U.S. Department of Labor

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

BRB No. 21-0187 BLA

TONY P. OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 12/16/2022
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 Claim of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Tony P. Owens, Clinchco, Virginia.

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

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order Denying Claim (2019-BLA-05119) rendered on

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision on

a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). This case involves a claim filed on April 15, 2016.[2]

The ALJ credited Claimant with at least thirty-two years of coal mine employment, with more than fifteen years underground, and found Claimant established legal pneumoconiosis[3] but not total disability. 20 C.F.R. §718.204(b)(2). Thus, the ALJ concluded Claimant failed to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[4] or establish entitlement under 20 C.F.R. Part 718. He therefore denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial.[5] The Director, Office of Workers' Compensation Programs, did not file a response brief.

In an appeal by an unrepresented claimant, the Benefits Review Board considers whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc*., 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with

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Claimant's behalf, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant indicated he previously filed a claim in 2015 which was withdrawn. Director's Exhibit 2. That claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[3] Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

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

[5] We affirm, as unchallenged, the ALJ's findings regarding length of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

applicable law.[6] 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 and comparable gainful work. 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on qualifying[7] pulmonary function studies or 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). The ALJ found Claimant failed to establish total disability by any means.[8] 20 C.F.R. §718.204(b)(2); Decision and Order at 8.

Pulmonary Function Studies

The ALJ summarized the results of three pulmonary function studies, dated September 23, 2016, April 28, 2017, and March 2, 2020. Decision and Order at 3; Director's Exhibit 31 at 10; Director's Exhibit 28 at 12; Employer's Exhibit 5 at 7. All studies were non-qualifying. Decision and Order at 3. Claimant's treatment records also contain pulmonary function studies dated October 8, 2013, January 14, 2016, June 2, 2016, April 4, 2017, April 4, 2018, April 23, 2019, that the ALJ failed to consider. *See* Decision and Order at 4; Director's Exhibit 28 at 47, 50, 65; Claimant's Exhibit 8; Employer's

[6] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2, 7; Employer's Exhibit 1; Hearing Transcript at 18, 20.

[7] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendix B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i) (ii).

[8] The ALJ made no specific findings pursuant to 20 C.F.R. §718.204(b)(2)(iii), however, such failure is harmless, as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Exhibits 3; 4; 5 at 6. The ALJ's failure to consider and weigh all the pulmonary function studies, however, is harmless, as none of the studies produced qualifying values. Appendix B of 20 C.F.R. Part 718; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, we affirm the ALJ's finding that the pulmonary function studies do not support total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 3, 8.

Arterial Blood Gas Studies

The record contains five arterial blood gas studies, dated September 23, 2016, April 28, 2017, October 19, 2018, June 25, 2019, and March 2, 2020. Claimant's Exhibits 6-7; Director's Exhibits 28, 31; Employer's Exhibit 5. The September 23, 2016 study was qualifying both at rest and with exercise. Director's Exhibit 31. The April 28, 2017 study was non-qualifying both at rest and with exercise. Director's Exhibit 28. The October 19, 2018 study was qualifying at rest, but non-qualifying with exercise. Claimant's Exhibit 6. The June 25, 2019 study was conducted only at rest and was qualifying. Claimant's Exhibit 7. Finally, the March 2, 2020 study was qualifying at rest, but non-qualifying with exercise. Employer's Exhibit 5.

The ALJ summarized some, but not all the results of the arterial blood gas studies, finding three studies were qualifying and two were non-qualifying. Decision and Order at 3; Claimant's Exhibits 6, 7; Director's Exhibits 28 at 26-27; 31 at 17-18; Employer's Exhibit 5. When noting the results for the March 2, 2020 study, the ALJ simply indicated the results were non-qualifying. Decision and Order at 3. While the exercise sample was non-qualifying, the sample at rest was qualifying.[9] Employer's Exhibit 5.

The ALJ also failed to weigh the conflicting studies together or make a specific finding on whether the blood gas studies support total disability at 20 C.F.R. §718.204(b)(2)(ii).[10] Decision and Order at 4, 8. The ALJ's findings regarding the arterial blood gas studies thus do not comply with Administrative Procedure Act (APA),[11] which

[9] Additionally, the ALJ failed to recognize that an exercise sample was collected in the October 19, 2018 study. Decision and Order at 3; Claimant's Exhibit 6. It also appears the ALJ mistakenly summarized two resting samples for the September 23, 2016 study; however, a sample was taken at rest and then with exercise. Decision and Order at 3; Director's Exhibit 31 at 18.

[10] Contrary to Employer's argument, the ALJ made no finding that Claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(ii) because the most recent blood gas study was non-qualifying. Employer's Brief at 4.

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

requires that the ALJ weigh all relevant evidence and explain his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162 (1989*McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984). We therefore vacate the ALJ's finding that Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 8.

Medical Opinions

In weighing the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv), the ALJ accurately noted that Drs. Forehand, Sargent, and McSharry all found Claimant not totally disabled by a respiratory or pulmonary impairment.[12] Decision and Order at 8; Director's Exhibits 28, 33; and Employer's Exhibits 5, 8. Thus, the ALJ correctly indicated their opinions do not support a finding of total disability. Decision and Order at 8. But the ALJ simply indicated the physicians "all agree [Claimant] is not disabled" and "no other medical evidence of record suggests otherwise." Decision and Order at 8. As discussed above, the blood gas studies are conflicting regarding the presence of total disability, an issue the ALJ did not address. Because the ALJ's analysis of the blood gas studies could affect the weight he accords the medical opinions regarding total disability, he must reconsider the medical opinions after he has addressed the blood gas studies.[13] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012) (it is the

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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).

[12] Dr. Forehand initially found Claimant totally disabled based on the September 23, 2016 blood gas studies, but modified his opinion after considering the April 28, 2017 exercise arterial blood gas study. Director's Exhibits 31 at 6; 33 at 3-4. Dr. Sargent opined that Claimant has a non-disabling "mild obstructive ventilatory impairment with mild arterial blood gas abnormalities with exercise." Director's Exhibit 28 at 4; Employer's Exhibit 8 at 16, 21. Dr. McSharry found no evidence of a pulmonary disability and opined Claimant has normal lung function with a mild diffusion impairment and hypoxemia that improves with exercise. Employer's Exhibit 5 at 3.

[13] When considering the issue of pneumoconiosis, the ALJ credited Dr. Forehand's opinion that Claimant has "non-disabling" legal pneumoconiosis, noting he considered the "more recent" April 28, 2017 blood gas study obtained by Dr. Sargent. Decision and Order at 6, 8. However, three additional studies were performed after that time, spanning three years and yielding mixed qualifying and nonqualifying results, which Dr. Forehand did not consider. *See* Claimant's Exhibit 6-7; Employer's Exhibit 5. Therefore, we are unable to conclude the ALJ addressed all the blood gas study results.

duty of the ALJ to make findings of fact and to resolve conflicts in the evidence); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (an ALJ must adequately explain his reasons for crediting a physician).

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. He must consider the blood gas studies and provide an adequate rationale for how he resolves the conflict in the evidence. *See* 20 C.F.R. §718.204(b)(2)(ii). If the ALJ finds the blood gas studies supportive of a finding of total disability, he must then weigh all the relevant evidence together, taking into account any contrary probative evidence to determine whether Claimant is totally disabled. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. Thus, he must also make credibility determinations regarding the contrary medical opinion evidence, considering the qualifications of the respective physicians, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *Looney*, 678 F.3d at 316-17; *Hicks*, 138 F.3d 524, 533.

If Claimant establishes total disability on remand, he will invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b). The ALJ must then determine whether Employer has rebutted the presumption.[14] *See* 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). If the ALJ finds that 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). In rendering all of his findings on remand, the ALJ must explain his findings and conclusions in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[14] Thus, we need not address the ALJ's finding that Claimant failed to establish clinical pneumoconiosis. *See* 20 C.F.R. §718.202; *Larioni*, 6 BLR at 1278; Decision and Order at 5.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Claim and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge