U.S. Department of Labor

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

BRB No. 20-0514 BLA

GREGORY P. PRESTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PINNACLE PROCESSING, INCORPORATED	)	DATE ISSUED: 3/30/2022
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 on Remand Denying Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judges, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order on Remand Denying Benefits (2013-BLA-05448) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on February 3, 2012 and is before the Benefits Review Board for the second time.

In a May 17, 2017 Decision and Order Denying Benefits, the ALJ credited Claimant with thirty-three years of qualifying coal mine employment. He found the evidence did not establish the existence of complicated pneumoconiosis and thus Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). 30 U.S.C. §921(c)(3) (2018). He further found Claimant did not establish a totally disabling respiratory or pulmonary impairment, and thus 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).[1] Because Claimant failed to establish total disability, the ALJ also found Claimant could not establish entitlement under 20 C.F.R. Part 718 and therefore denied benefits.

Pursuant to Claimant's appeal, the Board affirmed the ALJ's finding that Claimant does not have complicated pneumoconiosis. However, it vacated his determination that the medical opinion evidence did not establish total disability because he did not properly address the exertional requirements of Claimant's usual coal mine employment. Thus, the Board vacated the ALJ's findings that Claimant did not invoke the Section 411(c)(4) presumption. *Preston v. Pinnacle Processing, Inc.*, BRB No. 17-0464 BLA, slip op. at 3-4 n.5 (Oct. 12, 2018) (unpub.).

The Board instructed the ALJ to determine the exertional requirements of Claimant's work as a coal preparation plant superintendent, including whether it involved mild, moderate, heavy, or very heavy labor. *Id.* It also instructed the ALJ to address Claimant's challenge to the validity of Dr. Broudy's exercise blood gas study. *Id.* at 10. It further instructed him to reconsider the medical opinions in conjunction with the above

[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.

determinations, to fully explain his credibility determinations, and to determine whether Claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id.* The Board noted if the ALJ determined Claimant established total disability, he would be able to invoke the Section 411(c)(4) presumption, and the ALJ would need to consider whether the Employer rebutted that presumption.[2] *Id.*

On remand, the ALJ found Dr. Broudy's non-qualifying exercise blood gas study is valid, Claimant's last coal mine work requires medium exertion, and the medical opinion evidence does not establish total disability. Consequently, he again found Claimant is not entitled to benefits under the Act.

On appeal, Claimant challenges the ALJ's finding his work required medium exertion and he did not establish total disability based on the medical opinions. Employer and its Carrier (Employer) respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance 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 (1965).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, 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 qualifying pulmonary function studies, qualifying arterial blood gas studies,[4] evidence of pneumoconiosis and

[2] We affirm, as unchallenged on appeal, the ALJ's finding Claimant has thirty-three years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 23.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 21.

[4] 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.

cor pulmonale with right-sided congestive heart failure, or medical opinions.[5] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the 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).

In accordance with the Board's remand instructions, the ALJ determined the exertional requirements of Claimant's usual coal mine work. Weighing the medical opinions, he found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 16. Claimant asserts the ALJ erred in classifying his impairment as "medium work" under the *Dictionary of Occupational Titles* (DOT). Decision and Order on Remand at 2-5. He also maintains the ALJ erred in discrediting the opinions of Drs. Rasmussen and Cohen. We disagree.

Exertional Requirements

Claimant does not challenge the ALJ's decision to rely on the DOT in determining the exertional requirements of his job, or the ALJ's findings that "medium work" under the DOT involves lifting 20 to 50 pounds "occasionally." Decision and Order at 3. We therefore affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Instead, Claimant alleges the evidence reflects he performed "heavy work" because he "frequently lifted up to 50 pounds and occasionally up to 75 pounds." Claimant's Brief at 18. We disagree.

Claimant last worked as a coal preparation plant superintendent, which he described as a "glorified timekeeper." Hearing Transcript at 39; Director's Exhibit 20 at 11-12. He worked in an office in a building adjacent to the processing plant and monitored approximately fifty employees and their immediate supervisors. Hearing Transcript at 35, 43. He indicated he would step in to help when the employees and their supervisors were unable to get work done. *Id*. at 36-38. He described working in the office two to three hours a day and visiting the preparation plant daily. Decision and Order on Remand at 2, *quoting* Hearing Transcript at 21-22; *see also* Director's Exhibit 20 at 11-12. Claimant testified he performed manual labor for two to three hours a day: conducting electrical

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Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The Board previously affirmed the ALJ's finding that Claimant did not establish total disability based on pulmonary function studies, arterial blood gas studies, or evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii).

work, shoveling, cleaning, lifting components, changing dryer screens, and doing "whatever need[ed] to be done." Hearing Transcript at 42; *see* Director's Exhibit 20 at 11-12. He also testified climbing stairs was part of his job, explaining that a preparation plant is "nothing but stairs." Hearing Transcript at 25; *see* Director's Exhibit 20 at 14. He stated the preparation plant was 8-9 stories high, with elevated walkways to the silos.

The ALJ acknowledged Claimant lifted dryer screens weighing approximately seventy-five to one hundred pounds, but this was with the help of at least one other person. Decision and Order on Remand at 2 n.2; *see* Hearing Transcript at 22-23. Claimant does not challenge the ALJ's finding that lifting 100 pounds with the help of another person is the equivalent of exerting 50 pounds of force by himself under the DOT. *See Skrack*, 6 BLR at 1-711. The ALJ also noted that while Claimant described lifting small motors that weighed seventy-five pounds and other objects in excess of one hundred pounds, this heavier work occurred earlier in his coal mining career when he was underground and prior to his becoming a coal preparation plant superintendent.[6] Decision and Order on Remand at 2; *see* Hearing Transcript at 22-24, 36-39. While Claimant alleges his occasional lifting of seventy-five-pound motors constitutes heavy work under the DOT, he does not challenge the ALJ's finding that this lifting occurred earlier in his career and therefore should not be included among the exertional requirements of his "usual coal mine work" as a superintendent. 20 C.F.R. §718.204(b)(1)(i); *see Skrack*, 6 BLR at 1-711; *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982) ("usual coal mine work" is "the most recent job the miner performed regularly and over a substantial period of time"). And, while Claimant's job required him to climb stairs, the ALJ accurately found the record

[6] Claimant alleges the ALJ ignored that he was required to lift up to seventy-five pounds. Claimant testified he did "quite a bit" of heavy lifting "throughout his career," including seventy-five-pound motors. Hearing Transcript at 23. However, immediately thereafter, when asked, "So you did some heavy lifting?" Claimant responded, "Yeah, though – throughout underground, when I was underground. I mean, when you're underground, all you had to lift was a slate bar and a cap wedge." *Id.* at 23-24. Claimant was next asked whether lifting was a regular part of his job throughout his mining career and he replied: "Totally, from day one till day end. I mean, mining is just brute labor." *Id.* at 24. Claimant admitted, however, he did not do the same physical labor as a plant superintendent that he did as an underground miner; he testified he was "the last line of defense" to perform manual labor after the regular workers and their respective supervisors. *Id.* at 36-38.

does not establish how frequently Claimant climbed the stairs.[7] Decision and Order on Remand at 2 n.3.

Based on the totality of the evidence, the ALJ rationally found Claimant performed two to three hours of manual labor, lifted up to fifty pounds, and would sometimes climb nine flights of stairs. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc*., 12 BLR 1-190, 1-192 (1989); *Tackett v. Cargo Mining Co*., 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his findings unless they are inherently unreasonable); Decision and Order on Remand at 2. Comparing these exertional requirements to those described in DOT, the ALJ permissibly found Claimant performed medium work.[8] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order on Remand at 3.

The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the ALJ's finding that Claimant's job duties are "best described" as medium labor. Decision and Order on Remand at 3.

Medical Opinions

The record contains five medical opinions. Drs. Sood, Rasmussen, and Cohen opined Claimant is totally disabled while Drs. Broudy and Jarboe opined he is not. We affirm as unchallenged the ALJ's discrediting of Dr. Sood's opinion. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 15-16; Claimant's Exhibit 3. We also reject Claimant's contention the ALJ failed to give a permissible rationale for finding the opinions of Drs. Rasmussen and Cohen insufficient to satisfy his burden of proof.

[7] Although the preparation plant was eight to nine stories high, Claimant's office was not in the plant. Hearing Transcript at 42-43. The record does not indicate how many flights of stairs Claimant climbed each day when he went to the plant to supervise operations. Decision and Order at 3 n.2; Hearing Transcript at 42-43.

[8] The DOT defines "Medium Work" as "[e]xerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Light Work." Decision and Order on Remand at 3, *quoting Dictionary of Occupational Titles,* App. C (4th Ed., Rev. 1991).

Dr. Rasmussen conducted the Department of Labor (DOL) complete pulmonary evaluation on February 24, 2012. Director's Exhibit 11. He obtained a normal pulmonary function study. *Id*. Dr. Rasmussen diagnosed a moderate gas exchange impairment based on the blood gas study and noted Claimant achieved an oxygen consumption of 18.3 millimeters,[9] indicating he was able to perform moderate to heavy labor. *Id*. at 49, 85-86 (Deposition at 24-25). However, because Dr. Rasmussen understood Claimant's last coal mine job involved "heavy lifting" and "considerable heavy manual labor" requiring an oxygen consumption of up to 25 milliliters per kilogram per minute, he opined that Claimant was totally disabled from returning to his supervisor position. *Id*. at 48-49.

Dr. Cohen reviewed the medical reports of Drs. Rasmussen, Broudy, and Jarboe. Claimant's Exhibit 2 at 5. Based on "[t]he drop in [Claimant's] exercise PO2 and gas exchange abnormality with exercise" shown during Dr. Rasmussen's examination, Dr. Cohen opined Claimant lacks the respiratory capacity to perform the "heavy manual labor required" with his last coal mine work.[10] Claimant's Exhibit 2 at 10-12, 18-19.

Having found that Claimant's job duties require medium work, the ALJ permissibly found the opinions of Drs. Rasmussen and Cohen are less credible because it is unclear whether they had an accurate understanding of the exertional requirements of Claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Napier*, 301 F.3d at 713-14; Decision and Order on Remand at 14. As the ALJ accurately noted, Dr Rasmussen testified he believed Claimant had to lift as much as 100 pounds and climb stairs "vigorously" as a coal preparation plant supervisor but Claimant lifted no more than fifty pounds and "nothing in the record suggests [Claimant] was required to [climb stairs] vigorously." Decision and Order on Remand at 14; *see* Director's Exhibit 11 at 97. Additionally, the ALJ permissibly found Dr. Rasmussen failed to adequately explain how he determined Claimant's usual coal mine work would require an oxygen consumption of up to 25 milliliters per kilogram per minute, and permissibly questioned whether that figure was based on an overestimation of the exertional requirements of Claimant's job. *See*

[9] Dr. Rasmussen made a typographical error in the narrative section of his report, listing an oxygen consumption rate of 19.5 milliliters per kilogram per minute instead of 18.3. *See Preston*, BRB No. 17-0464 BLA, slip op., at 6 n.9; Director's Exhibit 11 at 49, 85.

[10] During his deposition, Dr. Cohen was asked if Claimant could lift as much as 75 to 100 hundred pounds. Dr. Cohen stated that degree of lifting constituted heavy manual labor and that Claimant could not do it. Claimant's Exhibit 2 at 12.

Napier, 301 F.3d at 713-14; *Cornett*, 227 F.3d at 578; Decision and Order on Remand at 14.

It is the ALJ's function to weigh the evidence, draw appropriate inferences and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012). Even if the Board would weigh the evidence differently if considered de novo, it must affirm the ALJ's finding if it is supported by substantial evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis").

Claimant also has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because the ALJ acted within his discretion in finding Claimant's medical opinions insufficient to establish total disability we affirm his determination at 20 C.F.R. §718.204(b)(2)(iv). We further affirm the ALJ's overall conclusion that Claimant is not totally disabled and is unable to invoke the Section 411(c)(4) presumption.[11] *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order on Remand at 16-17. Claimant's failure to establish total disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, also precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[11] Because the ALJ gave a permissible reason for discounting the opinions of Drs. Rasmussen and Cohen, we need not address Claimant's additional arguments regarding their opinions or his contention that the ALJ erred in relying on the opinions of Drs. Broudy and Jarboe to find he is not totally disabled. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Claimant's Brief at 19-27.

Accordingly, we affirm the ALJ's Decision and Order on Remand Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge