U.S. Department of Labor

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

BRB No. 21-0301 BLA

WAYNE E. MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY	)	
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	DATE ISSUED: 9/13/2022
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2020-BLA-05732) 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 subsequent claim filed on September 24, 2019.[1]

The ALJ credited Claimant with twenty-one years of underground coal mine employment based on the parties' stipulation but determined he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant was unable to 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),[2] and therefore failed to establish a change in an applicable condition pursuant to 20 C.F.R. §725.309[3] or entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.

[1] Claimant filed a previous claim on August 27, 2014, which the district director denied because Claimant did not establish total disability. Director's Exhibit 1.

[2] 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); *see* 20 C.F.R. §718.305.

[3] 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 prior claim for failure to establish total disability, he is required to submit new evidence establishing that element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

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. The Director, Office of Workers' Compensation Programs, declined to file a response brief.[4]

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.[5] 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 these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 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

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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, 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.[6] *See Rafferty v. Jones & Laughlin Steel*

[4] We affirm, as unchallenged, the ALJ's finding of twenty-one years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[5] 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); Director's Exhibit 5.

[6] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas studies and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *Skrack*, 6 BLR at 1-711; Decision and Order at

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).

Medical Opinions

In addressing the medical opinions, the ALJ first considered the exertional requirements of Claimant's usual coal mine employment. We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine work as a motorman required "heavy labor" and included lifting forty-pound rock-dust bags, twenty-to-thirty-pound posts, eighteen-to-twenty-foot rails, belt structures, and cable. *Skrack*, 6 BLR at 1-711; Decision and Order at 5.

The ALJ then weighed the opinions of Drs. Zlupko, Basheda, and Rosenberg.[7] Director's Exhibit 13; Employer's Exhibits 3-6. Dr. Zlupko performed the Department of Labor (DOL) complete pulmonary evaluation of Claimant on December 11, 2019 and obtained non-qualifying pulmonary function and blood gas studies.[8] Director's Exhibit 13 at 1, 6-7. He indicated Claimant's blood gas study showed a "normal" drop in PO2 with exertion and opined Claimant is not totally disabled from a pulmonary perspective. *Id.* at 4-5.

Dr. Basheda examined Claimant on September 15, 2020, reviewed Claimant's treatment records and Dr. Zlupko's report, and obtained non-qualifying pulmonary function and blood gas studies. Employer's Exhibit 4 at 1, 4-5. He conducted an ambulatory pulse oximetry test on September 15, 2020, after Claimant walked for six

11-12. In addition, the irrebuttable presumption of total disability due to pneumoconiosis is not applicable because there is no evidence in the record that Claimant has complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 19.

[7] The ALJ permissibly found evidence submitted with Claimant's current claim is more probative of his condition than evidence submitted in his prior claim. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than medical evidence submitted with a prior claim because of the progressive nature of pneumoconiosis); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982); Decision and Order at 9-10.

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

minutes, and opined it showed no oxygenation impairment. *Id.* at 5-6, 18. In addition, he noted Claimant worked as a motorman and would have to carry up to eighty pounds. *Id.* at 6, 16. He opined Claimant has a mild to moderate multifactorial restriction that could be caused by obesity or interstitial lung disease but no oxygenation impairment. *Id.* at 17-18. Dr. Basheda also diagnosed a class II impairment based on Claimant's mild reductions in the FEV1 and FVC values on pulmonary function testing. *Id.* at 18.

Dr. Basheda was deposed on November 24, 2020 and testified that Claimant is disabled by orthopedic problems and not a pulmonary disease. Employer's Exhibit 6 at 27. When questioned whether Claimant could return to his last coal mine employment, Dr. Basheda stated Claimant "could perform some activity" but that his restrictive impairment, which the physician believed is related to Claimant's pulmonary fibrosis, "may prevent [Claimant] from doing the real exertional work in coal mining work." *Id.* Dr. Basheda further testified that Claimant could have some difficulty performing the exertional duties of his last coal mine employment and noted that Claimant's six-minute walk used to assess his oxygenation during the September 15, 2020 pulse oximetry test is not the same as the exertional work he conducted while coal mining. *Id.* at 30.

Dr. Rosenberg reviewed Claimant's treatment records, his objective testing, and Dr. Zlupko's report. Employer's Exhibit 3. Dr. Rosenberg opined Claimant has a moderate restriction, mild ventilatory reduction, and no obstruction based on his pulmonary function results and a mild oxygenation reduction with exercise. *Id.* at 5; Employer's Exhibit 5 at 20. Furthermore, he opined Claimant's oxygenation reduction with exercise is due to heart failure and that his moderate restriction is due to obesity. Employer's Exhibits 3 at 5, 5 at 22-23. Dr. Rosenberg concluded Claimant is not disabled from a pulmonary perspective but disabled generally based on multiple "whole-person disorders." Employer's Exhibit 3 at 6.

Dr. Rosenberg was deposed on October 21, 2020 and described Claimant's last coal mine work duties as requiring "up to medium degrees of physical capacity." Employer's Exhibit 5 at 12-13. When questioned if Claimant was disabled from a pulmonary impairment, he acknowledged "the [objective test] values are not qualifying" but further testified that "as a whole person, obviously you're going to have adverse effects with gas [ex]change and the problems that we're observing here." *Id.* at 29. He also believed that if Claimant "exercised more probably the gas exchange would worsen even more." *Id.* at 31.

The ALJ found the opinions of Drs. Zlupko, Basheda, and Rosenberg well-reasoned and documented and that "all physicians agree Claimant is not totally disabled from

performing his usual coal mine work from a pulmonary perspective."[9] Decision and Order at 18. Thus, she found Claimant failed to establish total disability based on the medical opinions and the evidence as a whole. *Id.* at 18-19, 22; *see* 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends the ALJ did not properly characterize the opinions of Drs. Basheda and Rosenberg and failed to discuss relevant portions of their opinions that support finding he is totally disabled. Thus, Claimant asserts the ALJ's total disability analysis fails to satisfy the Administrative Procedure Act (APA).[10] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); Claimant's Brief at 7. We agree.

The ALJ correctly noted Dr. Basheda opined Claimant is disabled by orthopedic problems and not a pulmonary disease. Decision and Order at 15-16, 18; Employer's Exhibits 4 at 19, 6 at 27. However, Dr. Basheda also testified Claimant's interstitial lung disease and restrictive impairment "may prevent him from doing the real exertional work in coal mining work." Employer's Exhibit 6 at 27. While the ALJ identified his testimony, she did not actually discuss it in relation to Claimant's argument raised in his post-hearing brief that Dr. Basheda's opinion supports a finding of total disability. *See 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 15-16, 18; Claimant's Post-Hearing Brief at 1-2. We therefore vacate the ALJ's reliance on Dr. Basheda's opinion to conclude Claimant is not totally disabled.

Dr. Rosenberg specifically opined that Claimant is not totally disabled from a respiratory standpoint. *See* Employer's Exhibits 3 at 6, 5 at 29. However, there is some merit in Claimant's contention that it is unclear whether Dr. Rosenberg conflated the issues of total disability and disability causation. Claimant's Brief at 6. Dr. Rosenberg opined

[9] The ALJ failed to determine whether Dr. Zlupko had an adequate understanding of the exertional requirements of Claimant's last coal mine work, though she did indicate he failed to include Claimant's CM-911 Form summarizing his coal mine employment history, or any other summary of Claimant's coal mine employment, with his report. Decision and Order at 13; Claimant's Brief at 3. On his report, Dr. Zlupko checked the box indicating "'Employment History,' Form CM-911a or equivalent (dated 09/23/2019) is attached." Director's Exhibit 13.

[10] The APA provides that 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).

Claimant is disabled generally based on multiple "whole-person disorders," but also testified about "adverse effects" due to Claimant's "gas [ex]change" abnormality and that his gas exchange would likely worsen with exercise. Employer's Exhibits 3 at 6; 5 at 29, 31. He attributes Claimant's moderate restriction to obesity and any oxygenation reduction to heart failure. *See* Employer's Exhibits 3 at 5-6, 6 at 23.

The proper inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has established a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether the Section 411(c)(4) presumption has been rebutted. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii). Because it is unclear whether the ALJ fully considered if Dr. Rosenberg's opinion is sufficient to establish Claimant does not have a respiratory or pulmonary impairment that would prevent him from performing his usual coal mine work, irrespective of the cause of that impairment, we vacate the ALJ's reliance on his opinion to find Claimant is not totally disabled. Because the ALJ did not adequately explain her findings as the APA requires, we vacate her determination that Claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv) and therefore did not invoke the Section 411(c)(4) presumption. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 15-16, 18-19, 22. Consequently, we further vacate her finding that Claimant did not establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c) and her denial of benefits.

Remand Instructions

On remand, the ALJ must consider whether Claimant has established total disability, taking into consideration whether the physicians had an adequate understanding of the exertional requirements of Claimant's last coal mine employment. *See Gonzales v. Director, OWCP*, 869 F.2d 776, 779 (3d Cir. 1989); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985). She must then reweigh the evidence as a whole, setting forth her findings in detail, including her underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. The ALJ must also be mindful that a physician may conclude a miner is totally disabled even if the objective studies are 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). The relevant inquiry is whether Claimant has a respiratory or pulmonary impairment that precludes the performance of his usual coal mine work. *Cornett*, 227 F.3d at 578 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). However, if Claimant does not establish total disability, the ALJ may reinstate her denial

of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2 (1986).

If Claimant establishes total disability on remand, he will have invoked the Section 411(c)(4) presumption and thereby established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The ALJ must then consider whether Employer has rebutted the presumption by establishing Claimant has neither legal nor clinical pneumoconiosis,[11] 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). In reaching her conclusions on remand, the ALJ must explain the bases for all of her credibility determinations, findings of fact, and conclusions of law as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

[11] "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). "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, 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge