U.S. Department of Labor

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

BRB No. 22-0508 BLA

WILLIAM D. KUTSEY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RONALD BUSH COAL COMPANY c/o RONALD BUSH	)	DATE ISSUED: 6/27/2023
	)	
and	)	
	)	
STATE WORKERS INSURANCE FUND (PA)	)	
	)	
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

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

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

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

Claimant appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Denying Benefits (2020-BLA-05945) rendered on a claim filed on February 26, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, she found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4), or establish entitlement pursuant to 20 C.F.R. Part 718. She therefore denied benefits.

On appeal, Claimant argues the ALJ erred in finding he failed to establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a substantive response.

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.[2] 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 (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 in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12

[1] 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.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15; Director's Exhibit 3.

BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Total Disability

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must prove he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). 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 pulmonary function studies or arterial blood gas studies,[3] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[4] 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 weighing the medical opinions at 20 C.F.R. §718.204(b)(2)(iv) and in finding he is not totally disabled. Claimant's Brief at 9-12. We agree.

The ALJ considered two medical opinions.[5] Decision and Order at 7-9. Dr. Corwin conducted the Department of Labor (DOL) sponsored complete pulmonary evaluation of Claimant on September 30, 2019. Director's Exhibit 21 at 2-6. He was provided a copy of Claimant's CM-911a Employment History Form and noted Claimant's history of

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

[4] The ALJ found Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). She found the two pulmonary function studies were non-qualifying; the two blood gas studies were non-qualifying; and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 5-6, 5 n.5; Director's Exhibit 21; Employer's Exhibit 1.

[5] We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine employment required "heavy labor," which included lifting and carrying 90 to 100 pounds and shoveling coal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

wheezing attacks and complaints of shortness of breath with exertion and when walking up steps and hills. *Id*. In addition, he indicated Claimant's pulmonary function study results showed a moderate restrictive impairment and his blood gas study showed resting and exercise hypoxemia. *Id*. at 6. Dr. Corwin opined that based on Claimant's "moderate impairment" and "clinical limitations," he "would not be able to participate in his previous line of work given [the] significant dust exposure and physical exertion required." *Id*. at 6-7.

Dr. Kruklitis reviewed Claimant's medical records and examined him on May 12, 2021. Employer's Exhibit 1. He opined Claimant's pulmonary function study results showed "obstructive lung disease with reversibility." *Id.* at 2, 4 (unpaginated). In addition, he noted Claimant described shortness of breath, which was worse while "climbing steps or walking up a grade," and that he suffered from coughing and wheezing. *Id.* at 1 (unpaginated). Dr. Kruklitis opined Claimant was not totally disabled because he "denie[d] shortness of breath at rest and . . . can walk without dyspnea on level ground." *Id.* at 1-2 (unpaginated).

The ALJ found Dr. Corwin failed to explain how Claimant's impairment would prevent him from performing his usual coal mine employment because the "only basis" he provided for his opinion was Claimant's non-qualifying pulmonary function study and "unnamed" clinical limitations. Decision and Order at 8. She thus determined his opinion was conclusory and insufficiently documented or reasoned to support a finding of total disability. *Id.*

The ALJ also found Dr. Kruklitis's opinion is conclusory as he did not explain whether Claimant's shortness of breath would prevent him from performing his usual coal mine work but found his opinion otherwise supported by the non-qualifying objective testing. Decision and Order at 8-9. Further, the ALJ determined both medical opinions merited reduced probative weight because neither physician demonstrated an understanding of the exertional requirements of Claimant's usual coal mine employment. *Id*. at 8. However, she found Dr. Kruklitis's opinion outweighed Dr. Corwin's opinion as it was supported by the non-qualifying objective testing. *Id.* at 8-9. Consequently, she found Claimant failed to establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), and the evidence as a whole. *Id.* at 9; *see* 20 C.F.R. §718.204(b)(2).

Claimant contends the ALJ erred in discrediting Dr. Corwin based on his "mere[] . . . failure to list specific exertional requirements of Claimant's last coal mine employment." Claimant's Brief at 11-12. We agree.

As Claimant argues, 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 usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in a doctor's report are sufficient to establish total disability and may not be rejected "as being nothing more than mere notations of the patient's descriptions unless there is specific evidence for doing so in the report"); *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) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability); *see also Gonzales v. Director, OWCP*, 869 F.2d 776, 779-80 (3d Cir. 1989) (physician's opinion that a miner's impairment is *not totally disabling* lacks probative value if the physician does not know the miner's job requirements).

Contrary to the ALJ's finding, Dr. Corwin based his opinion on more than just a non-qualifying pulmonary function study and "unnamed" "clinical limitations." Rather, as Claimant alleges, he "phrased [his opinion] in terms of total disability" and "provide[d] a medical assessment of physical abilities" and exertional limitations that, if credited, is sufficient to support a finding that Claimant cannot perform the heavy manual labor required of his previous coal mine work. Claimant's Brief at 11-12. Dr. Corwin noted Claimant's history of "attacks of wheezing," "dramatic worsening" of shortness of breath beginning "after several years" of working with a drill, and complaints of increasing difficulty with activity, including: shortness of breath walking up steps; an inability to "fully walk up hill for many years" due to shortness of breath; and an inability to hunt or fish "because of his dyspnea." Director's Exhibit 21. Thus, Dr. Corwin concluded Claimant "would not be able to participate in his previous line of work" based on Claimant's "moderate" impairment indicated on pulmonary function testing, hypoxemia indicated on blood gas testing, and "clinical limitations . . . which do not require [a] similar degree of exertion." *Id.*; Director's Exhibit 27.

As the ALJ failed to fully consider Dr. Corwin's opinion, we must remand the claim for her to determine whether Dr. Corwin credibly diagnosed total disability based on Claimant's moderate impairment indicated on objective testing in conjunction with his respiratory limitations due to shortness of breath.[6] 30 U.S.C. §923(b) (ALJ must address

[6] Although Dr. Corwin did not identify the exertional requirements of Claimant's job as entailing heavy work, he specifically noted Claimant operated a drill and his

all relevant evidence); *Cornett*, 227 F.3d at 578; *Budash*, 9 BLR at 1-51-52; *see also McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 4, 7-9; Director's Exhibit 21 at 2-7. Regardless of whether Dr. Corwin specifically identified the exertional requirements of Claimant's usual coal mine work, he provided sufficient information that, if credited, could support a finding that Claimant is totally disabled.[7] *Scott*, 60 F.3d at 1141; *Poole v*, 897 F.2d at 894.

Consequently, we vacate the ALJ's weighing of the medical opinions and her finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole.[8] We therefore vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption.

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objective testing results and respiratory limitations would preclude him from performing his previous coal mine work. Director's Exhibit 21 at 7.

[7] Thus, contrary to our dissenting colleague's assessment, we do not remand the claim for the ALJ to render her own medical opinion as a layperson on whether a diagnosis of a moderate impairment, by itself, is disabling. We remand the claim for the ALJ to consider the entirety of Dr. Corwin's opinion, including his conclusion that Claimant's respiratory limitations "which do not require [a] similar degree of exertion," would prevent him from his previous coal mine work (which the ALJ found required heavy manual labor). We note, moreover, the ALJ's own recognition of the relevance of these respiratory limitations when she discredited Dr. Kruklitis's opinion, in part, for failing to "explain or analyze whether Claimant's shortness of breath [while climbing steps or walking up a grade] would prevent him from performing the exertional requirements of his last coal mine job." Decision and Order at 9; Employer's Exhibit 1.

[8] Claimant also alleges the ALJ erred in discrediting Dr. Corwin for relying on non-qualifying objective testing. Claimant's Brief at 10. It is unclear whether the ALJ intended to discredit Dr. Corwin on that basis or was simply acknowledging the fact that the testing was non-qualifying. Nevertheless, we remind the ALJ that a physician can offer a reasoned medical opinion diagnosing total disability even when the objective testing is 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) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment).

Remand Instructions

On remand, the ALJ must reconsider Dr. Corwin's medical opinion diagnosing a disabling impairment based on pulmonary function testing and Claimant's respiratory limitations, in conjunction with the ALJ's findings with respect to the exertional requirements of Claimant's usual coal mine employment. *See Cornett*, 227 F.3d at 578; *Budash*, 9 BLR at 1-51-52. The ALJ then must reweigh the medical opinions and the evidence as a whole to determine whether Claimant is totally disabled. *See Gonzales*, 869 F.2d at 779-80. If the ALJ again finds Claimant is not totally disabled, she may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

If she finds Claimant establishes total disability, she must also determine the length of his coal mine employment and whether it was performed in underground mines or in substantially similar conditions at surface mines. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i). If Claimant establishes both fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, he will invoke the Section 411(c)(4) presumption, in which case the ALJ would have to consider whether Employer rebutted it.[9] 20 C.F.R. §718.305(d)(1).

If Claimant establishes total disability, but not fifteen years of qualifying employment, the ALJ must address Claimant's entitlement pursuant to 20 C.F.R. Part 718. *See* 20 C.F.R. §718.305. In rendering all her findings on remand, the ALJ must comply with the Administrative Procedure Act.[10] 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).

[9] Employer did not contest that Claimant has simple pneumoconiosis. Decision and Order at 3; Hearing Transcript at 11-12.

[10] The Administrative Procedure Act provides every adjudicatory decision must 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 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

BOGGS, Administrative Appeals Judge, dissenting:

I would affirm the ALJ's determination. Here the ALJ permissibly determined that Dr. Corwin 's finding of total disability (the only physician opinion of record supporting such a finding) was inadequate because it was conclusory; Dr. Corwin did not explain how Claimant was unable to engage in his last coal mine employment because of his respiratory or pulmonary impairment.[11] *Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997) (assertion which does not explain how the doctor reached the opinion expressed or contain his reasoning does not qualify as a reasoned medical opinion); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (determination of whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985) (medical report may be rejected as unreasoned where physician fails to explain how his findings support his diagnosis).

[11] There also was no evidence supporting a finding of complicated pneumoconiosis and no autopsy or biopsy evidence.

Additionally, unlike the cases cited by the majority, there was no *physician* report of limitations which could be compared to the exertional requirements of claimant's last job in order to determine whether total disability exists. *See supra* at 5.

The ALJ is a layperson, not a physician. *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22-24 (1993) (interpretation of medical data is a matter for medical experts). The record does not supply the information the ALJ would need in order to properly compare the information of record to the exertional requirements of the job.[12] Consequently, the majority is faulting the ALJ for not conducting an analysis when the record does not supply the requisite information for doing so, i.e., evidence of record that would enable the ALJ to determine whether the testing showing impairment, though not qualifying under the DOL standards, would preclude Claimant from engaging in his usual coal mine employment (such as evidence as to the oxygenation level required for heavy work that the ALJ could compare to Claimant's test results), credible evidence from a physician as to the Claimant's limitations that could be compared to the exertional requirements of Claimant's job, or sufficient description of the severity of the impairment so that the ALJ could infer total disability. *See McMath v. Director, OWCP*, 12 BLR 1-6, 1-10 (1988) (ALJ must address whether statements constituted a physician's assessment of physical limitations or merely a narrative of claimant's self-reported symptoms which are insufficient alone to establish total disability); *see also Kowalchick v. Director, OWCP*, 893 F.2d 615, 623 (3d Cir. 1990). The ALJ reached a permissible determination based on permissible findings. *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3d Cir. 1979). It is

[12] A medical report need only describe the severity of the impairment or the physical effects imposed by a claimant's respiratory impairment sufficiently so that the ALJ can infer the claimant is totally disabled. *Budash v. Bethlehem Mine Corp.*, 9 BLR 1-48 (1986). In this case, Dr. Corwin's labelling Claimant as having a "moderate impairment" does not tell the ALJ much about the severity of the impairment for purposes of comparison with the exertional requirements of the miner's usual employment, as he does not provide any information about what that means apart from his conclusory determination that Claimant is totally disabled (which the ALJ permissibly rejected as unexplained, and thus not reasoned). *See* Decision and Order at 8; Director's Exhibit 21.

unreasonable to require her to do more, given the record before her. Accordingly, I would affirm the ALJ's determination.

JUDITH S. BOGGS
Administrative Appeals Judge