U.S. Department of Labor

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

BRB Nos. 22-0333 BLA
and 22-0333 BLA-A

DAVID L. WELLS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 04/27/2023
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

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

Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Denying Benefits (2020-BLA-05416) rendered on a claim filed on November 16, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Heritage Coal Company (Heritage) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He credited Claimant with 9.56 years of coal mine employment and therefore found he 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).[1] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis, but did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202, 718.204(b). Based on Claimant's failure to establish an essential element of entitlement,[2] the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability and clinical pneumoconiosis. Employer responds in support of the denial of benefits. On cross-appeal, Employer challenges the ALJ's determination that Heritage is the responsible operator. It further argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3]

[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] Because Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304, the ALJ also found he could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3).

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

It also argues that the duties the district director performs create an inherent conflict of interest that violates its due process rights. Finally, it asserts the ALJ erred in finding Peabody Energy is the liable carrier.[4] The Director, Office of Workers' Compensation Programs (the Director), has filed a response in support of Claimant's argument that the ALJ erred in weighing the evidence on total disability. The Director also urges the Benefits Review Board to reject Employer's constitutional arguments and affirm the ALJ's finding that Employer is the responsible operator and carrier.

The 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).

Responsible Operator

The responsible operator is the potentially liable operator[6] that most recently employed the miner. 20 C.F.R. §725.495(a)(1). The district director is initially charged

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> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 9.56 years of coal mine employment and the existence of legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.202(a)(4); Decision and Order at 9.

[5] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit because Claimant performed his last coal mine employment in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 16-17.

[6] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day

with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2).

Employer argues, on cross-appeal, that the ALJ should have found Heritage is not the properly named responsible operator because either L.E. Hawkins Contractors, Inc. or Cowin & Company more recently employed Claimant for more than one year. Employer's Brief at 23-24. The ALJ correctly found, however, Employer stipulated that Claimant's most recent period of cumulative employment of not less than one year was with Heritage. Decision and Order at 9; Oct. 21, 2020 Joint Prehearing Report. Stipulations of fact that are fairly entered into are binding on the parties. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996). Because Employer has offered no reason why it should not be bound by its stipulation, we affirm the ALJ's finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Responsible Insurance Carrier

We have affirmed the ALJ's finding that Heritage is the correct responsible operator, and Employer does not challenge his finding that Heritage was self-insured by Peabody Energy on the last day it employed Claimant; thus we affirm these findings. *See Skrack*, 6 BLR at 711; 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Feb. 22, 2021 Order; Decision and Order at 9-14. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund). Employer's Brief at 24-45.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibits 36, 37, 41. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. *Id*. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id.* Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners

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of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. *Id*.; Director's Exhibit 48. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Heritage when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 9-14.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 24-45. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[7] (2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when the DOL also administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5) the DOL released Peabody Energy from liability; (6) the Director is equitably estopped from imposing liability on the company; and (7) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health. *Id*. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (October 25, 2022), *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022), and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus we affirm the ALJ's determination that Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Entitlement to Benefits – 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a

[7] Employer raised this argument for the first time in this claim in its post-hearing brief to the ALJ. Employer's Post-Hearing Brief at 30.

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. Failure to establish any one of these elements 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).

Total Disability

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). A claimant may establish total disability based on qualifying[8] 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).

The ALJ found the pulmonary function studies, blood gas studies, and medical opinions do not independently establish total disability, and that the evidence weighed together does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 29-33.[9]

Claimant argues the ALJ erred in weighing the blood gas study and medical opinion evidence. Claimant's Brief at 11-31.

[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).

[9] We affirm, as unchallenged on appeal, the ALJ's finding that the pulmonary function studies do not establish total disability. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 30. The ALJ further found there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 31.

Blood Gas Studies

The ALJ considered three blood gas studies dated December 12, 2017, November 29, 2018, and October 15, 2020. Director's Exhibits 24, 53; Employer's Exhibit 6. All of the studies produced non-qualifying values at rest, but the December 12, 2017 study produced qualifying values with exercise. The ALJ gave more weight to the non-qualifying resting studies than the qualifying exercise study and thus found the weight of the blood gas study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 31; Order Denying Recon. at 3.

Claimant argues the ALJ erred in crediting the non-qualifying resting studies over the qualifying exercise study. Claimant's Brief at 11-24. We agree.

The ALJ observed that exercise studies may be more probative of Claimant's ability to perform his usual coal mine employment than resting studies but stated "the regulations do not provide for a single exercise value to outweigh three nonqualifying resting values." Decision and Order at 31; *see Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); Order Denying Recon. at 3. He thus credited the three resting studies over the one exercise study. Order Denying Recon. at 3.

While the regulations do not specifically state a single exercise value may outweigh three nonqualifying resting values, they also do not preclude the ALJ from making such a finding. 20 C.F.R. §718.204(b)(2)(ii). Further, the Board has held an ALJ may permissibly give more weight to an exercise study than the resting studies if it is more indicative of the miner's ability to perform his usual coal mine employment. *See Coen*, 7 BLR at 1-31-32 (exercise blood gas study may be given more weight than resting blood gas studies). Because the ALJ has not explained why the exercise blood gas study is outweighed by the resting studies, his decision does not satisfy the Administrative Procedure Act (APA).[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 31; Order Denying Recon. at 3. Moreover, the ALJ failed to render the necessary factual finding regarding the exertional requirements of Claimant's usual coal mine employment which would allow him to determine whether the exercise study is more probative than the resting studies. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider

[10] The Administrative Procedure Act requires the ALJ to consider all relevant evidence in the record, and to set forth his "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).

all the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal bases for his decision); *Coen*, 7 BLR at 1-31-32.

Further, the ALJ erred in crediting the non-qualifying studies over the qualifying study based solely on recency. Decision and Order at 31. The United States Courts of Appeals for the Fourth and Sixth Circuits have 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). In explaining the rationale behind the "later evidence rule," the Fourth Circuit reasoned "a later test or exam is a more reliable indicator of [a] miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *See Adkins*, 958 F.2d at 51-52. As the test results do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id.* at 52. But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply" because one must be incorrect, "and it is just as likely that the later evidence is faulty as the earlier." *Id.* The ALJ must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id.* Thus the ALJ erred in crediting the more recent non-qualifying studies over the early qualifying study for no reason other than when Claimant performed them.

We therefore vacate the ALJ's finding that the blood gas study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(ii) and remand the case for further consideration of the evidence.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Chavda, Pearle, Tuteur, and Selby. Decision and Order at 32-33. Drs. Chavda and Pearle opined Claimant is totally disabled based on his qualifying exercise blood gas study and his DLCO values. Director's Exhibit 24; Claimant's Exhibits 4, 7. Dr. Tuteur opined Claimant is totally disabled by a respiratory impairment based on his blood gas studies and six-minute walk test. Director's Exhibit 53; Employer's Exhibits 11, 12. Dr. Selby opined Claimant is not totally disabled because the objective testing is not qualifying. Employer's Exhibits 6 at 29-32, 13 at 36. The ALJ found the opinions of Drs. Chavda and Pearle not well-reasoned and documented, and that the opinions of Drs. Tuteur and Selby do not aid Claimant in establishing total disability. Decision and Order at 32-33; Order Denying Recon. at 4-5. Thus, he found the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Claimant argues the ALJ erred in discrediting the opinions of Drs. Chavda and Pearle. Claimant's Brief at 26-31. In his Decision and Order, the ALJ discredited their opinions because they are based on the blood gas study evidence, which he found does not establish total disability. Decision and Order at 32-33. Claimant filed a Motion for Reconsideration asking the ALJ to reconsider, in part, their opinions that Claimant is totally disabled based on his DLCO values. Mot. For Recon. at 8-10. The ALJ found they discussed Claimant's DLCO values but were clearly relying only on the blood gas study evidence to diagnose total disability. Order Denying Recon. at 4-5.

Because we vacate the ALJ's finding that the blood gas study evidence does not establish total disability, we also vacate his finding that the opinions of Drs. Chavda and Pearle are not credible because they rely on the qualifying December 12, 2017 blood gas study. Decision and Order at 32-33; Order Denying Recon. at 4-5.

There is also merit to Claimant's argument that the ALJ erred in finding Drs. Chavda and Pearle opined he is totally disabled based only on the qualifying blood gas study. Claimant's Brief at 27-28. Dr. Chavda opined Claimant's DLCO values were "very low" and are qualifying under the American Medical Association guidelines. Claimant's Exhibit 7 at 28-29, 35-36. He further opined that if he did not have any of Claimant's blood gas study results, he would consider Claimant to be totally disabled based on his DLCO values alone. *Id*. at 46. Dr. Pearle opined Claimant's impairment is moderate based, in part, on his "severely reduced DLCO" and that he is totally disabled by hypoxia. Claimant's Exhibit 4 at 4. Thus, the ALJ's finding is not supported by substantial evidence. *See Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why he did it); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion); Order Denying Recon. at 4-5.

Claimant next argues the ALJ erred in weighing Dr. Tuteur's opinion. Claimant's Brief at 31. We agree.

In his Decision and Order, the ALJ found Dr. Tuteur did not diagnose total disability and thus his opinion does not aid Claimant in meeting his burden. Decision and Order at 33. On reconsideration, the ALJ found Dr. Tuteur's opinion not well-reasoned because it is not clear whether he diagnosed a totally disabling respiratory impairment and because he did not have an adequate understanding of the exertional requirements of Claimant's coal mine employment. Order Denying Recon. at 5-7.

Dr. Tuteur opined Claimant is disabled by a respiratory impairment based on the hypoxia seen on his blood gas study results and six-minute walk test. Employer's Exhibits

11 at 3; 12 at 12-13, 20, 26-27. The ALJ observed that Dr. Tuteur opined Claimant has "impairment of oxygen-gas exchange during exercise," but found it is unclear whether Dr. Tuteur was diagnosing a respiratory impairment because he attributed Claimant's disability to coronary artery disease and hypertension. Order Denying Recon. at 6-7, *quoting* Employer's Exhibit 12 at 12. The relevant inquiry at 20 C.F.R. §718.204(b)(2), however, is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See* 20 C.F.R. §718.204(b), (c); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Mabe v. Bishop Coal Co*., 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co*., 7 BLR 1-178, 1-181 (1984). Thus the ALJ's finding that Dr. Tuteur did not diagnose total disability due to a respiratory impairment is not supported by substantial evidence. *See Owens*, 724 F.3d at 557; *Martin*, 400 F.3d at 305; Decision and Order 33; Order Denying Recon. at 5-7.

We also vacate the ALJ's finding that Dr. Tuteur's opinion is not credible based on his understanding of Claimant's exertional requirements. Order Denying Recon. at 5-6. In assessing total disability, an ALJ must determine the exertional requirements of a miner's usual coal mine work and then consider them in conjunction with the medical opinions. *See Hicks*, 138 F.3d at 533; *Rowe*, 710 F.2d at 254-55; *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *see also Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). As discussed above, the ALJ failed to determine the exertional requirements of Claimant's usual coal mine employment. Thus, he erred in discrediting Dr. Tuteur's opinion without determining Claimant's exertional requirements and comparing them to the doctor's assessment of his respiratory impairment.

We therefore vacate the ALJ's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). We further vacate the ALJ's finding Claimant did not establish total disability in consideration of the evidence as a whole, 20 C.F.R. §718.204(b)(2), and the denial of benefits.

Clinical Pneumoconiosis

Because it may affect the ALJ's findings regarding total disability due to pneumoconiosis, 20 C.F.R. §718.204(c), we address Claimant's argument that the ALJ erred in weighing the evidence of clinical pneumoconiosis.[11]

The ALJ found the x-ray evidence and medical opinions weigh in favor of a finding that Claimant does not have clinical pneumoconiosis, but that the computed tomography (CT) scan evidence is positive for the disease.[12] 20 C.F.R. §718.202(a)(1), (4); Decision and Order at 24-26. Considering the evidence as a whole, he found Claimant did not establish the existence of clinical pneumoconiosis.[13] 20 C.F.R. §718.202(a); Decision and Order at 26.

Claimant's sole argument with respect to the x-ray evidence is that the ALJ erred in failing to "apply the later evidence rule." Claimant's Brief at 31-32. We disagree.

The ALJ considered six readings of three x-rays dated December 7, 2017, November 29, 2018, and October 15, 2020. Decision and Order at 16, 24-25. He noted all of the physicians who read the x-rays are dually-qualified as Board-certified radiologists and B readers, except Dr. Selby, who is a B reader. *Id.* at 16. Drs. Crum and Meyer read the December 7, 2017 x-ray as negative for pneumoconiosis. Director's Exhibit 24; Employer's Exhibit 1. Dr. Smith read the November 29, 2018 x-ray as positive for pneumoconiosis while Dr. Tarver read the x-ray as negative for pneumoconiosis. Claimant's Exhibit 6; Employer's Exhibit 9. Finally, Dr. Miller read the October 15, 2020 x-ray as positive while Dr. Selby read the x-ray as negative for pneumoconiosis. Claimant's Exhibit 8; Employer's Exhibit 6.

[11] 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 coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[12] We affirm, as unchallenged, the ALJ's finding that the CT scan evidence is positive for clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25-26.

[13] The record does not contain any biopsy or autopsy evidence. 20 C.F.R. §718.202(a)(2); Decision and Order at 15.

The ALJ found the December 7, 2017 x-ray negative for pneumoconiosis because both physicians read the x-ray as negative. Decision and Order at 24-25. He found the November 29, 2018 x-ray in equipoise as one physician read the x-ray as positive and one read it as negative and both are equally qualified. *Id.* at 25. However, he found the October 15, 2020 x-ray positive for pneumoconiosis because Dr. Miller, who read it as positive, is better qualified than Dr. Selby, who read the x-ray as negative. *Id.* Considering there is one positive, one negative, and one x-ray in equipoise, he concluded the x-rays establish Claimant does not have pneumoconiosis. *Id*.

In weighing x-rays, an ALJ must undertake a quantitative and qualitative analysis of the evidence, taking into consideration the readers' qualifications and the findings set forth in their readings. *See Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987). And while more recent x-ray evidence *may* be given greater weight if it shows the miner's condition has deteriorated, contrary to Claimant's argument the ALJ was not required to accord determinative weight to the October 15, 2020 x-ray based solely on its recency. *See Adkins*, 958 F.2d at 52; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988). As Claimant raises no further argument, we affirm the ALJ's finding that the x-ray evidence does not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1).

We agree with Claimant, however, that the ALJ erred in finding the medical opinion evidence does not establish clinical pneumoconiosis. Claimant's Brief at 32-33.

The ALJ considered the opinions of Drs. Chavda, Tuteur, Selby, and Pearle. Decision and Order at 26. Drs. Chavda, Tuteur, and Selby opined Claimant does not have clinical pneumoconiosis, while Dr. Pearle opined he has the disease. Director's Exhibits 24, 53; Claimant's Exhibit 4; Employer's Exhibits 6, 11-13. After summarizing the physicians' opinions, the ALJ summarily concluded the medical opinion evidence "establishes the absence of pneumoconiosis." Decision and Order at 26. The ALJ made no determination as to whether the medical opinions are reasoned and documented. *Id.* Therefore, he erred in failing to critically analyze the physicians' opinions, render any findings as to whether their opinions are reasoned and documented, or otherwise explain why he found their opinions establish the absence of clinical pneumoconiosis as the APA requires. *See Pickup*, 100 F.3d at 873; *Wojtowicz*, 12 BLR at 1-165; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Consequently, we vacate the ALJ's finding that the medical opinion evidence establishes the absence of clinical pneumoconiosis, 20 C.F.R. §718.202(a)(iv), and that the overall weight of the relevant evidence fails to establish the existence of the disease. 20 C.F.R. §718.202(a).

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. He 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). Specifically, he must undertake a quantitative and qualitative analysis of the conflicting results and provide an adequate rationale for how he resolves the conflict in the evidence. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016); *Adkins*, 958 F.2d at 52-53; *see also Mullins Coal*, 484 U.S. at 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence").

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must first determine the exertional requirements of Claimant's usual coal mine work and consider the medical opinions assessing his impairment in light of those requirements.[14] *See Hicks*, 138 F.3d at 533; *Rowe*, 710 F.2d at 254-55; *Cornett*, 227 F.3d at 578; *McMath*, 12 BLR at 1-9 (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to the miner's work capabilities). In rendering his credibility findings, he must consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010); *see also Hicks*, 138 F.3d at 533; *Rowe*, 710 F.2d at 255.

If the ALJ finds either the blood gas studies or medical opinions support a finding of total disability, he must weigh all the relevant evidence together to determine whether Claimant is totally disabled. *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 the bases for his credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. 20 C.F.R. Part 718; *see Trent*, 11 BLR at 27; *Perry*, 9 BLR at 1-2.

However, if Claimant establishes total disability, the ALJ must determine whether he can establish entitlement under 20 C.F.R. Part 718. In so doing, the ALJ must reweigh

[14] A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982).

whether the medical opinion evidence establishes clinical pneumoconiosis. He must explain his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If the ALJ finds the medical opinions support a finding of clinical pneumoconiosis, he must weigh all the relevant evidence together to determine whether Claimant has established clinical pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *see also Fields*, 10 BLR at 1-21. If he finds Claimant has established the existence of clinical pneumoconiosis, he must determine whether Claimant's clinical pneumoconiosis arose out of his coal mine employment and whether his total disability is due to pneumoconiosis. 20 C.F.R. §§718.203, 718.204(c). If he finds Claimant has not established clinical pneumoconiosis, the ALJ need only address whether Claimant is totally disabled due to legal pneumoconiosis.[15] *Id*.

[15] It is unnecessary for the ALJ to separately consider whether Claimant's legal pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203 as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *See* 20 C.F.R. §718.201(a)(2), (b); *see also Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

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 proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge