to meet his burden of proving total disability." Director's Reply Brief at 1-2; *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016) (an ALJ must weigh the quality, not just the quantity, of the evidence); *Sunny Ridge Min. Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (an ALJ may consider "quantitative differences in the evidence so long as qualitative differences [are] also considered"). Moreover, the DOL has recognized 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). Thus, as the Director asserts, the question before the ALJ "is whether Claimant can perform his most recent coal-mine employment, not whether he could . . . perform it after receiving bronchodilators." Director's Brief at 2.

As the only basis the ALJ provided for finding the pulmonary function study evidence does not establish total disability is the numerical superiority of the non-qualifying pre- and post- bronchodilator results, Decision and Order at 5, we vacate her finding at 20 C.F.R. §718.204(b)(2)(i). *Addison*, 831 F.3d at 252-54; *Keathley*, 773 F.3d at 740.

Medical Opinions[7]

The ALJ also considered the medical opinions of Drs. Ajjarapu, Fino, and Sargent. Dr. Ajjarapu opined Claimant has a "severe pulmonary impairment" that renders him unable to perform his previous coal mine employment. Director's Exhibit 17 at 6. In a supplemental report, however, Dr. Ajjarapu noted Dr. Fino's "more recent" objective

[7] The ALJ correctly found none of the arterial blood gas studies, conducted on January 8, 2018, August 22, 2018, and November 4, 2020, produced qualifying results and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 5-6; Director's Exhibits 17, 20; Employer's Exhibit 3. Therefore, we affirm her finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

testing[8] and therefore opined Claimant "doesn't appear to be totally disabled." *Id.* at 1. She stated that "[b]ased on Dr. Fino's results, [Claimant] is not totally disabled, and he retains the pulmonary capacity to do his previous coal mine employment." *Id.* Drs. Fino and Sargent opined Claimant has a mild respiratory impairment that does not disable him from performing his last coal mine job.[9] Director's Exhibit 20 at 8-9; Employer's Exhibits 2 at 3, 3 at 2.

The ALJ found Dr. Ajjarapu's opinions in equipoise and that "Drs. Fino and Sargent did not conclude . . . Claimant is totally disabled." Decision and Order at 8. She thus found Claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 8.

Because the ALJ's weighing of the pulmonary function studies may affect her weighing of the medical opinions, we vacate her finding that Claimant failed to establish total disability at 20 C.F.R. §§718.204(b)(2)(iv) and 718.204(b)(2) overall, and remand the case for further consideration. Consequently, we vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and the denial of benefits.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on a preponderance of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i). She must properly characterize the pulmonary function study evidence and undertake a quantitative and qualitative analysis of the conflicting results in rendering her findings of fact. *See Addison*, 831 F.3d at 252-54; *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *see also Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence").

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must first determine the exertional requirements of Claimant's usual coal mine work and

[8] Dr. Ajjarapu noted "[b]oth the spirometry values and blood gas results [Dr. Fino conducted] were much higher than [Claimant's] initial values on the day" she examined him, but stated she "presume[d] that his condition was better on the day" Dr. Fino examined him because Dr. Fino's testing was done more recently. Director's Exhibit 17 at 1.

[9] Drs. Fino and Sargent opined Claimant has the respiratory capacity to perform his last coal mine job. Employer's Exhibits 2 at 3, 3 at 2.

consider the medical opinions assessing his impairment in light of those requirements.[10] *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (a physician who asserts a claimant is capable of performing assigned duties should state the physician's knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *see also 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); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to the miner's work capabilities); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability). In rendering her credibility findings, she must consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *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 then weigh the categories of evidence together to determine if Claimant has established total disability based on a preponderance of the evidence. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, and thus invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305(d)(1)(i), (ii). As the burdens of proof on remand may shift, we decline to address the issues of disease and disability causation. 20 C.F.R. §§718.202, 718.205(c). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial 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). In rendering her findings on remand, the ALJ must comply with the Administrative Procedure Act.[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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[10] A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982).

[11] The Administrative Procedure Act 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 . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge