U.S. Department of Labor

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

BRB No. 22-0543 BLA

GLENIS C. ROSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 11/15/2023
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 Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Glenis C. Rose, Clintwood, Virginia.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Denying Benefits (2021-BLA-05231) rendered on a subsequent claim filed on September 11, 2019,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 10.6 years of coal mine employment. She thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish pneumoconiosis. 20 C.F.R. §718.202(a). She thus 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 (the Director), has declined to file a brief, unless requested.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed two prior claims. Director's Exhibits 1, 2. The district director denied the previous claim on July 20, 2018, because Claimant failed to establish any element of entitlement. Director's Exhibit 2. 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 she 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 any element of entitlement, Claimant had to submit new evidence establishing one element of entitlement to obtain review of his current claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

[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); 20 C.F.R. §718.305.

conclusions of law if they are 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 – Length Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ found both parties stipulated to no more than 10.6 years of coal mine employment at the hearing. Decision and Order at 2-3. This was error. Prior to Claimant's testimony at the hearing, Employer's attorney stated Employer was willing to stipulate to 10.6 years. Hearing Transcript at 12. In response, Claimant's lay representative stated Claimant was willing to stipulate to "[*a*]*t least* 10.6" years. *Id.* (emphasis added). On Claimant's application for benefits, he alleged twenty-four years of coal mine employment. Director's Exhibit 3 at 1. Claimant never retracted this assertion of twenty-four years of coal mine employment and continued to assert more than 10.6 years of coal mine employment at the hearing. *See* Director's Exhibits 64, 69 at 2. Because the ALJ mischaracterized Claimant's stipulation and failed to render necessary factual findings, we vacate her length of coal mine employment finding and thus her determination Claimant did not invoke the Section 411(c)(4) presumption. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); Decision and Order at 2-3. We therefore also vacate the denial of benefits.

Total Disability

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

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 14-15; Director's Exhibits 9, 10.

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, 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 did not render any findings on whether the pulmonary function and arterial blood gas studies support total disability, or if there is evidence of cor pulmonale with right-sided congestive heart failure. *See Addison*, 831 F.3d at 252-53; 20 C.F.R. §718.204(b)(2)(i)-(iii). Nor did she render any finding on the exertional requirements of Claimant's usual coal mine employment. *See Addison*, 831 F.3d at 252-53; *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); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). Although she found Dr. Forehand's medical opinion diagnosing total disability is reasoned and documented, she summarily found it outweighed by the contrary opinions of Drs. Fino and Sargent. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 7-10. Moreover, she did not render a finding on whether all the evidence weighed together at 20 C.F.R. §718.204(b)(2)(i)-(iv) establishes total disability.

Because the ALJ's failure to render any findings with respect to the pulmonary function studies, arterial blood gas studies, and exertional requirements of Claimant's usual coal mine employment may affect her weighing of the medical opinion evidence, we must vacate her credibility findings with respect to Drs. Forehand, Fino, and Sargent. Decision and Order at 10. Further, the ALJ did not explain why she found the opinions of Drs. Fino and Sargent outweigh Dr. Forehand's opinion on the issue of total disability; thus her consideration of their opinions does not satisfy the Administrative Procedure Act (APA).[5] *Addison*, 831 F.3d at 252-53; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 10. The ALJ's apparent reliance on a head count of positive and negative diagnoses is an insufficient basis to find Claimant has not satisfied his burden. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). She has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *Addison*, 831 F.3d at 256-57; *Lane Hollow Coal Co. v. Director, OWCP*

[5] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include a statement of "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz*, 12 BLR at 1-165.

Remand Instructions

On remand, the ALJ must first determine if Claimant has established at least fifteen years of underground coal mine employment or "substantially similar" surface coal mine employment. *Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007).

If the ALJ finds Claimant has established at least fifteen years of qualifying coal mine employment, she must address whether he is totally disabled by a respiratory or pulmonary impairment based on an evaluation of the pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, and medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). She must render a finding with respect to the exertional requirements of Claimant's usual coal mine employment and compare that finding with the physicians' descriptions of Claimant's pulmonary impairment and physical limitations. *See Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *Cornett*, 227 F.3d at 578; 20 C.F.R. §718.204(b)(2)(iv). Further, she must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty*, 9 BLR at 1-232.

If Claimant establishes both total disability and at least fifteen years of qualifying coal mine employment, he will have invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1). The ALJ must then determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015).

If the ALJ finds Claimant has established less than fifteen years of qualifying coal mine employment, she must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718 by establishing 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).[6] 30 U.S.C. §901; 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c).

[6] Because the burden of proof may change on remand, we decline to fully address, as premature, the ALJ's weighing of the evidence on the issue of pneumoconiosis. Decision and Order at 4-11. We note, however, the ALJ appears to have impermissibly counted heads in concluding Claimant does not have legal pneumoconiosis because the two most credible opinions, from Drs. Forehand and Sargent, are "in equipoise" while a third physician who was given "less probative weight," Dr. Fino, opined Claimant does not

The ALJ must explain the bases for her findings in accordance with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165. When weighing the medical opinions, she must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *Milburn Colliery v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). She must explain her basis for resolving the conflict in the medical opinion evidence rather than engaging in a headcount of the positive and negative diagnoses. *Ondecko*, 512 U.S. at 281.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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have the disease. *Id.* at 10. Nor did she explain the apparent conflict between her determination that Drs. Forehand and Sargent are entitled to equal, "full probative weight" as to whether Claimant has legal pneumoconiosis, and her later statement that she "particularly" credited Dr. Sargent's opinion on the issue. *Id.* at 10-11. The ALJ must address these errors on remand if she reaches the issue of legal pneumoconiosis or rebuttal thereof.