U.S. Department of Labor

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

BRB No. 21-0528 BLA

JERRY W. MOOREHEAD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THE MONONGALIA COUNTY COAL COMPANY	)	
	)	DATE ISSUED: 9/27/2022
and	)	
	)	
MURRAY ENERGY CORPORATION TRUST, c/o SMARTY CASUALTY CLAIMS	)	
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 Modification Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Aimee M. Stern (Dinsmore & Shohl, LLP), Wheeling, West Virginia, for Employer and its Carrier.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order on Modification Denying Benefits (2020-BLA-05647) 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 request for modification of the denial of a Miner's claim filed on July 7, 2017.

In a Decision and Order Denying Benefits issued on August 19, 2019, ALJ Natalie A. Appetta denied benefits because Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Director's Exhibit 53. Claimant timely requested modification and submitted additional evidence. Director's Exhibit 54. The district director denied benefits and Claimant requested a hearing, which ALJ Swank held on May 11, 2021. Director's Exhibits 56, 62, 63.

In his July 12, 2021 Decision and Order on Modification Denying Benefits, the ALJ accepted the parties' stipulation that Claimant has twenty-nine years of coal mine employment and found that more than fifteen years of that employment was performed in underground mines. After determining that granting modification would render justice under the Act,[1] the ALJ found Claimant established the existence of both clinical and legal

[1] The ALJ stated he was required to make a "threshold" determination of whether granting modification would render justice under the Act prior to considering the modification petition on the merits. Decision and Order at 4 (citing *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007) (*Sharpe I*)). However, while *Sharpe I* held an ALJ must consider the question before ultimately granting *the relief* requested in a modification petition, nothing in *Sharpe I* establishes an ALJ may make the determination at the outset, before *considering the merits* of the petition. While it might make sense to make a threshold determination in cases of obvious bad faith, it does not follow that a threshold determination is appropriate in cases where there is no indication of improper motive. Rather, because accuracy is a relevant factor, it follows that an ALJ must consider the evidence and render findings on the merits to properly assess whether modification is warranted. *See* 65 Fed. Reg. at 79,920, 79,975 (Dec. 20, 2000) (rejecting limits on modification because Congress's overriding concern in enacting the Act was to ensure miners who are totally disabled due to pneumoconiosis arising out of coal mine employment receive compensation); *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 330 (4th Cir. 2012) (the search for "justice under the Act" should be guided, first and foremost, by the need to ensure accurate benefit distribution). The Board has previously advised the ALJ of the law on this issue. *Payne v. Terry Eagle Ltd. P'ship*, BRB No. 19-0507 BLA, slip op. at 7 n.12 (Sept. 28, 2020) (unpub.); *Jasper v. Consolidated*

pneumoconiosis.[2] He further found Claimant failed to establish total disability and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2),[3] or establish an essential element of entitlement. Concluding that Claimant did not establish a basis for modification, the ALJ denied benefits.

On appeal, Claimant contends the ALJ erred in finding that he failed to establish total disability. Employer responds in support of the denial of benefits.[4] The 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.[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).

Coal Co., BRB Nos. 17-0273 & 17-0275 BLA, slip op. at 7 n.11 (Apr. 12, 2018) (unpub.); *Parsons v. Westmoreland Coal Co.*, BRB No. 17-0266 BLA, slip op. at 2 n.4 (Feb. 28, 2018) (unpub.).

[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). "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis if a miner had at least fifteen years of underground or substantially similar surface coal mine employment and has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] Because they are unchallenged on appeal, we affirm the ALJ's findings of more than fifteen years of underground coal mine employment and that Claimant established clinical and legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania.

Modification of a denial of benefits may be granted if a change in conditions has occurred or there was a mistake in a determination of fact in the prior decision. 20 C.F.R. §725.310(a). When considering a modification request, the ALJ must consider the evidence for any mistake of fact, including the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995).

The Section 411(c)(4) Presumption—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 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found none of the pulmonary function studies and arterial blood gas studies of record established total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order on Modification at 24. We affirm these findings as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983).

Before weighing the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the ALJ addressed the exertional requirements of Claimant's usual coal mine employment work as a belt crew worker. Decision and Order on Modification at 7. He considered Claimant's testimony that as part of his duties he was required to install rollers and lift 100 pounds daily. Taking official notice of the *Dictionary of Occupational Titles*,[6] the ALJ found the

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Director's Exhibits 4, 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] The ALJ noted the *Dictionary of Occupational Titles* defines heavy work as "exerting up to 50 to 100 pounds of force occasionally" and/or "25-50 pounds of force frequently and/or 10 to 20 pounds of force constantly to move objects." Decision and Order on Modification at 8 n.8 (internal quotations omitted).

job duties Claimant described "required heavy manual labor." *Id.*, *citing* Hearing Transcript at 16-18, 23, 30-33, 35.[7] *Id.*

The ALJ then considered the originally submitted medical opinions of Drs. Jaworski and Ranavaya, along with the new opinion from Dr. Cohen submitted on modification.[8] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Modification at 13-16. Drs. Jaworski and Ranavaya opined that Claimant is not totally disabled. Director's Exhibit 14; Employer's Exhibit 2. In contrast, Dr. Cohen opined that Claimant's recent pulmonary function study results show an early obstructive defect with a diffusion impairment, and exercise testing shows an abnormal widening of the A-a gradiant, a gas exchange abnormality. Director's Exhibit 55 at 7. He concluded that these "combined impairments" prevent Claimant from performing the heavy manual labor that his job required for working as a general inside laborer or beltman.[9] *Id.*

As the ALJ noted, Dr. Cohen "explained that the objective medical testing is consistent with defects and impairments that, when considered together, demonstrate Claimant is totally disabled." Decision and Order on Modification at 14; Director's Exhibit 55. The ALJ, however, found Dr. Cohen's opinion not well reasoned because Dr. Cohen relied on nonqualifying objective studies. According Dr. Cohen's opinion "little weight," the ALJ concluded the medical opinions did not establish total disability. *Id.* at 15.

Claimant contends the ALJ erred in discrediting Dr. Cohen's opinion. Claimant's Brief at 7-8. We agree. Contrary to the ALJ's findings, the regulations specifically provide that despite non-qualifying pulmonary function studies or blood gas studies, total disability may be established if a physician, exercising reasoned medical judgment based on medically acceptable diagnostic techniques, concludes the miner's respiratory or

[7] We affirm as unchallenged the ALJ's finding that Claimant's usual coal mine employment was working as a belt crew worker and required heavy manual labor. *See Skrack*, 6 BLR at 1-711.

[8] The record also includes a medical report from Dr. Saludes stating Claimant's pulmonary function studies showed moderate obstruction. Claimant's Exhibit 1. The ALJ found the doctor's statement insufficient to establish total disability because it "does not specifically address total disability." Decision and Order on Modification at 14. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

[9] Dr. Cohen recorded that Claimant's job duties required him to change belt rollers that weighed up to ninety pounds and carry rolls of belt material that weighed fifty-five pounds. Dr. Cohen further noted Claimant "had to carry belt support structures weighing up to 100 pounds, and shovel coal intermittently." Director's Exhibit 55 at 7.

pulmonary condition prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Thus, a physician may offer a reasoned medical opinion diagnosing total disability even though 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, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

Dr. Cohen explained why he believes a respiratory or pulmonary impairment prevents Claimant from performing his usual coal mine work despite his non-qualifying pulmonary function and blood gas studies. Director's Exhibit 55. After examining Claimant and administering a pulmonary function study, blood gas study, and diffusion capacity test, he opined that Claimant's pulmonary function testing "demonstrated an early obstructive defect with diffusion impairment reduced to 65% of reference and a Dl/Va of 57% of reference." *Id*. at 7. He further reported that Claimant's "cardiopulmonary exercise testing showed abnormal widening of the A-a gradient, a gas exchange abnormality . . . ." *Id.* Dr. Cohen concluded that "[t]hese combined impairments are totally disabling for the extremely heavy manual labor required by [Claimant's] last coal mining job as an inside laborer or beltman." *Id.*

Because the ALJ erred in rejecting Dr. Cohen's opinion solely for relying on non-qualifying pulmonary function and blood gas studies, we vacate his determination that Dr. Cohen's opinion is not reasoned. Consequently, we also vacate his findings that the medical opinions do not establish total disability, 20 C.F.R. §718.204(b)(2)(iv), and that all the relevant evidence weighed together does not establish total disability. 20 C.F.R. §718.204(b)(2); *see Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 577.

Remand Instructions

On remand, the ALJ must reconsider the medical opinions of Drs. Cohen, Ranavaya, and Jaworski, taking into consideration the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). Further, we instruct the ALJ to consider the medical opinions in light of the exertional requirements of Claimant's usual coal mine employment. *See Gonzales v. Director, OWCP*, 869 F.2d 776, 779-80 (3d Cir. 1989); *Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 577.

If Claimant establishes total disability based on the medical opinion evidence, the ALJ must determine whether he is totally disabled taking into consideration all relevant evidence. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the ALJ must then

determine whether Employer is able to rebut it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. If the ALJ finds Claimant has established entitlement to benefits on remand, he must address whether he is granting modification based on a change in conditions or a mistake in a determination of fact and determine the benefits commencement date accordingly. 20 C.F.R. §725.503(d). If Claimant does not 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order on Modification Denying Benefits and remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge