U.S. Department of Labor

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

BRB No. 21-0524 BLA

EUGENE REYNOLDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	
	)	DATE ISSUED: 12/23/2022
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 Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Eugene Reynolds, Honaker, Virginia.

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

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2020-BLA-05125)

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

rendered on a miner's claim filed on April 19, 2018, pursuant to the Black lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established at least twenty-eight years of qualifying coal mine employment but failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). She therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.304. The ALJ thus denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.[4]

In an appeal filed without representation, the Benefits Review Board addresses 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 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).

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

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[2] 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.

[3] The ALJ accurately observed the record contains no evidence of complicated pneumoconiosis. Decision and Order at 9-11. Thus, Claimant is unable to 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).

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least twenty-eight years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[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 Virginia. *Shupe v. Director,* OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2, 3.

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 claimants if certain conditions are met, but 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).

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

To 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), Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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.[6] *See* 20 C.F.R. §718.204(b)(1). 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).

Pulmonary Function Studies

The ALJ assessed the three pulmonary function studies of record.[7] Decision and Order at 5. She accurately observed none produced qualifying[8] values.[9] *Id.*; Director's

[6] The ALJ determined Claimant last worked in coal mine employment on a supply crew where he loaded roof bolts, glue, plates, rock and timbers, and hauled the materials inside. Decision and Order at 3; Hearing Transcript at 12. The ALJ did not make a finding as to what level of exertion these duties required.

[7] The ALJ considered pulmonary function studies dated May 24, 2018, February 12, 2019, and October 8, 2020. Decision and Order at 5; Director's Exhibits 12, 14; Employer's Exhibit 5.

[8] 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).

[9] Because the administering physicians reported differing heights, the ALJ permissibly relied on an average height of 66.3 inches and properly rounded the value to

Exhibits 12, 14; Employer's Exhibit 5. Therefore, we affirm her finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Arterial Blood Gas Studies

The ALJ considered the results of four arterial blood gas tests. Decision and Order at 6; Director's Exhibits 12-14; Employer's Exhibit 3. She correctly observed the May 24, 2018 study produced non-qualifying values at rest and qualifying values during exercise, while the February 2, 2019, February 15, 2019, and October 8, 2020 studies produced non-qualifying values at rest and during exercise.[10] Decision and Order at 6. The ALJ concluded "[a]s the majority of the studies and the most recent study do not qualify under the [Department of Labor] DOL standards, I find that the ABG study evidence does not establish total disability." *Id.* Substantial evidence supports this finding. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012). We therefore affirm the ALJ's finding that the preponderance of blood gas evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); Decision and Order at 6.

Medical Opinions[11]

The ALJ considered three medical opinions. Decision and Order at 6-9. Dr. Forehand performed the DOL's complete pulmonary evaluation of Claimant on May 24, 2018. Based on the non-qualifying resting and qualifying exercise blood gas studies that

66.5 inches to conform to the nearest greater height appearing in the tables set forth in Appendix B. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 5 n.7. Although Claimant was over seventy-seven years old at the time of each test, the ALJ correctly applied the maximum reported table age of seventy-one given the absence of medical evidence to the contrary. Decision and Order at 7; *see* 20 C.F.R. Part 718, App. B; *Meade*, 24 BLR at 1-46-47.

[10] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[11] Because the record contains no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure, the ALJ properly found Claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 6.

he obtained,[12] Dr. Forehand opined that "insufficient residual gas exchange capacity remains to return to, meet the physical demands of, or tolerate additional coal mine dust exposure at [C]laimant's last coal mining job." Director's Exhibit 12 at 6. Dr. Forehand prepared a supplemental report on July 25, 2019, in which he reviewed Dr. Sargent's February 12, 2019 non-qualifying blood gas studies. Director's Exhibit 16 at 3. He maintained Claimant is totally disabled, explaining the May 24, 2018 exercise test that he conducted better approximated the exertional level of Claimant's last coal mine job and that, regardless, the non-qualifying pO2 values of 64 at rest and 65 with exercise that Dr. Sargent obtained "under any condition or any age is not normal and should prevent [Claimant] from working in underground coal mining."[13] *Id.*

Dr. Sargent evaluated Claimant on February 12, 2019. Director's Exhibit 14. He interpreted the non-qualifying pO2 values that he obtained as showing "[m]oderate hypoxemia at rest and with low-level exertion."[14] *Id.* at 8. Despite noting Claimant's usual coal mine work required heavy lifting, Dr. Sargent opined "[Claimant] has the respiratory capacity to do any job required in the mining of coal that a normal 78-year-old man could be expected to do." *Id.* at 4-5. He explained a "pO2, like pulmonary function, deteriorates with age. A pO2 in the range of 64 to 65 is probably close to normal for a 78-year-old man." *Id.* In a subsequent report, Dr. Sargent addressed Dr. Forehand's criticisms that Dr. Forehand's exercise study better reflects the exertional requirements of Claimant's last coal mine job and that Dr. Sargent's pO2 values, though non-qualifying, would preclude any individual from performing underground coal mine employment. Director's Exhibit 16; Employer's Exhibit 1. Specifically, Dr. Sargent responded that Dr. Forehand's blood gas study "barely meets" DOL disability standards and "does not take into account the effect of aging on gas exchange," a pO2 of 64 is not "per se disabling," and the gas abnormality present is "minimal" given Claimant's age. Employer's Exhibit 1.

[12] Claimant walked on a treadmill for three minutes at a sixteen percent grade and at a speed of 1.5 miles per hour. Director's Exhibit 12 at 9. He achieved a heart rate of 104 beats per minute. *Id.*

[13] Claimant additionally submitted the report printout of Dr. Forehand's February 15, 2019 blood gas study as affirmative evidence. Director's Exhibit 13. Dr. McSharry, the only physician to comment on this test, noted neither the resting nor exercise values are qualifying. Employer's Exhibit 5 at 2. No physician commented as to whether the study demonstrates any other degree of impairment.

[14] Claimant walked on a treadmill for two minutes and three seconds and achieved a maximum heart rate of seventy-four beats per minute. Director's Exhibit 14 at 8.

Dr. McSharry evaluated Claimant on October 8, 2020, and reviewed the reports and studies of Drs. Sargent and Forehand. Employer's Exhibit 5. Dr. McSharry interpreted his October 8, 2020 resting blood gas study as "notable for mild hypoxemia for age but outside [the DOL] standards for disability." *Id.* at 1. Regarding his exercise study on the same date, Dr. McSharry noted "a modest increase in A-a gradient" with "no significant desaturation" and "[t]he ABG values still remained well above [the DOL] threshold for disability at maximum exercise."[15] *Id.* at 1, 18. Dr. McSharry diagnosed "mild hypoxemia" and opined "from a pulmonary perspective, [Claimant] is capable of performing any work reasonably expected of an 80-year-old man." *Id.* at 4.

In resolving the conflict in evidence, the ALJ stated:

> [Dr. Forehand's] opinion is based on his May 24, 2018 ABG studies, there is no discussion or explanation as to why he credited these studies over his more recent and non-qualifying studies of February 15, 2019. Moreover, Dr. Forehand stated that a PO2 of 64 at any age would prevent an individual from working in the coal mines, which is inconsistent with the DOL standards. Accordingly, the opinion is afforded lesser weight on the issue of total disability. Notably, Drs. Sargent and McSharry did not opine that the Claimant was totally disabled. Therefore, I find that total disability has not been established by reasoned medical opinions.

Decision and Order at 8

We vacate the ALJ's conclusion as to the medical opinion evidence as she conducted only a limited analysis of the relevant evidence and misstated the law and Dr. Forehand's opinion. 20 C.F.R. §718.204(b)(2)(iv); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

To the extent the ALJ found a physician cannot offer a reasoned diagnosis of total disability in the absence of qualifying objective evidence, she erred. Total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing as a non-qualifying impairment may still render a miner incapable of performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Even a mild impairment may be totally disabling depending on the exertional requirements

[15] Claimant walked on a treadmill for three minutes and forty-eight seconds at a five percent grade and at the speed of one mile per hour before stopping due to shortness of breath. Employer's Exhibit 5 at 18. He achieved a heart rate of eighty-eight beats per minute. *Id.*

of a miner's usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion"); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (miner is totally disabled if he cannot perform the exertional requirements of his previous job). As all opining physicians diagnosed at least a mild blood gas impairment, the ALJ erred in failing to address whether Claimant's impairment precludes the exertional requirements of his last coal mine job. *See Scott*, 60 F.3d at 1141.

Further, although Dr. Forehand relied on his May 24, 2018 qualifying exercise study, he did not rely exclusively on it to diagnose total disability. Dr. Forehand explicitly cited his own May 24, 2018 non-qualifying resting pO2 of 65.8 as leaving insufficient oxygen to meet the physical demands of Claimant's last coal mining job[16] and similarly cited Dr. Sargent's February 12, 2019 non-qualifying pO2 values of 64 and 65 as supportive of total disability.[17] Director's Exhibits 12 at 6, 16 at 2-3. As Dr. Forehand explicitly recognized the values from Dr. Sargent's testing are non-qualifying, and specifically tied his opinion that the values support total disability at any age to the

[16] Moreover, Dr. McSharry stated Dr. Forehand's resting study "just exceeded the [DOL] threshold for disability." Employer's Exbibit 5 at 2.

[17] The ALJ accurately observed Dr. Forehand did not discuss the non-qualifying results of his February 15, 2019 study in his July 25, 2019 supplemental report. Decision and Order at 8; Director's Exhibits 12, 16. Nonetheless, as no physician interpreted the study as either supportive or unsupportive of an impairment that precludes the exertional requirements of Claimant's usual coal mine work, substantial evidence does not support the ALJ's finding that Dr. Forehand "credited" his May 24, 2018 blood gas studies "over his more recent and non-qualifying studies of February 15, 2019." Decision and Order at 8; *see Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). For the same reason, to the extent the ALJ found Dr. Forehand's February 15, 2019 study more probative of Claimant's condition than the May 24, 2018 and February 12, 2019 studies on which Dr. Forehand relied, substantial evidence does not support the ALJ's finding. *Schetroma*, 18 BLR at 1-23-24; *Marcum*, 11 BLR at 1-24.

performance of underground coal mine work, his opinion is consistent with both the regulation and Appendix C.[18] *Id.*

As the ALJ did not provide a valid reason for discrediting Dr. Forehand's opinion, we vacate her determination that Claimant did not establish total disability by medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). She must first determine the exertional requirements of Claimant's usual coal mine work. She must then reconsider all medical opinions on total disability in light of the exertional requirements of Claimant's last coal mine job, including Dr. Forehand's opinion that his May 24, 2018 exercise study is more probative of Claimant's ability to perform his last coal mine job and he is also disabled by the non-qualifying values obtained by Dr. Sargent on February 12, 2019. *See Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997). The ALJ should also consider whether Drs. Sargent and McSharry's opinions constitute evidence that Claimant is not totally disabled, *i.e.*, he can perform the exertional requirements of his "previous coal mine work," 20 C.F.R. §718.204(b)(1)(i), given their assessments that he has the respiratory capacity to perform the type of work "expected" of a 78- or 80-year-old man. Director's Exhibit 14; Employer's Exhibit 5. In rendering her credibility findings, the ALJ must consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42 (4th Cir. 1997). If

[18] To the extent the ALJ credited Dr. Sargent's opinion that the tables at Appendix C do not account for the effects of age, she erred. The regulation at 20 C.F.R. §718.204(b)(2)(ii) provides, "[i]n the absence of contrary probative evidence," arterial blood-gas values that are equal to or less than those set forth in Appendix C "shall establish a miner's total disability." 20 C.F.R. §718.204(b)(2)(ii). During the notice and comment period before the DOL promulgated Appendix C, the DOL acknowledged that altitude and age affect arterial blood-gas values. It accounted for the effects of both by adopting a simple sliding scale that designates three levels of altitude for which qualifying pO2 values have been adjusted for the advanced age of miners filing claims. 45 Fed. Reg. 13,678, 13,712 (Feb. 29, 1980). The DOL explained that because altitude has a greater effect on oxygen blood tension than age, and implementing a second sliding scale for age would be "complicated," "it is entirely appropriate to determine a level of arterial oxygen tension below which the claimant can be considered to be disabled regardless of age." *Id.*

Claimant establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must also reweigh the evidence as a whole and determine whether Claimant has established total disability and invoked the Section 411(c)(4) presumption. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must then consider whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Anderson.*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In rendering her findings on remand, the ALJ must comply with the Administrative Procedure Act.[19] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[19] The Administrative Procedure Act provides that every adjudicatory decision must include "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).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge