U.S. Department of Labor

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

BRB No. 21-0569 BLA

DAVID E. MINOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KNIGHT HAWK COAL, LLC	)	
	)	
and	)	
	)	
AIG	)	DATE ISSUED: 04/28/2023
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Kyle L. Johnson (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Denying Benefits (2019-BLA-06019) rendered on a claim filed on December 20, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-eight years of underground coal mine employment. However, he found the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant did 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),[1] and failed to establish a required element of entitlement. Thus, he denied benefits.

On appeal, Claimant argues the ALJ erred in weighing the medical opinion evidence to find he is not totally disabled. Employer and its Carrier (Employer) respond in support of the denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has not filed a response. Claimant has filed a reply reiterating his arguments.

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 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 a claimant in

[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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged, the ALJ's finding that Claimant established thirty-eight years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4; Hearing Tr. at 18, 52.

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

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 (1986) (en banc).

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 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 the pulmonary function studies, arterial blood gas studies, and medical opinions do not establish total disability.[4] 20 C.F.R. §718.204(b)(2)(i)-(ii), (iv); Decision and Order at 17, 21. He also assigned Claimant's treatment records "little weight" because they do not discuss whether Claimant has a totally disabling pulmonary or respiratory disability. Decision and Order at 21. Therefore, he found Claimant did not establish total disability.[5] 20 C.F.R. §718.204(b)(2); Decision and Order at 21.

[4] The ALJ did not make a specific finding as to whether Claimant established total disability under 20 C.F.R. §718.204(b)(2)(iii). However, the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

[5] We initially reject Claimant's argument that the ALJ applied the wrong legal standard when addressing the issue of total disability. Claimant's Brief at 23-24; Claimant's Reply Brief at 8-10. Contrary to Claimant's contention, the ALJ correctly stated the relevant standard as follows:

> [A] miner may be found totally disabled from a respiratory or pulmonary standpoint if, in the absence of contrary probative evidence, the evidence meets one of the criteria set forth in 20 C.F.R. §718.204(b). That regulation provides criteria for a finding of total disability based upon pulmonary function tests, arterial blood gas studies, a diagnosis of cor pulmonale, or a

Claimant does not challenge the ALJ's findings that the pulmonary function studies and arterial blood gas studies do not support total disability; thus we affirm them. 20 C.F.R. §718.204(b)(2)(ii), (iii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

Claimant argues the ALJ erred in weighing the medical opinions. Claimant's Brief at 9-23; Claimant's Reply Brief at 1-8. Claimant's argument has merit.

The ALJ considered the opinions of Drs. Chavda, Istanbouly, Jarboe, and Tuteur. Decision and Order at 8-15, 17-21; Director's Exhibits 16, 18, 25, 26, 27, 31; Claimant's Exhibits 7, 8; Employer's Exhibits 4, 5. He found Drs. Chavda and Istanbouly opined Claimant is totally disabled by a respiratory or pulmonary impairment, whereas Drs. Jarboe and Tuteur opined he is not. Decision and Order at 8-15, 17-21. The ALJ assigned "substantial weight" to Drs. Jarboe's and Tuteur's opinions because he found them well-reasoned, well-documented, and based on medically acceptable clinical and laboratory diagnostic techniques.[6] *Id*. at 20. He accorded less weight to the opinions of Drs. Istanbouly and Chavda because he found they did not explain their conclusions that Claimant was unable to perform his last usual coal mine employment. *Id*. at 20-21.

We agree with Claimant's argument that the ALJ erred in discrediting Dr. Istanbouly's opinion. Claimant's Brief at 11-23; Claimant's Reply Brief at 1-8. The ALJ found Dr. Istanbouly did not adequately explain how Claimant's reduced objective testing measurements render him unable to perform his last coal mine employment. Decision and Order at 20.

In his initial and supplemental reports, Dr. Istanbouly noted Claimant's pulmonary function studies showed a moderate nonspecific ventilatory limitation. Director's Exhibits

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> well-documented and well-reasoned physician's opinion. With regard to each category of evidence, the like evidence must first be evaluated and then weighed with both like and unlike evidence to determine if the evidence as a whole supports a finding of total disability.

Decision and Order at 16-17, *quoting* 20 C.F.R. §718.204(b). Accordingly, the ALJ applied the correct total disability standard.

[6] Claimant does not challenge the ALJ's credibility findings regarding Drs. Jarboe and Tuteur's contrary medical opinions on total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17-21; Director's Exhibits 25, 26, 27; Employer's Exhibits 4, 5. Thus, we affirm them. *Skrack*, 6 BLR at 1-711.

16, 18. He also noted Claimant's exercise test showed a reduced VO2 max and reduced METS at his VO2 max. *Id.* At his deposition, Dr. Istanbouly described specifically how Claimant would be unable to perform his last coal mine employment:

> [S]omeone with damaged lungs like [Claimant], this is generally speaking, they cannot do any outdoor job because he cannot work under extreme weather conditions. . . . [H]e cannot work in any job where there is a lot of dust around him, including coal mining. He cannot do any job where he is required to talk a lot, like phone operator. . . . He cannot talk frequently. He cannot walk frequently. He cannot do anything outdoor, and definitely no surrounding dust. . . . Needless to say, no physical jobs. No heavy-duty physical job.

Claimant's Exhibit 8 at 15-16. Thus the ALJ erred in failing to consider the entirety of Dr. Istanbouly's reports and testimony when he discredited his opinion. 30 U.S.C. §923(b) (ALJ must consider all relevant evidence); *Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989)*; Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253-54 (4th Cir. 2016); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Because the ALJ's credibility finding is not supported by substantial evidence, we must vacate it. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 268-69 (4th Cir. 2002); *Smith v. Martin Cnty. Coal Co.*, 23 BLR 1-69, 1-75-76 (2004); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-93 (1988).

We also agree with Claimant's argument that the ALJ erred in discrediting Dr. Chavda's opinion on total disability. Claimant's Brief at 9-11; Claimant's Reply Brief at 1-8. The ALJ found Dr. Chavda's opinion "vague as he did not explain why the Claimant's reduced spirometry results indicated that he would have difficulty walking and lifting and carrying more than 10 pounds." Decision and Order at 21.

Dr. Chavda opined Claimant's pulmonary function studies demonstrate a "moderate respiratory impairment." Claimant's Exhibit 7 at 6. He noted the reduced pulmonary function testing values indicate Claimant does not have sufficient lung capacity to perform his usual coal mine employment, indicating Claimant would have difficulty walking, lifting, and carrying about ten pounds:

> If he has to work in coal mines as a roof boulter [sic], continuos [sic]-mine operator, as a mine supervisor and has to walk in the underground coal mine, with, carrying weight about 20 to 40 lbs. at times, then FEV1 of 2.61 which is his lowest FEV1 is not sufficient enough to perform his usual coal mine

> work for eight hours with some intermittent rest allowed to him. . . . [H]e does not have sufficient lung capacity to perform [his usual] coal mine employment.
>
> . . . .
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> Due to low FEV1 and FVC he will have difficulty doing work in a dusty underground coal mine, he will easily get short of breath. Activities like walking, lifting, climbing about a flight or less, carrying weight about 10 lbs. for 10 to 15 minutes, may be very difficulty [sic] for him to do for eight hours, as a[n] underground coal miner. He describe [sic] his work, he has stands [sic] for 6 hours, he has to lift 50 lbs. 3 time[s] per day, 25 lbs., 5 times per day, carrying 5 gal of oil, which weighs 40 lbs., his tools weighs [sic] 20 lbs., his gears [sic] weighs 35 lbs. He has to walk with this weight for about 4 miles. This is significant labor-intensive work; he is not able to do due to FEV1 of 2.61 Liter in my opinion.

Claimant's Exhibit 7 at 6-7. Thus, the ALJ again erred by failing to consider the entirety of Dr. Chavda's opinion when he discredited it. 30 U.S.C. §923(b) (ALJ must consider all relevant evidence); *Wensel*, 888 F.2d at 17; *Sea "B" Mining Co.*, 831 F.3d at 253-54; *Rowe*, 710 F.2d at 255; *McCune*, 6 BLR at 1-998.

Because the ALJ's credibility finding is not supported by substantial evidence, we must also vacate it. *See Scott*, 289 F.3d at 268-69; *Smith*, 23 BLR at 1-75-76; *Justice*, 11 BLR at 1-93.

In light of the foregoing, we vacate the ALJ's determination that Claimant failed to establish total disability based on the medical opinion evidence[7] and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); *see Rafferty*, 9 BLR at 1-232. Because we vacate the ALJ's finding that Claimant failed to establish total disability, we also vacate his finding that Claimant failed to invoke the Section 411(c)(4) presumption. Consequently, we also vacate the ALJ's denial of benefits and remand the case for further consideration.[8]

[7] Because we vacate the ALJ's findings discrediting the opinions of Drs. Istanbouly and Chavda for the reasons discussed above, we need not address Claimant's additional challenges to the ALJ's evaluation of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Claimant's Brief at 9-23; Claimant's Reply Brief at 1-8.

[8] In light of our vacating the ALJ's findings regarding total disability, we need not address Claimant's arguments regarding the ALJ's failure to render determinations on the

Remand Instructions

On remand, the ALJ must reconsider the opinions of Drs. Istanbouly and Chavda in their entirety and determine if they credibly establish Claimant is totally disabled at 20 C.F.R. §718.204(b)(2)(iv). He must explain his weighing of the evidence in accordance with the requirements of the Administrative Procedure Act (APA).[9] 5 U.S.C. §557(c)(3)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The ALJ must then resolve the conflict in the medical opinion evidence by addressing the physicians' explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses; he must explain the bases for his credibility determinations in accordance with the APA. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69 (7th Cir. 2001); *Wojtowicz*, 12 BLR at 1-165. He must then weigh the evidence regarding total disability as a whole to determine whether Claimant has a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b). *See Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 1-198.

If Claimant fails to establish total disability, benefits are precluded and the ALJ may reinstate his denial of benefits. *See Trent*, 11 BLR at 1-27. If the ALJ finds the evidence establishes total disability, Claimant will thereby invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4). The ALJ must then consider whether Employer can rebut the Section 411(c)(4) presumption by establishing Claimant has neither legal nor clinical pneumoconiosis, or by establishing "no part of the miner's 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015).

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existence of pneumoconiosis or causation. On remand, should the ALJ find Claimant establishes total disability, he must consider those issues necessary to the outcome of the case.

[9] The Administrative Procedure Act requires that every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

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.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge