U.S. Department of Labor

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

BRB No. 22-0282 BLA

LARRY WAYNE POSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BROWNIES CREEK COLLIERIES	)	
	)	
and	)	
	)	
THE TRAVELERS COMPANIES, INCORPORATED	)	DATE ISSUED: 7/13/2023
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Dan F. Partin, Harlan, Kentucky, for Claimant.

Michael Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

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

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits (2016-BLA-05552) rendered on a subsequent claim filed on June 9, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found the record does not contain any evidence that Claimant suffers from complicated pneumoconiosis and thus Claimant was 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). He further found Claimant did not establish a totally disabling pulmonary or respiratory impairment and therefore did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.204(b)(2), 718.305. The ALJ thus denied benefits.

On appeal, Claimant argues the ALJ erred in finding he is not totally disabled. Employer and its Carrier (Employer) respond in support of the denial of benefits.[3] The

[1] This is Claimant's seventh claim for benefits. Director's Exhibits 1-5, 7. On February 17, 2016, the district director denied Claimant's previous claim for failure to establish a totally disabling pulmonary or respiratory impairment. Director's Exhibit 5. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must 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). Because the district director denied Claimant's previous claim for failure to establish a totally disabling pulmonary or respiratory impairment, Claimant had to submit new evidence establishing this element of entitlement to obtain review of his current claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 5.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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. Because Claimant did not establish total disability, the ALJ did not make a finding as to the length of Claimant's coal mine employment. Decision and Order at 13 n.88 (unpaginated).

[3] The Travelers Companies, Inc., specifically deny the agency has jurisdiction to decide their liability, that they have surety coverage, and that they are the correct surety for this claim. Employer's Brief at 1 n.1. They assert that although the ALJ's Decision and

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.[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).

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

A miner is totally disabled if he has a pulmonary or respiratory impairment that, 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 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).

Claimant contends the ALJ erred in finding that he did not establish total disability based on Dr. Baker's opinion and Claimant's treatment records at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole.[5]

Medical Opinions and Treatment Records

Order did not address their arguments in favor of their dismissal and discovery, they preserve them here. *Id.*

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Employer's Exhibit 7 at 13, 32. Director's Exhibits 8, 10 at 3.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii) as none of the pulmonary function or blood gas studies are qualifying, and there is no evidence of cor pulmonale with right-sided congestive heart failure. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14 (unpaginated).

The ALJ considered the opinions of Drs. Baker and Rosenberg and Claimant's treatment records from St. Elizabeth Physicians Family Medicine. Decision and Order at 9-13 (unpaginated); Director's Exhibits 15-18; Claimant's Exhibits 1, 2; Employer's Exhibit 5. He accurately noted that neither Dr. Baker nor Dr. Rosenberg opined Claimant is totally disabled.[6] Director's Exhibits 17, 18; Employer's Exhibit 5. The ALJ also summarized the treatment records and found that they did not address whether Claimant is totally disabled or his ability to perform his usual coal mine work. Decision and Order at 9, 13 (unpaginated); Director's Exhibit 16; Claimant's Exhibit 1. Thus, the ALJ concluded Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 13 (unpaginated).

Claimant asserts the ALJ erred in failing to fully consider Dr. Burns's treatment records or his August 6, 2015 letter/medical opinion, as well as Claimant's testimony, in assessing whether Claimant has a totally disabling respiratory or pulmonary impairment. Claimant's Brief at 2-6. He contends this evidence, when considered in conjunction with the exertional requirements of his usual coal mine work, establishes that his lung condition is totally disabling. *Id.*

Initially, we reject Claimant's assertion that the ALJ erred in failing to consider Dr. Burns's August 6, 2015 medical report. The ALJ declined to consider this medical report as he found Claimant did not submit it as evidence in the proceedings before him.[7]

[6] Dr. Baker reported Claimant worked from 1971 to 1984 operating shuttle cars, supply motors, scoops, rail runners, and cutting machines, which required him to lift 25 pounds several times per day and walk 200 yards per day. Director's Exhibit 15 at 17. Dr. Rosenberg relied on Dr. Baker's description of Claimant's work. Employer's Exhibit 5 at 2. They each opined Claimant does not have a totally disabling respiratory or pulmonary disability. Director's Exhibits 17 at 23, 18 at 3; Employer's Exhibit 5 at 3.

[7] Under cover letter dated June 16, 2016, while the case was pending before ALJ Joseph E. Kane, Claimant submitted Dr. Burns's August 6, 2015 letter as affirmative medical opinion evidence. However, on August 14, 2020, pursuant to *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the case was reassigned to ALJ Bell (the ALJ) for a de novo hearing. *See* Aug. 14, 2020 Order; Feb. 23, 2019 Order. In granting the parties' Joint Motion for a Decision on the Record, the ALJ ordered that "[o]n or before January 22, 2021, each party is to electronically file with the Court its Black Lung Evidence Summary Form, along with all of the evidence which has been designated by that party in the Black Lung Evidence Summary Form." Sept. 29, 2020 Order. Although Claimant submitted his evidence summary form under cover letter dated January 19, 2021, designating Dr. Burns's August 6, 2015 letter *and* treatment records with St. Elizabeth's Physicians between February 6, 2017 and April 23, 2020, as "CX 1," Claimant attached only treatment records to his evidence summary form. Claimant's Exhibits 1-3. As Claimant did not file Dr. Burns's

Decision and Order at 9 n.56 (unpaginated); *see also* Decision and Order at 11 (unpaginated) (ALJ again noting that "'Correspondence of Dr. Burns dated August 6, 2015' . . . has not been submitted"). As Claimant does not challenge this finding, we agree with Employer that Claimant has forfeited any argument regarding Dr. Burns's August 6, 2015 medical report and whether it establishes total disability. *See Samons v. Nat'l Mines Corp.*, 25 F.4th 455, 466-67 (6th Cir. 2022); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021); Employer's Brief at 9.

We agree with Claimant, however, that the ALJ erred in failing to make a finding as to the exertional requirements of his usual coal mine work and in failing to fully consider those requirements in conjunction with Claimant's treatment records and testimony. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild respiratory impairment may preclude the performance of the miner's usual duties; ALJ must compare the miner's assessed limitations with the exertional requirements of his usual coal mine work). Although Claimant testified he last worked as a shuttle car operator for Brownies Creek Collieries in 1985, which required him to perform "heavy lifting," the ALJ did not make a finding as to Claimant's usual coal mine work or its exertional requirements. Claimant's Brief at 6; Employer's Exhibit 7 at 13-14. Further, as Claimant states, his treatment records documenting pulmonary conditions, symptoms, and prescribed oxygen therapy, as well as his testimony concerning his breathing limitations, are relevant to the total disability inquiry.[8] *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Claimant's Brief at 3-6; Employer's Exhibit 7 at 16-17. As the ALJ failed to adequately consider this relevant evidence in conjunction with the exertional requirements of Claimant's usual coal mine work, we vacate his findings that Claimant did not establish

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August 6, 2015 letter in accordance with the ALJ's September 29, 2020 Order, the ALJ permissibly found it was not submitted before him. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (ALJ has broad discretion over procedural matters); Decision and Order at 9 n.56, 11 (unpaginated).

[8] Claimant's treatment records document, for example, diagnoses of chronic obstructive pulmonary disease and dyspnea on exertion, shortness of breath, chronic productive cough, and wheezing, as well as prescriptions for Albuterol and Ventolin inhalers and oxygen therapy. Claimant's Brief at 3-6; Director's Exhibit 16; Claimant's Exhibits 1, 2. And at the July 10, 2017 hearing before ALJ Kane, Claimant testified, among other things, his breathing problems preclude household chores and that he smothers at night despite sleeping with home oxygen. Claimant's Brief at 5; Employer's Exhibit 7 at 16-17.

total disability at 20 C.F.R. §718.204(b)(2)(iv) and on the record as a whole. Decision and Order at 13 (unpaginated).[9]

Remand Instructions

On remand, the ALJ must first determine the exertional requirements of Claimant's usual coal mine work. *Cornett*, 227 F.3d at 578. He must then consider Claimant's treatment records and testimony in conjunction with those requirements and draw appropriate inferences. *Id.*; *Ward*, 93 F.3d. at 218-19. If the ALJ finds Claimant's treatment records and testimony support a finding of total disability, he must weigh this evidence in conjunction with the medical opinions to determine whether Claimant has established total disability at 20 C.F.R. §718.204(b)(2)(iv). In rendering his credibility findings, he must consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

The ALJ must also reweigh the evidence as a whole and determine whether Claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198. In determining whether Claimant is totally disabled, the ALJ must explain his findings as the Administrative Procedure Act requires.[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the

[9] Our dissenting colleague's assertion that Claimant did not sufficiently raise this argument is demonstrably incorrect. Among other things, Claimant's brief contains two and a half pages of examples detailing his respiratory impairment from his treatment records that the ALJ did not consider, Claimant's Brief at 2-4, along with another page describing the exertional requirements of his coal mine work. *Id.* at 5-6. Claimant then succinctly (and accurately) states "the ALJ erred by not making a finding of the exertional requirements of [Claimant's] usual coal mine employment" with an "assessment of [his] respiratory impairment," and further argues why it matters. *Id*. (citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000); *Parsons v. Black Coal Co.*, 7 BLR 1-236 (1984)). In this respect, contrary to our colleague's assertion, the brief plainly speaks for itself. *Id.* And unlike the authority cited by our colleague in which the lower court ruled on an issue no party even appealed -- let alone argued -- no more is required here. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("parties frame the issue for decision" and tribunals assume "the role of neutral arbiter of the matters the parties present").

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

Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If Claimant establishes total disability, he will establish a change in an applicable condition of entitlement and the ALJ must proceed to review the merits of his claim. 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In doing so, the ALJ must address whether Claimant established at least fifteen years of qualifying coal mine employment and therefore invoked the Section 411(c)(4) presumption and, if so, whether Employer rebutted it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. If the ALJ finds Claimant established total disability but did not invoke the Section 411(c)(4) presumption, he must further consider whether Claimant has established entitlement under 20 C.F.R. Part 718.

Alternatively, 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).

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 remanded for further consideration consistent with this decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to remand the case for further consideration as to whether Claimant has established total disability at 20 C.F.R. §718.204(b)(2)(iv) and on the record as a whole.

A fundamental concept of our "adversarial system" is that a court must "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (Where "courts have approved departures from the party presentation principle, the justification has usually been to protect a pro se litigant's rights."). Pursuant to this principle, "courts generally do not craft new arguments for a party, especially in civil cases and especially when the party is represented by counsel." *Horne v. Elec. Eel Mfg. Co., Inc.*, 987 F.3d 704, 727 (7th Cir. 2021). "Courts are entitled to expect represented parties to incorporate all relevant arguments" in the pleadings that directly address a motion or appeal. *Dahua Tech. USA Inc. v. Feng Zhang*, 988 F.3d 531, 538 (1st Cir. 2021). Thus the Board should not consider an argument that has not been raised by Claimant. *Greenlaw*, 554 U.S. at 243; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Feng Zhang*, 988 F.3d at 538; *Horne*, 87 F.3d at 727; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). Claimant must demonstrate with some degree of specificity the manner in which the ALJ's decision is unsupported by the facts or contrary to law. *Cox*, 791 F.2d at 446.

A review of Claimant's Board brief reflects that, apart from the placement of his evidence summary, a paragraph challenging the ALJ's failure to consider Dr. Burns's

August 6, 2015 letter,[11] and the addition of a single sentence stating, "Judge Bell made no mention of the claimant's usual coal mine work in conjunction with his cursory [analysis] of disability," Claimant's argument on total disability is identical to that in his closing brief before the ALJ. *See* Claimant's Brief at 2-6; Claimant's Closing Brief at 4-8. Claimant does not allege that his usual coal mine work required any degree of physical exertion,[12] and does not explain how any of the evidence he summarizes supports a finding of reversible error in the ALJ's disability finding. Claimant's Brief at 2-6. Although Claimant generally asserts the evidence establishes that he should avoid the dusty working conditions of his usual coal mine work, this argument fails to establish total disability as a matter of law.[13] *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989) (a recommendation against further coal dust exposure is insufficient to establish total disability); Claimant's Brief at 5. Therefore, as Claimant's specific argument lacks merit and he fails to identify clear error in the ALJ's decision, I would affirm the denial of benefits.

JUDITH S. BOGGS
Administrative Appeals Judge

[11] I agree with the majority that Claimant forfeited any argument that Dr. Burns's August 6, 2015 medical report establishes total disability in failing to challenge the ALJ's finding that the report was not properly before him. *See Samons v. Nat'l Mines Corp.*, 25 F.4th 455, 466-67 (6th Cir. 2022); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021); Decision and Order at 9 n.56 (unpaginated).

[12] Claimant cited his July 10, 2017 hearing testimony as establishing that his usual job duties "involved the claimant being exposed to heavy concentrations of dust on a daily basis." Claimant's Brief at 5.

[13] With due respect to my colleagues, a reading of Claimant's brief, rather than selectively edited quotations, reveals Claimant did not make the argument the majority suggests he put forth.