U.S. Department of Labor

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

BRB No. 20-0332 BLA

JAMES A. BREWSTER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROOKS RUN COAL COMPANY, LLC	)	
	)	
and	)	
	)	
CHARTIS CASUALTY COMPANY	)	DATE ISSUED: 08/31/2021
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk, PLLC), Beckley, West Virginia, for Claimant.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05000) rendered on a subsequent claim[1] filed on April 20, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established at least fifteen years of coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(3) (2018), and therefore established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] He further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant's first claim, filed on March 17, 1997, was denied because he did not establish total disability. Director's Exhibit 1. The district director denied his second claim, filed on October 27, 2010, for reasons of abandonment on September 13, 2011. Director's Exhibit 2. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.309(c). Claimant did not take any additional action before filing his current claim. Director's Exhibit 3.

[2] Section 411(c)(4) 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.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The district director denied Claimant's most recent prior claim as abandoned. Director's Exhibit 2. Consequently, Claimant must demonstrate at least one element of entitlement to obtain review of his subsequent claim. *White*, 23 BLR at 1-3.

On appeal, Employer asserts the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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 Associates, 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. *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 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 found Claimant established total disability based on the medical opinion evidence and the evidence as a whole.[6] Decision and Order at 21; *see* 20 C.F.R. §718.204(b)(2)(iv).

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as 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 6.

[6] The ALJ accurately found the record contains no qualifying pulmonary function or arterial blood gas studies. Decision and Order at 17-18; Director's Exhibits 13, 17; Claimant's Exhibit 2; *see* 20 C.F.R. §718.204(b)(2)(i), (ii). He further accurately found no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure and insufficient evidence to establish complicated pneumoconiosis. Decision and Order at 7, 19; *see* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.204(b)(1), (b)(2)(iii).

The ALJ considered the medical opinions of Drs. Werntz, Go, and Zaldivar. Decision and Order at 20-21. Dr. Werntz examined Claimant, considered his coal mine employment and exposure histories, and conducted objective testing including pulmonary function and arterial blood gas studies. Director's Exhibits 13, 21. He indicated Claimant's usual coal mine work as a roof bolter required six to seven metabolic equivalents (METs) of aerobic capacity and that he had "no direct evidence regarding [Claimant's] pulmonary capacity at that level of exertion." Director's Exhibit 13 at 4. But he found Claimant managed to produce only three METs of work on his exercise blood gas study, "well below what would be required for his last Coal Mine Employment," and was "confident that he does have adequate pulmonary reserves for 3 METS of work." Director's Exhibits 13 at 4; 21 at 4. Noting Claimant's abnormal pulmonary function study, impaired resting arterial blood gas study, and low diffusion capacity for carbon monoxide, he concluded Claimant is unable to perform the exertional requirements of his last coal mine employment. Director's Exhibits 13 at 4; 21 at 4.

Dr. Go considered Claimant's coal mine employment and exposure histories, reviewed the objective testing of record, including pulmonary function and arterial blood gas studies, and evaluated Claimant's treatment records. Claimant's Exhibit 2. He concluded Claimant's pulmonary function and blood gas testing are consistent with a class two pulmonary impairment, as defined by the American Medical Association, and concluded Claimant is unable to perform his usual coal mine employment as a roof bolter, which he determined required heavy labor. *Id.* at 10. He further noted his disagreement with Dr. Zaldivar's opinion disregarding Claimant's abnormal diffusion capacity measurement in assessing his impairment, noting attempts "to 'correct' the DLCO [diffusing capacity for carbon monoxide] measurement for reduced lung volumes using the DL/Va value [DLCO divided by the alveolar volume] . . . is not accepted by the American Thoracic Society." *Id.*

Dr. Zaldivar examined Claimant, considered his coal mine employment and exposure histories, and conducted objective testing including pulmonary function and arterial blood gas studies. Director's Exhibit 27; Employer's Exhibits 1-2. Noting the significant improvement in Claimant's pulmonary function studies after the administration of bronchodilators, Dr. Zaldivar determined Claimant is "fully capable" of performing very heavy manual labor so long as he is properly treated with bronchodilators, Director's Exhibit 27 at 7, and would be able to perform his usual coal mine employment with "intensive treatment." Employer's Exhibit 1 at 2.

The ALJ summarily stated that the opinions of Drs. Werntz and Go "are well-documented and well-reasoned," while he discredited Dr. Zaldivar's opinion as less reasoned and thus less persuasive. Decision and Order at 21.

The ALJ permissibly discredited Dr. Zaldivar's opinion because the physician conditioned his opinion on Claimant's receiving "intensive treatment" with bronchodilators. 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, [although] it may aid in determining the presence or absence of pneumoconiosis."); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 21.

Although the opinions of Drs. Werntz and Go could constitute substantial evidence in support of finding Claimant totally disabled, we agree with Employer that the ALJ's summary statement that their opinions "are well-documented and well-reasoned" does not adequately explain his rationale for crediting their opinions. Employer's Brief at 4-9 (unpaginated). Whether a physician's opinion is adequately reasoned to support Claimant's burden is for the ALJ to determine. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. However, the Administrative Procedure Act (APA) requires every adjudicatory decision be accompanied by a statement of "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). While the ALJ noted Drs. Werntz and Go concluded Claimant is unable to perform his usual coal mine employment, Decision and Order at 21, he failed to discuss the physicians' underlying rationale for their opinions or provide a basis for his conclusion that their opinions are "well-documented and well-reasoned." *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must review all evidence and provide reasoned explanation for the weight given to the evidence); *Hicks*, 138 F.3d at 533 (ALJ must adequately explain his reason for crediting a physician); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989) (factfinder is required to examine the validity of the reasoning of a medical opinion in light of the objective evidence upon which the opinion is based). We thus must vacate the ALJ's finding that the opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv) and remand the case for the ALJ to provide an explanation of his rationale for crediting the opinions of Drs. Werntz and Go.

On remand, the ALJ must reconsider whether the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). In so doing, the ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. He must also explain his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. If the ALJ finds that the medical opinion evidence establishes total disability, he must weigh all of the relevant evidence together to determine whether Claimant has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

Because we have vacated the ALJ's finding of total disability, we also vacate his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. Because the ALJ's analysis of the medical opinion evidence is consistent with the law and supported by substantial evidence, I would affirm his finding that Claimant established total disability and thus invoked the Section 411(c)(4) presumption. Because Employer has not identified any error in his finding that it did not rebut the presumption, Claimant is entitled to benefits.

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. 20 C.F.R. §718.204(b)(1). Total disability can be established by pulmonary function studies, 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). If an ALJ finds that total disability has been established under one or more subsections, he must weigh the evidence supportive of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988);

Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc).

The majority accurately concludes that the opinions of Drs. Werntz and Go "could constitute substantial evidence in support of finding Claimant totally disabled." Therefore, the only remaining question relevant to this appeal is whether the ALJ adequately explained his rationale for giving their total disability diagnoses greater weight than Dr. Zaldivar's opinion. He did.

Whether a physician's opinion is adequately documented and reasoned to support Claimant's burden is for the ALJ to decide. *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). To make this determination, "the ALJ must examine the reasoning employed in [the] medical opinion in light of the objective material supporting that opinion, and also must take into account any contrary test results or diagnoses." *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000).

As the ALJ noted, Dr. Werntz examined Claimant, determined his last coal mine employment as a roof bolter required "moderate aerobic demand," and opined Claimant would be unable to perform this work due to his pulmonary impairments. Decision and Order at 20-21; Director's Exhibit 13 at 4. Likewise, Dr. Go "conducted a medical record review of a variety of Claimant's medical records, reports, and diagnostic tests" before concluding Claimant's last coal mine job as a roof bolter required heavy labor and Claimant would be unable to perform that job due to his pulmonary impairments. Decision and Order at 21; Claimant's Exhibit 2. Meanwhile, Dr. Zaldivar acknowledged Claimant has a pulmonary impairment but stated he could return to his usual coal mine work *if* he received "intensive" treatment for his asthma. Employer's Exhibit 1.

Reviewing this evidence, the administrative law judge permissibly gave greater weight to Drs. Werntz's and Go's opinions because they provided "well-documented and well-reasoned" explanations for why Claimant cannot perform the exertional demands of his previous coal mine work. Decision and Order at 21. Conversely, he found Dr. Zaldivar's opinion "less persuasive" because his finding of no total disability was "*conditional* on Claimant receiving intensive treatment." *Id*. (emphasis in original).

Because I can discern what the administrative law judge did and why he did it, the duty of explanation under the APA is satisfied. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012). The ALJ specifically explained that Drs. Werntz and Go offered well-

reasoned opinions for finding Claimant totally disabled, while Dr. Zaldivar conditioned Claimant's ability to work on receiving intensive treatment. Decision and Order at 21.

Because the ALJ provided permissibly credited the opinions of Drs. Werntz and Go, I would affirm his credibility determinations. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010). I therefore would affirm the ALJ's finding that Claimant is totally disabled at 20 C.F.R. §718.204(b)(2), and thus invoked the Section 411(c)(4) presumption. Because Employer has not identified any error in the ALJ's finding that it did not rebut the presumption, I would affirm the award of benefits.

I, therefore, dissent.

GREG J. BUZZARD
Administrative Appeals Judge