U.S. Department of Labor

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

BRB No. 21-0201 BLA

TERRY McALLISTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 12/16/2022
Employer-Petitioner	)	
	)	
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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for Claimant.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2019-BLA-05812) rendered on a subsequent claim filed on

April 15, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

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

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and in finding Employer failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, has not filed a response.

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[1] This is Claimant's third claim for benefits. Director's Exhibits 1-2; 4. The district director denied his first claim for failure to establish total disability and total disability due to pneumoconiosis. Director's Exhibit 1; Decision and Order at 1. The district director denied his second claim, filed on February 20, 2013, as abandoned. Decision and Order at 1; 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. §725.409.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she 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); *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). Because Claimant failed to establish any element of entitlement in his prior claim, he had to submit new evidence establishing any one element to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[3] 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); *see* 20 C.F.R. §718.305.

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

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.[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).

Invocation of the Section 411(c)(4) Presumption—Total Disability

A miner is totally disabled if a pulmonary or respiratory impairment, standing alone, prevents the miner from performing his or her usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on qualifying[6] 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 consider 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 established total disability based on the pulmonary function studies, medical opinion evidence, and the evidence as a whole.[7] Decision and Order at 16-18.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies dated July 13, 2016, May 30, 2018, September 9, 2019, September 18, 2019, and October 31, 2019. Decision and Order at 6-7. He found the July 13, 2016, May 30, 2018, September 9, 2019, and October 31, 2019 studies produced qualifying pre-bronchodilator values,[8] while the September 18, 2019 study produced non-qualifying values. Decision and Order at 6-7; Director's Exhibits

[5] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 35.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[7] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 16.

[8] The ALJ also noted that the July 13, 2016 and May 30, 2018 pulmonary function studies produced non-qualifying post-bronchodilator results. Decision and Order at 15.

17, 20, 22; Claimant's Exhibits 1, 3; Employer's Exhibits 4, 9. Noting the majority of the studies support a finding of total disability, he accorded more weight to the qualifying pre-bronchodilator values than to the two non-qualifying post-bronchodilator values because the disability question is "not whether Claimant can perform his duties while medicated." Decision and Order at 15. He further found the October 31, 2019 qualifying study entitled to the most weight because it was the most recent and more probative of Claimant's current disability. *Id.* at 16. Thus, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer argues the ALJ erred by not considering Dr. Vuskovich's reports assessing the validity of the pulmonary function studies, including the most recent study. Employer's Brief at 2, 4, 6. We agree.[9]

When considering pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ, as the fact-finder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

As Employer argues, the ALJ failed to consider Dr. Vuskovich's supplemental report dated February 15, 2020, which opined Claimant's most recent October 2019 pulmonary function study is invalid. Employer's Brief at 4-5; Employer's Exhibit 12. Other than noting that Employer's Exhibit 12 (Dr. Vuskovich's supplemental report) was received into the record, *see* Decision and order at 2 n. 2, the ALJ never refers to the exhibit or report again. Dr. Vuskovich also found portions of the July 13, 2016, May 30, 2018 and September 9, 2019 studies invalid in his November 4, 2019 medical report after reviewing Claimant's medical records.[10] Employer's Brief at 4-6; Director's Exhibit 22; Employer's Exhibit 8.

[9] Employer also points to Dr. Vuskovich's opinion regarding the validity of a February 1, 2017 pulmonary function study. Employer's Brief at 6. However, the ALJ did not consider this study because it was submitted in excess of the evidentiary limitations at 20 C.F.R. §725.414. Decision and Order at 2 n.1; Hearing Transcript at 6.

[10] Dr. Vuskovich found the July 13, 2016 MVV measurement invalid, the May 30, 2018 pre-bronchodilator FEV1 and FVC values invalid, the May 30, 2018 post-

In response, Claimant argues that even if the most recent pulmonary function study is invalid, there are still four qualifying pre-bronchodilator pulmonary function study results for total disability, with no evidence to the contrary. Claimant's Brief at 6. However, because the ALJ accorded most weight to the most recent October 31, 2019 qualifying pulmonary function study as more probative of Claimant's current disability in finding total disability established at 20 C.F.R. §718.204(b)(2)(i), the ALJ erred in not addressing Dr. Vuskovich's finding that the study is invalid. The ALJ failed to assess relevant conflicting evidence regarding the validity of the pulmonary function studies. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener*, 23 BLR at 1-237; Decision and Order at 15. Because the ALJ did not address relevant evidence regarding the validity of the pulmonary function studies, we vacate his finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *See McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Medical Opinion Evidence

The ALJ next considered the medical opinions of Drs. Silman, Nader, Green, Vuskovich, and Zaldivar. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order 16-17. Dr. Silman opined that Claimant is totally disabled based on the qualifying July 13, 2016 pulmonary function study and his shortness of breath. Director's Exhibit 17 at 5. Dr. Nader found Claimant totally disabled based on the qualifying September 9, 2019 pulmonary function study and his symptoms. Claimant's Exhibit 1 at 5. Dr. Green opined Claimant is totally disabled based on the qualifying October 31, 2019 pulmonary function study. Claimant's Exhibit 3 at 6. Dr. Vuskovich concluded Claimant has the pulmonary capacity to return to his last coal mining job based on the non-qualifying September 18, 2019 pulmonary function study and non-disabling arterial blood gas study results. Employer's Exhibits 8, 12. Dr. Zaldivar concluded that, without appropriate treatment, Claimant would be impaired and unable to perform his usual coal mining work, "although at most times he will not be sufficiently impaired." Employer's Exhibit 7.

The ALJ found the opinions of Drs. Silman, Nader, Green, and Vuskovich well-reasoned and well-documented. Decision and Order at 17. He accorded little weight to Dr. Zaldivar's medical opinion, finding it equivocal and impermissibly based on Claimant's ability to perform his work with medical treatment. *Id.* Therefore, the ALJ

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bronchodilator FVC/FEV1 values valid, the September 9, 2019 MVV measurement invalid, and the September 9, 2019 FVC/FEV1 results valid. Director's Exhibit 22; Employer's Exhibit 8.

concluded the medical opinion evidence establishes total disability under 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer asserts that the ALJ's analysis of the medical opinion evidence is undermined by his failure to make necessary findings regarding the validity of the qualifying pulmonary function studies upon which the physicians relied. Employer's Brief at 6-7. We agree, in part.

The ALJ failed to address relevant evidence regarding the validity of the pulmonary function studies. In addition, all the physicians' opinions are at least partially based on pulmonary function study evidence, and it is unclear if the ALJ would find the medical opinion evidence sufficient to support total disability notwithstanding the experts' reliance on the various pulmonary function studies. *See* Decision and Order at 17.

Nevertheless, contrary to Employer's argument, the ALJ's consideration of Dr. Zaldivar's opinion was not reliant on the ALJ's underlying findings regarding the pulmonary function studies. Rather, the ALJ permissibly found Dr. Zaldivar's opinion undermined because it was equivocal and reliant on Claimant's pulmonary function after treatment. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the 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."); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (ALJ may reject an equivocal medical opinion); Decision and Order at 17. Therefore, we affirm the ALJ's discrediting of Dr. Zaldivar's opinion.

However, because the ALJ's weighing of the remaining medical opinions[11] was dependent on his findings regarding the pulmonary function studies and his failure to address relevant evidence regarding the validity of the pulmonary function studies, we vacate his determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, we vacate the ALJ's finding that Claimant established total disability when weighing the evidence as a whole at 20 C.F.R. §718.204(b). Consequently, we must also vacate his findings that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c).

[11] Employer also argues the ALJ "incorrectly discredited" Dr. Vuskovich's opinion. Employer's Brief at 7. However, the ALJ found Dr. Vuskovich's opinion well-reasoned and well-documented. Decision and Order at 17.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. 20 C.F.R. §718.204(b)(2). He must initially reconsider whether the pulmonary function studies support total disability, first resolving the conflicting evidence as to the validity of pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i). Specifically, the ALJ must consider Dr. Vuskovich's supplemental report dated February 15, 2020, in which he opined Claimant's most recent October 31, 2019 pulmonary function study is invalid. Employer's Exhibit 12. He must also consider Dr. Vuskovich's November 4, 2019 report that found portions of the July 13, 2016, May 30, 2018, and September 9, 2019 studies invalid. Director's Exhibit 22. Finally, he must also consider the conflicting evidence regarding the validity of these studies.[12] If a study does not precisely conform to the quality standards, he must determine if it is in substantial compliance. 20 C.F.R. §718.101(b). The ALJ must then weigh the studies together, undertaking a qualitative and quantitative analysis of the evidence and providing an adequate rationale for how he resolves conflicts in the evidence. *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989).

Then, the ALJ must reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). In weighing the opinions, he must take into consideration the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See 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); *Wojtowicz*, 12 BLR at 1-165. If the ALJ finds the evidence establishes total disability under 20 C.F.R. §718.204(b)(2)(i) or (iv), he must weigh all the relevant evidence together, like and unlike, to determine whether Claimant has established the existence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 198.

[12] Dr. Silman indicated Claimant put forth good effort and cooperation during the administration of the July 13, 2016 study. Director's Exhibit 17 at 12. Dr. Gaziano opined that the July 13, 2016 and May 30, 2018 studies are valid. Director's Exhibit 25 at 3. Dr. Nader found the September 9, 2019 results were acceptable and reproducible. Claimant's Exhibit 1 at 4. Dr. Green indicated Claimant put forth the effort required to generate valid results during the administration of the October 31, 2019 study. Claimant's Exhibit 3.

If the ALJ finds the evidence establishes total disability, Claimant will have invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the ALJ must then determine if Employer is able to rebut it.[13] 20 C.F.R. §718.305(d). Alternatively, if Claimant does not establish total disability, benefits must be denied as he has failed to establish an essential element of entitlement. *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).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[13] Because we have vacated the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's argument that the ALJ erred in his findings regarding rebuttal of legal pneumoconiosis.