U.S. Department of Labor

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

BRB No. 22-0349 BLA

RONNIE L. WOLFORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POCAHONTAS COAL COMPANY, LLC	)	DATE ISSUED: 9/27/2023
	)	
and	)	
	)	
BRICKSTREET/ENCOVA MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Cameron Blair, Joseph E. Wolfe, and Brad A. Austin (Wolfe, Williams, & Reynolds), Norton, Virginia, for Claimant.

Jarrod R. Portwood and Joseph D. Halbert (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits (2020-BLA-05279) rendered on a claim filed on October 7, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-three years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption.[2] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, declined to respond unless requested.

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.[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).

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful

[1] 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

work. 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 Claimant established total disability based on the arterial blood gas studies, medical opinions, and in consideration of the evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 7-16. Employer asserts the ALJ erred in finding the blood gas study and medical opinion evidence establishes total disability. Employer's Brief at 6-15.

Arterial Blood Gas Studies

The ALJ considered the results of four arterial blood gas studies dated January 31, 2019, June 18, 2019, July 2, 2020, and October 14, 2020. Decision and Order at 7-9; Director's Exhibits 18 at 2, 22 at 7; Claimant's Exhibit 3 at 7; Employer's Exhibit 2 at 16. The January 31, 2019 study produced non-qualifying[5] values at rest and qualifying values during exercise. Director's Exhibit 18 at 2. The June 18, 2019 study produced non-qualifying values at rest; no exercise study was conducted. Director's Exhibit 22 at 7. The July 2, 2020 study produced qualifying values at rest; no exercise study was conducted. Claimant's Exhibit 3 at 7. The October 14, 2020 study produced non-qualifying values at rest and during exercise. Employer's Exhibit 2 at 16.

[4] The ALJ found the pulmonary function studies do not establish 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 at 6-7, 9. In addition, the ALJ correctly found no evidence of complicated pneumoconiosis; thus Claimant could not invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 17 n.17.

[5] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

The ALJ gave the January 31, 2019, July 2, 2020, and October 14, 2020 studies equal weight and found them to be more probative than the June 18, 2019 study. Decision and Order at 9. Weighing the blood gas study evidence together, the ALJ found the preponderance of the blood gas studies support a finding of total disability. *Id.*

We initially reject Employer's assertion that the ALJ erred in weighing the June 18, 2019 study. Employer's Brief at 5-7. Substantial evidence supports the ALJ's finding Dr. Fino failed to explain why he did not conduct an exercise study in light of the non-qualifying resting study.[6] Decision and Order at 9, *citing* 20 C.F.R. §718.105(b) ("If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated."); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Employer next argues the ALJ erred in not giving more weight to the October 14, 2020 study because it contends the study is more reliable as it is the most recent. Employer's Brief 4-6. We disagree. The ALJ was not required to credit the October 14, 2020 non-qualifying studies over the prior qualifying studies. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held it is irrational to credit evidence solely because of recency where the miner's condition has improved. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). Thus, the ALJ correctly did not find the October 14, 2020 study more probative based only on its recency where Claimant's condition improved.

Finally, Employer argues the ALJ has not explained her finding the preponderance of the blood gas studies support finding total disability because "there are just as many non-qualifying resting values as there are qualifying resting values." Employer's Brief at 7. We agree the ALJ's finding does not satisfy the explanatory requirements of the Administrative Procedure Act (APA)[7] as she failed to adequately explain how she resolved

[6] We note the record contains no evidence of Dr. Fino offering Claimant an exercise arterial blood gas test or Claimant declining to perform an exercise arterial blood gas test. Moreover, an exercise arterial blood gas test was seemingly not medically contraindicated as Dr. Fino administered a six-minute exercise pulse oximetry test. Director's Exhibit 22.

[7] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

the conflict in the arterial blood gas study evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The ALJ gave the January 31, 2019 study, consisting of a non-qualifying resting result and a qualifying exercise result, the July 2, 2020 study, consisting of a qualifying resting result, and the October 14, 2020 study, consisting of a non-qualifying resting result and a non-qualifying exercise result, equal weight and summarily concluded "the arterial blood gas studies, weighed together, support a finding of total disability." Decision and Order at 9. Even disregarding Dr. Fino's non-qualifying June 18, 2019 resting study, which the ALJ permissibly gave little probative weight, the record consists of two non-qualifying resting studies, one qualifying resting study, one qualifying exercise study, and one non-qualifying exercise study. Director's Exhibit 18 at 2; Claimant's Exhibit 3 at 7; Employer's Exhibit 2 at 16. Given the ALJ specifically noted "there is nothing to suggest that any of these tests warrant more probative weight than another," we are unable to discern how the ALJ determined a preponderance of the arterial blood gas studies supports a finding of total disability.[8]

Therefore, we vacate the ALJ's determination that Claimant established total disability based on the arterial blood gas study evidence. 20 C.F.R. §718.204(b)(2)(ii). We remand the case for the ALJ to resolve the conflict between the qualifying and non-qualifying studies of record. The ALJ must set forth in detail how she resolves the conflict in the evidence, as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

Medical Opinions

The ALJ considered the opinions of Drs. Habre, Fino, Agarwal, and Rosenberg. Decision and Order at 9-16. Dr. Habre opined Claimant is totally disabled from a pulmonary or respiratory impairment, while Drs. Agarwal, Fino, and Rosenberg opined Claimant is not totally disabled. Director's Exhibits 18, 22, 25; Employer's Exhibits 3, 4, 6; Claimant's Exhibit 3.

Dr. Habre conducted the Department of Labor-sponsored complete pulmonary examination. He noted Claimant had moderate hypoxemia both at rest and after exercise based on the arterial blood gas studies he administered. Director's Exhibit 18 at 3. Based

---

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).

[8] Even assuming the ALJ permissibly gave more weight to the exercise studies than the rest studies, her finding is still unexplained as the exercise studies are in equipoise.

on his studies and examination, Dr. Habre concluded Claimant would not be able to perform his last coal mine job and was totally disabled. *Id.*

The ALJ found Dr. Habre's opinion well-reasoned, despite his not having access to subsequent non-qualifying arterial blood gas tests, because his conclusion was consistent with her finding that the arterial blood gas evidence supported a finding of total disability. Decision and Order at 14.

Dr. Agarwal initially concluded Claimant was totally disabled. Claimant's Exhibit 3 at 6. After reviewing the non-qualifying results from the October 14, 2020 resting and exercise arterial blood gas studies, he opined Claimant was not totally disabled and retained the pulmonary capacity to perform his last coal mine job. Employer's Exhibit 14 at 19-20. Nevertheless, he also stated he was confident the results of the blood gas studies he administered were correct. *Id.* at 23.

The ALJ found Dr. Agarwal's opinion not reasoned because he did not adequately explain how the non-qualifying results of the October 2020 study affected his opinion. Decision and Order at 15. She further discredited his opinion as speculative and gave it very little probative weight on the issue of total disability. *Id.*

Dr. Rosenberg opined Claimant was not totally disabled based, in part, on his latest arterial blood gas study being "well above qualifying levels." Employer's Exhibit 6 at 4. The ALJ found Dr. Rosenberg's conclusion Claimant was not totally disabled was not well explained given "the preponderant arterial blood gas results demonstrate Claimant's disability." Decision and Order at 16.

Dr. Fino concluded Claimant was not totally disabled from a pulmonary or respiratory standpoint based on the non-qualifying results of the objective studies administered as part of his examination. Director's Exhibit 22 at 8. After reviewing the results of a later qualifying arterial blood gas test, Dr. Fino maintained his opinion Claimant was not totally disabled and further opined such variability was not consistent with Claimant having a coal mine dust related condition. Employer's Exhibit 4 at 3.

The ALJ found Dr. Fino did not adequately explain his conclusion Claimant was not totally disabled given his understanding that Claimant's usual coal mine work sometimes involved very heavy exertional requirements. Decision and Order at 15. The ALJ also discredited Dr. Fino's opinion because, as discussed above, he did not administer an exercise arterial blood gas test, which she permissibly concluded was not in substantial compliance with regulatory requirements. *Id.* at 9, 15.

Because the ALJ's error in weighing the arterial blood gas study evidence affected her weighing of the medical opinion evidence, we must vacate her findings the medical

opinion evidence supports finding total disability and the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16. Consequently, we must vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits. 30 U.S.C. §921(c)(4). We therefore remand the case for further consideration.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. She must initially reconsider whether Claimant established total disability based on a preponderance of the blood gas studies at 20 C.F.R. §718.204(b)(2)(ii). In doing so, she must undertake a quantitative and qualitative analysis of the conflicting results and adequately explain her basis for resolving the conflict in the evidence 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 Addison*, 831 F.3d at 252-54; *Adkins*, 958 F.2d at 52-53; *see also Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence").

The ALJ must also reconsider whether the medical opinions support the establishment of total disability. 20 C.F.R. §718.204(b)(2)(iv). She must discuss all relevant evidence, critically analyze the medical opinions, and render necessary credibility findings. *See Addison*, 831 F.3d at 256-57; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). In rendering her credibility findings, the ALJ should address 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. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

If the ALJ finds either the blood gas studies or medical opinions support a finding of total disability, she must weigh all of the relevant evidence together to determine whether Claimant is totally disabled and can invoke the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). The ALJ must explain her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must reconsider whether Employer can rebut it.[9] 20 C.F.R. §718.305(d)(1); *Minich v. Keystone Coal*

[9] If Claimant invokes the Section 411(c)(4) presumption, the burden shifts to Employer to establish he has neither legal nor clinical pneumoconiosis, 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).

Mining Corp., 25 BLR 1-149, 1-150 (2015). Alternatively, if the ALJ finds Claimant is not totally disabled, he will have failed to establish an essential element of entitlement and the ALJ may reinstate the denial 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).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge