U.S. Department of Labor

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

BRB No. 21-0513 BLA

BILLY R. DAUGHERTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DARTY LEASING COMPANY, INCORPORATED	)	DATE ISSUED: 04/11/2023
	)	
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 and the Order Denying Reconsideration of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits and the Order Denying Reconsideration (2019-BLA-

05948) rendered on a claim filed on December 15, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with thirty-four years of qualifying coal mine employment. However, she found he failed to establish a totally disabling respiratory or pulmonary impairment and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Consequently, she denied benefits. Claimant filed a timely Motion for Reconsideration, which the ALJ denied.

On appeal, Claimant argues the ALJ erred in finding he failed to establish total disability and therefore erred in finding he did not invoke the Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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).

To 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), Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 work. *See* 20 C.F.R. §718.204(b)(1). 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)-

[1] Claimant's initial claim, filed September 21, 2016, was withdrawn. Director's Exhibits 1, 37. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is 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.

[3] 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 Transcript at 10.

(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).

The ALJ considered the medical opinions of Drs. Forehand, Raj, Tuteur, and Vuskovich.[4] Decision and Order at 6-8. Drs. Forehand, Raj, and Tuteur opined Claimant is totally disabled. Director's Exhibit 14; Claimant's Exhibits 1, 3, 4; Employer's Exhibit 1. Dr. Vuskovich opined that "with appropriate asthma therapy [Claimant] had the pulmonary capacity to return" to his usual coal mine employment. Employer's Exhibit 8. The ALJ accorded each of the medical opinions "some weight," and she concluded the medical opinion evidence as a whole does not support a finding of total disability. Decision and Order at 8.

Claimant argues the ALJ erred in her weighing of the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Claimant's Brief at 9-14. We agree.

The ALJ has not explained how she determined the medical opinions do not establish total disability, when she accorded all of them "some weight" and three of the four opinions diagnose total disability. Decision and Order at 8; Director's Exhibit 14; Claimant's Exhibits 1, 3, 4; Employer's Exhibit 1. Moreover, she provided no analysis of the opinions of Drs. Tuteur and Vuskovich.[5] Decision and Order at 8. Consequently, her findings are not in compliance with the Administrative Procedure Act.[6] 5 U.S.C.

[4] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6.

[5] Additionally, we agree with Claimant's contention that the ALJ erred in crediting Dr. Vuskovich without considering his opinion that Claimant may be able to perform his usual coal mine work if he were properly treated for asthma. Claimant's Brief at 15; Employer's Exhibit 8 at 26. The proper inquiry regarding whether Claimant is totally disabled is whether he is able to perform his usual coal mine work, and not whether he is able to perform that work with the use of medication. 20 C.F.R. §718.204(b)(2); *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("[T]he use of a bronchodilator does not provide an adequate assessment of the miner's disability . . . .").

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

§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) (ALJ must conduct an appropriate analysis of the evidence to support her conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Moreover, she appears to have overlooked relevant evidence in discrediting Dr. Forehand because he "did not discuss the Claimant's non-qualifying" objective testing. Decision and Order at 8. A physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Dr. Forehand acknowledged that Claimant's objective testing was non-qualifying. Director's Exhibit 14. However, he explained that, despite its non-qualifying values, Claimant's pulmonary function studies demonstrate an impairment that "leaves [C]laimant with insufficient 'wind' (the ability to increase ventilation in response to an increase in physical activity) to meet the physical demands of his usual coal mine employment." *Id.* Therefore, the ALJ erred in summarily rejecting Dr. Forehand's diagnosis of total disability without considering his explanation and the bases for his opinion. *Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 577.

Similarly, she appears to have overlooked relevant evidence in criticizing Dr. Raj's diagnoses of total disability because he "did not address the change in the Claimant's [pulmonary function testing] results within the short time frame." Decision and Order at 8. Although Dr. Raj initially opined Claimant was not totally disabled because his August 6, 2019 examination did not produce qualifying objective testing, the physician reconsidered the evidence after re-examining Claimant and reviewing Dr. Tuteur's subsequent examination of Claimant. Employer's Exhibit 1. He explained that it is not unusual to see variability in pulmonary function studies with time and, while Claimant's pulmonary function studies are not always qualifying, his impairment on pulmonary function studies and his desaturation in oxygen with exercise would render him unable to perform his usual coal mine employment. Claimant's Exhibits 1, 4. Consequently, the ALJ erred in failing to address the physician's entire opinion. *See McCune v. Central*

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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).

Appalachian Coal Co., 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

We therefore vacate the ALJ's finding that the medical opinion evidence does not establish total disability, and that the evidence as a whole does not establish total disability. 20 C.F.R. §718.204(2)(iv). We further vacate her finding that Claimant did not invoke the Section 411(c)(4) presumption, and the denial of benefits. 30 U.S.C. §921(c)(4) (2018).

On remand, the ALJ must reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). In so doing, the ALJ must first determine the exertional requirements of Claimant's usual coal mine work and consider the medical opinions taking into account those requirements.[7] *See 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). She must determine whether the opinions of Drs. Forehand, Raj, Tuteur, and Vuskovich are well-reasoned and documented, explaining the weight she accords each medical opinion based on her consideration of the physicians' comparative credentials, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). After reaching a determination on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must then weigh all relevant evidence together to determine whether Claimant is totally disabled and has invoked the Section 411(c)(4) presumption.[8] *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption, and the ALJ must consider whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant fails to 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). In rendering her findings on remand, the ALJ must explain the bases for her

[7] Although the ALJ acknowledged Claimant's last job as an underground miner performing regular maintenance and changing motors as a mechanic, she did not make a finding regarding the exertional requirements of such work. Decision and Order at 4.

[8] We decline to address, as premature, Claimant's contention that the ALJ erred in finding he did not establish pneumoconiosis. Claimant's Brief at 17-18; Decision and Order at 10.

findings in accordance with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge