U.S. Department of Labor

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

BRB No. 23-0434 BLA

JAMES I. COWFER, JR. Claimant-Petitioner v. JAMES I. COWFER CONTRACTING and AMERICAN MINING INSURANCE COMPANY, a/k/a BERKLEY CAUSALTY COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 01/22/2025 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for Claimant.

Sean B. Epstein (Thomas, Thomas & Hafer, LLP), Pittsburgh, Pennsylvania, for Employer.

Amanda Torres (Seema Nanda, Solicitor of Labor; Jennifer Feldman Jones, Acting 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.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2022-BLA-05849) rendered on a claim filed on January 19, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 22.3 years of qualifying coal mine employment but found he did not establish a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2). Thus, she found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018). As Claimant failed to establish total disability, a necessary element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.

On appeal, Claimant challenges the ALJ's finding that he did not establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting the ALJ conflated the issues of total disability and disability causation, and therefore asks the Benefits Review Board to vacate the denial of benefits and remand the case for further consideration of whether Claimant can invoke the Section 411(c)(4) presumption.[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

[1] 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 22.3 years of qualifying coal employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-8.

with applicable law.[3] 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, 361-62 (1965).

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

To invoke the Section 411(c)(4) presumption, 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.[4] 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 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 the arterial blood gas evidence supports a finding of total disability but the pulmonary function studies and medical opinions do not. She also found there is no evidence of cor pulmonale with right-sided congestive heart failure.[5] 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 10-21. Considering the evidence as a whole, the ALJ found the preponderance of the evidence does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 10-21.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 29-30.

[4] We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine work — a foreman who also operated loaders and dozers — required heavy labor. *See Skrack*, 6 BLR at 1-711; Decision and Order at 8.

[5] We affirm, as unchallenged, the ALJ's findings that the arterial blood gas studies support a finding of total disability whereas the pulmonary function studies do not and that there is no evidence of cor pulmonale with right-sided congestive heart failure. *Skrack*, 6 BLR at 1-711; Decision and Order at 13-14.

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Zlupko, Fino, and Basheda. Decision and Order at 14-24. Dr. Zlupko opined the pulmonary function and blood gas studies demonstrate Claimant has mild restrictive and obstructive impairments as well as elevated carbon dioxide levels causing a moderate or substantial impairment that would prevent him from performing the heavy labor required by his last coal mining job. Director's Exhibits 11 at 4-5; 14 at 1; 16 at 1. Dr. Fino opined that while the pulmonary function testing demonstrated reductions in FEV1 and FVC, these reductions are due to obesity, and Claimant is not disabled and retains the ability to perform his last coal mining job. Employer's Exhibits 1 at 10; 2 at 3. Dr. Basheda opined that, due to reductions in FEV1 and FVC caused by obesity, Claimant has a "Class II" impairment of the whole person under the American Medical Association's standards but retains the ability to perform his last coal mining job. Employer's Exhibit 3 at 13. Further, Dr. Basheda opined that, while the January 9, 2023 arterial blood gas testing produced qualifying values during exercise, the elevated carbon dioxide level was due to respiratory compensation for a metabolic alkalosis and did not reflect a pulmonary impairment. *Id.* at 14.

The ALJ found Dr. Zlupko's opinion poorly reasoned and not well-documented because he did not explain his conclusion that the non-qualifying pulmonary function and arterial blood gas studies demonstrated Claimant could not perform his last coal mining job. Decision and Order at 21-22. She further discredited Dr. Zlupko's opinion as internally inconsistent because, at different points, he described Claimant's impairment as mild, moderate, and substantial. *Id.* She therefore gave Dr. Zlupko's opinion little weight. *Id.* at 22. The ALJ credited Drs. Fino's and Basheda's opinions as documented and reasoned because each explained the factors he relied on in reaching his conclusion that the abnormal test results were due to obesity rather than a pulmonary impairment. *Id.* at 22-23. She further credited Dr. Basheda's opinion because he explained his conclusion that the qualifying exercise blood gas study was due to alkalosis rather than a pulmonary impairment and would not prevent Claimant from performing his last coal mining job. *Id.* at 23. Thus, crediting Drs. Fino's and Basheda's opinions over the opinion of Dr. Zlupko, the ALJ found the medical opinion evidence does not support a finding of total disability. *Id.* at 24.

We agree with Claimant's and the Director's arguments that the ALJ erred in evaluating the medical opinions by conflating the issues of total disability and disability causation. Claimant's Brief at 9-12 (unpaginated); Director's Brief at 4-5 (unpaginated). "The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether [Claimant has] a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305." *Johnson v. Apogee Coal Co.*,

26 BLR 1-1, 1-11 (2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023) (citing *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989)); *see also* 20 C.F.R. §718.204(a) ("If . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.").

The ALJ credited Drs. Fino's and Basheda's opinions, in part, because she found they explained that any impairment seen on pulmonary function testing, which Dr. Basheda opined constitutes a "Class II" impairment, is due to obesity rather than a pulmonary or respiratory condition. Decision and Order at 22-23. She further credited Dr. Basheda's opinion that the arterial blood gas study evidence does not demonstrate total disability because its qualifying exercise results were due to alkalosis rather than a pulmonary or respiratory condition. *Id.* at 23. Thus, in crediting Drs. Fino's and Basheda's opinions, the ALJ erroneously considered their explanations for the cause of Claimant's impairments seen on pulmonary function and blood gas testing rather than whether their opinions support or weigh against the existence of a disabling impairment. *See Johnson*, 26 BLR at 1-11.

We further agree with Claimant's assertion that the ALJ did not adequately explain her finding that Dr. Basheda's opinion is well-reasoned with respect to Claimant's pulmonary function testing. Claimant's Brief at 12 (unpaginated). Dr. Basheda diagnosed a Class II impairment due to reductions in FEV1 and FVC on pulmonary function testing but further opined that this impairment would not prevent Claimant from performing his last coal mining job. Decision and Order at 13-14; Employer's Exhibit 3. The ALJ acknowledged this aspect of Dr. Basheda's opinion but did not address whether he offered a credible rationale for concluding that Claimant's impairment does not prevent him from performing his usual coal mine work, which the ALJ found required heavy labor. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mining job). The ALJ's decision thus does not satisfy the Administrative Procedure Act (APA).[6] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see also Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997) (assertion which does not explain how a physician reached the opinion expressed does not constitute a reasoned medical opinion).

[6] 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 . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Based on the foregoing errors, we vacate the ALJ's finding that the medical opinion evidence does not support a finding of total disability, 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration. *See Johnson*, 26 BLR at 1-11; *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 21-24. We also vacate her findings that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) or invoke the Section 411(c)(4) presumption. Decision and Order at 24-26. Thus, we vacate her finding that Claimant is not entitled to benefits.

Remand Instructions

On remand, the ALJ must initially reconsider whether the medical opinion evidence supports a finding that Claimant has a totally disabling respiratory or pulmonary impairment without regard for the underlying cause of that impairment. 20 C.F.R. §718.204(b)(2)(iv); *see Johnson*, 26 BLR at 1-11. The ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). In addition, the ALJ must compare the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and resulting limitations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); *Gonzales v. Director, OWCP*, 869 F.2d 776, 779-80 (3d Cir. 1989); *see also Cornett*, 227 F.3d 578 (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine work). In reaching her credibility determinations, she must set forth her findings in sufficient detail and explain her rationale as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

After determining whether the medical opinion evidence supports a finding of total disability, the ALJ must then weigh the evidence as a whole to determine whether Claimant has established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

If Claimant establishes total disability, he will have invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305. The ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 26 BLR 1-149, 1-150 (2015). In that event, the ALJ must reconsider the evidence with the burden shifting to Employer to affirmatively establish Claimant has neither legal nor clinical pneumoconiosis[7] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Minich*, 25 BLR at 1-155.

If Claimant is unable to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[7] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge