U.S. Department of Labor

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

BRB Nos. 22-0523 BLA
and 22-0523 BLA-A

PRESTON D. HESS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 12/18/2023
	)	
	)	
Employer -Respondent	)	
Cross-Petitioner	)	
	)	
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 on Remand Denying Second Request for Modification of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Preston D. Hess, Rowe, Virginia.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

William M. Bush (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: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,[1] and Employer cross-appeals, Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Denying Second Request for Modification (2016-BLA-05404) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves Claimant's second request for modification of a subsequent clam filed on April 10, 2008, and is before the Board for a second time.[2]

In her March 11, 2020 Decision and Order Granting Second Request for Modification (Decision and Order), the ALJ credited Claimant with thirty years of underground coal mine employment based on the parties' stipulation. She also found Claimant established a totally disabling respiratory or pulmonary impairment based on the arterial blood gas studies and medical opinions.[3] 20 C.F.R. §718.204(b)(2)(ii), (iv). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis[4] at Section 411(c)(4) of the Act.[5] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. She further found Employer did not rebut the presumption and awarded benefits.

In consideration of Employer's appeal, the Board affirmed the ALJ's findings that Claimant had thirty years of underground coal mine employment and the arterial blood gas studies support total disability. *Hess v. Island Creek Coal Co.*, BRB No. 20-0238 BLA, slip op. at 2 n.4, 6 (Aug. 11, 2021) (unpub.). However, the Board held she erred in

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

[2] We incorporate the procedural history of the case as set forth in *Hess v. Island Creek Coal Co.*, BRB No. 20-0238 BLA, slip op. at 1-2 n.1 (Aug. 11, 2021) (unpub.).

[3] The ALJ found Claimant did not establish total disability based on the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6-7.

[4] She thus found Claimant established a change in conditions and a change in an applicable condition of entitlement. 20 C.F.R. §§725.309, 725.310

[5] 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.

weighing the medical opinion evidence on the issue of total disability. *Id*. at 6-9. Thus the Board vacated her conclusion that Claimant established total disability and invoked the Section 411(c)(4) presumption, and the award of benefits. *Id*. at 9-10. The Board also concluded she erred in weighing the evidence on rebuttal of the presumption. *Id*. at 9-14.

On remand, the ALJ concluded Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2). She therefore found he could not invoke the Section 411(c)(4) presumption. Because Claimant failed to establish an essential element of entitlement, she denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing the ALJ erred in finding Claimant failed to establish total disability. On cross-appeal, Employer argues the ALJ erred in finding Dr. Forehand's medical opinion reasoned and documented on the issue of total disability. Neither Claimant nor the Director have responded to Employer's cross-appeal argument.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with 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).

The ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established, the ALJ is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence establishes at least one element of entitlement that defeated an award in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). An ALJ may correct any mistake of fact, "including the ultimate issue of benefits eligibility." *Jessee v. Director, OWCP*, 5 F.3d 723, 724-26 (4th Cir. 1993).

[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); Hearing Transcript at 7.

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

A miner is considered to be totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[7] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[8] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant failed to establish total disability by any method.[9] 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order on Remand at 5-10. She therefore found Claimant did not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order on Remand at 10.

Arterial Blood Gas Studies

As an initial matter, we agree with the Director's argument that the ALJ erred by reconsidering the arterial blood gas study evidence. Director's Response Brief at 10-13. In consideration of Employer's prior appeal, the Board vacated the ALJ's finding that the medical opinion evidence supports total disability and, therefore, vacated her finding that Claimant established total disability. *Hess*, BRB No. 20-0238 BLA, slip op. at 6-9.

[7] We affirm the ALJ's finding that Claimant's usual coal mine employment as a shuttle car operator "required him to engage in a heavy level of exertion." Decision and Order on Remand at 5; *see Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991).

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The ALJ correctly found none of the pulmonary function studies of record are qualifying for total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 8. The Board previously discussed the ALJ's findings but did not explicitly affirm them. *Hess v. Island Creek Coal Co.*, BRB No. 20-0238 BLA, slip op. at 6 (Aug. 11, 2021) (unpub.). Thus, we now affirm these rational findings.

However, the Board addressed Employer's specific arguments with respect to her weighing of the blood gas study evidence, rejected those arguments, and affirmed her finding that the blood gas study evidence supports total disability. *Id*. at 5-6. The Board's holding constitutes law of the case, and the ALJ cited no valid exception to that doctrine. *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 209-10 (4th Cir. 2022); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989). We therefore reverse the ALJ's finding and reinstate the Board's affirmance of her original determination that the arterial blood gas study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinion Evidence

With respect to the medical opinions, the ALJ summarized Dr. Forehand's opinion that Claimant is totally disabled and the contrary opinions of Drs. Castle and Basheda that he is not totally disabled.[10] Decision and Order on Remand at 8-10; *see* Director's Exhibits 41, 65, 70, 91, 99; Employer's Exhibits 11, 12. She found all three opinions reasoned and documented. *Id*. at 10. She then stated, "[a]ffording some weight to all the opinions . . . the overall medical opinion evidence does not support a finding that [] Claimant is totally disabled." *Id*.

Because the ALJ's error with respect to the arterial blood gas testing may have affected her weighing of the medical opinion evidence, we must vacate her finding that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 10.

We also agree with the Director's argument that the ALJ failed to follow the Board's remand instructions. Director's Brief at 8-10. When the Board remands a case, the ALJ must comply with its instructions and "implement both the letter and spirit of the . . .

[10] The record also includes a report from Dr. Jonkers. Dr. Jonkers indicated she has treated Claimant for chronic obstructive pulmonary disease and coal workers' pneumoconiosis since 2011. Claimant's Exhibit 5. She stated Claimant "has severe bronchitis which has severely limited his life" and he "is now dyspneic with talking." Claimant's Exhibit 12. She noted Claimant's FEV1 is "less than 70% of predicted despite treatment with inhaled medications" and thus Claimant is "impaired to the point where he could not work in the mines or any other job." *Id*. The ALJ permissibly discredited Dr. Jonkers's opinion because she found it does "not include clinical findings, except for the results of one undated [pulmonary function study], and contains only limited and general observations of [] Claimant." Decision and Order on Remand at 8; *see Milburn Colliery v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

mandate," absent appropriate legal basis for not applying the mandate rule.[11] *See Salmons*, 39 F.4th at 209-10, *quoting United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993); *see also Scott v. Mason Coal Co.*, 298 F.3d 263, 267 (4th Cir. 2007). The Board instructed that, in weighing the medical opinions, the ALJ "must resolve the conflict in the opinions of Drs. Basheda and Forehand as to the reliability of a pulse oximetry test relative to that of a blood gas study[,]" and "address Dr. Basheda's statements that the variability in Claimant's blood gas studies may reflect a variable, rather than fixed, impairment." *Hess*, BRB No. 20-0238 BLA, slip op. at 14-15. The ALJ did not resolve this conflict.

Further, the Board instructed the ALJ to "explain the weight she accords each medical opinion based on her consideration of the physicians' comparative credentials, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions." *Hess*, BRB No. 20-0238 BLA, slip op. at 14. Although she found the opinions of Drs. Forehand, Castle, and Basheda are each reasoned and documented and entitled to "some weight," Decision and Order on Remand at 10, she did not explain why she found the opinions of Drs. Castle and Basheda outweigh Dr. Forehand's opinion on the issue of total disability as the Administrative Procedure Act (APA)[12] requires. *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); 20 C.F.R. §718.204(b)(2)(iv). The ALJ's unexplained finding that all the medical opinions are entitled to "some weight" and her apparent reliance on a head count of contrary opinions is an insufficient basis to find Claimant failed to meet his burden to establish total disability. Decision and Order on Remand at 10; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *Addison*, 831 F.3d at 256-57; *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir.

[11] *See, e.g., Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005) ("Deviation from the mandate rule is permitted only in a few exceptional circumstances, which include (1) when 'controlling legal authority has changed dramatically'; (2) when 'significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light'; and (3) when 'a blatant error in the prior decision will, if uncorrected, result in a serious injustice.'") (citations omitted).

[12] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include a statement of "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

1998); *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz*, 12 BLR at 1-165.

Based on the foregoing, we vacate the ALJ's finding that Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2). We further vacate her finding that Claimant failed to establish a basis for modification, 20 C.F.R. §725.310(a), and invoke the Section 411(c)(4) presumption. We therefore vacate the denial of benefits and remand the case for further consideration.

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence supports a finding of total disability taking into consideration that the arterial blood gas studies support total disability. 20 C.F.R. §718.204(b)(2)(iv). The ALJ must explain the weight afforded the medical opinions of Drs. Forehand, Basheda, and Castle based on the physicians' comparative credentials, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions.[13] *See Milburn Colliery v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The ALJ must then weigh all relevant evidence together to determine whether Claimant is totally disabled and has invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §§718.204(b)(2), 718.305. In doing so, the ALJ must comply with the Board's earlier remand instructions to resolve the conflict in the opinions of Drs. Basheda and Forehand as to the reliability of a pulse oximetry test relative to that of a blood gas study and address Dr. Basheda's statements that the variability in Claimant's blood gas studies may reflect a variable, rather than fixed, impairment.[14] Director's Exhibit 99 at 33; Claimant's Exhibit 13 at 4; Employer's Exhibit 11 at 19, 24-25.

If the ALJ finds Claimant has invoked the Section 411(c)(4) presumption, she must determine whether Employer rebutted the presumption by establishing Claimant does not have clinical or legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). If Employer fails to establish Claimant has neither form of pneumoconiosis, the ALJ must then determine

[13] Because we have instructed the ALJ to weigh the medical opinions on remand, we decline to address, as premature, Employer's argument on cross-appeal that she should have found Dr. Forehand's opinion not credible because he did not reconcile conflicts in the arterial blood gas study evidence that may weigh against his opinion. Employer's Consolidated Brief at 10-11.

[14] Like the Board's affirmance of the ALJ's finding that the blood gas studies support total disability, the Board's identification of these errors in her analysis of the medical opinions also constitute the law of the case.

whether Employer has established "no part of [Claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015). If Claimant fails to establish total disability, an essential element of entitlement, she 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). The ALJ must explain the bases for her findings in accordance with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

Accordingly, the ALJ's Decision and Order on Remand Denying Second Request for Modification is affirmed in part and vacated in part, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge