U.S. Department of Labor

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

BRB Nos. 21-0506 BLA
and 21-0506 BLA-A

RONALD J. BARROW	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SEXTET MINING CORPORATION	)	
	)	
and	)	DATE ISSUED: 02/15/2023
	)	
FRONTIER INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
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 Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

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: GRESH, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Claimant appeals and Employer and its Carrier (Employer) cross-appeal Administrative Law Judge (ALJ) Jerry R. DeMaio's[1] Decision and Order Denying Benefits (2010-BLA-05660) rendered on a claim filed on June 1, 2009, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has twenty-two years of qualifying coal mine employment but found Claimant did not establish a totally disabling pulmonary or respiratory impairment. He therefore determined Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and failed to establish an essential element of entitlement. Thus, the ALJ denied benefits.

[1] This claim was initially forwarded to the Office of Administrative Law Judges (OALJ) on June 21, 2010, where it was assigned to ALJ Joseph E. Kane, who issued an order remanding the claim to the district director to provide Claimant with a legally sufficient complete pulmonary evaluation. Director's Exhibits 25, 28. Subsequently, the claim was again referred to OALJ on July 20, 2015. Director's Exhibit 29. The case was assigned to ALJ Larry A. Temin, who again issued an order of remand to the district director to provide Claimant with a legally sufficient complete pulmonary evaluation. Jan. 24, 2018 Order of Remand. However, ALJ Temin later found a subsequent deposition of Dr. Chavda, the physician who performed Claimant's complete pulmonary examination, cured any deficiencies in his written reports, and thus vacated his previous order. Mar. 13, 2018 Order Vacating Remand. The case was then reassigned to ALJ DeMaio (the ALJ).

[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).

On appeal, Claimant argues the ALJ erred in finding he is not totally disabled. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (Director), has not responded to Claimant's appeal. In a reply brief, Claimant reiterates his previous contentions.

On cross-appeal, Employer contends the ALJ erred in finding the pulmonary function study evidence in equipoise. It also contends the Department of Labor district director is an "inferior officer" of the United States not properly appointed under the Appointments Clause of the Constitution.[3] The Director responds, urging the Benefits Review Board to reject Employer's constitutional arguments.[4]

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 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has 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 3, 5.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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).

Claimant asserts the ALJ erred in finding the blood gas studies, medical opinions, and evidence as a whole do not establish total disability.[6] Claimant's Brief at 6-20. On cross-appeal, Employer argues that the ALJ erred in finding the pulmonary function study evidence is in equipoise. Employer's Brief at 18-19 (unpaginated).

Arterial Blood Gas Study Evidence

The ALJ considered two arterial blood gas studies dated July 2, 2009, and March 11, 2010, both of which produced non-qualifying values at rest.[7] Decision and Order at 7; Director's Exhibit 11 at 15; Employer's Exhibit 2 at 3. He thus found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Claimant contends that the ALJ erred in failing to consider the April 18, 2011 blood gas study conducted by Dr. Matthews contained in Claimant's treatment records. Claimant's Brief at 3, 9-13. He asserts this study is qualifying as it produced a PO2 of 59. *Id.* at 10 (citing Claimant's Exhibit 2 at 2). Employer responds that any error in failing to address this study is harmless as the study is illegible or, alternatively, because it produced a PO2 of 69 and is therefore nonqualifying. Employer's Brief at 14-15 (nonpaginated).

We take no position regarding the April 18, 2011 blood gas study's legibility or whether it produced qualifying values; these are factual findings reserved for the ALJ. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255-56 (6th Cir. 1983); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill gaps in the ALJ's opinion). However, because the ALJ failed to

[6] We affirm, as unchallenged, the ALJ's determination that the pulmonary function studies do not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack*, 6 BLR at 1-711; Decision and Order at 7. In addition, the record contains no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 6.

[7] 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).

consider all of the evidence relevant to whether the blood gas studies establish total disability, we must vacate his determination that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(ii).[8] *See Rowe*, 710 F.2d at 255; *McCune*, 6 BLR at 1-998 (fact-finder's failure to discuss relevant evidence requires remand).

Medical Opinion Evidence

The ALJ considered Dr. Chavda's opinion that Claimant is totally disabled and the opinions of Drs. Selby and Rosenberg that he is not. Decision and Order at 7-10; Director's Exhibits 11, 14, 16; Claimant's Exhibit 3; Employer's Exhibits 2, 4-6. He determined that all three physicians had an accurate understanding of Claimant's usual coal mine employment[9] and, crediting the opinions of Drs. Selby and Rosenberg over Dr. Chavda's, found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 10.

Claimant contends the ALJ erred in his weighing of the medical opinions. Claimant's Brief at 6-20, 23-33. We agree.

The ALJ discredited Dr. Chavda's opinion because it is "unsupported by objective evidence" and contrary to the "well-reasoned opinions of Drs. Rosenberg and Selby." Decision and Order at 10. Initially, because the ALJ's weighing of the blood gas studies, which we have vacated, affected his consideration of the medical opinion evidence, we must also vacate his finding that the medical opinions do not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10. Further, contrary to the ALJ's finding, the regulations specifically provide that total disability may be established based on a reasoned medical opinion that a miner cannot perform his usual coal mine employment even when the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997).

[8] Employer further contends that requiring the ALJ to consider treatment record blood gas studies that a party has not designated as evidence would lead to a "virtual removal of the evidentiary limitations." *Id.* at 14. Contrary to Employer's assertion, treatment records are not subject to the numerical limitations on affirmative and rebuttal evidence, 20 C.F.R. §725.414(a)(4), and the ALJ is required to consider all relevant evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255-56 (6th Cir. 1983).

[9] We affirm, as unchallenged, the ALJ's determination that Claimant's usual coal mine employment required "lifting up to 100 pounds and walking distances." Decision and Order at 10; *see Skrack*, 6 BLR at 1-711.

Dr. Chavda explained why he believes Claimant has a respiratory or pulmonary impairment that prevents him from performing his usual coal mine work, notwithstanding that his pulmonary function and blood gas studies are non-qualifying. Claimant's Exhibit 3. After examining Claimant and administering a pulmonary function study and blood gas study, he opined Claimant's pulmonary function study, despite being non-qualifying, demonstrated Claimant would have difficulty performing his usual coal mine employment which required that he frequently stoop, lift up to one-hundred pounds, and walk two miles per week. *Id.* at 10-11. Because the ALJ erred in rejecting Dr. Chavda's opinion for relying on non-qualifying pulmonary function and blood gas studies, we vacate his determination that Dr. Chavda's opinion is not well-reasoned.

We also agree with Claimant that the ALJ erred in crediting the opinions of Drs. Selby and Rosenberg. Claimant's Brief at 20-24. Although the ALJ indicated Drs. Selby's and Rosenberg's opinions are "well-reasoned," Decision and Order at 10, he failed to provide any rationale to support this conclusion.[10] Because the ALJ did not explain his crediting of their opinions, his finding that the medical opinion evidence does not establish total disability does not satisfy the Administrative Procedure Act (APA).[11] 30 U.S.C. §923(b); *Rowe*, 710 F.2d at 254-55 (ALJs have a duty to consider all relevant evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for their decisions); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune*, 6 BLR at 1-998. We therefore vacate the ALJ's determinations that the medical opinion evidence does not establish total disability and that Claimant therefore did not invoke the Section 411(c)(4) presumption.[12] 20 C.F.R. §§715.204(b)(2)(iv), 718.305.

[10] The ALJ did note Dr. Rosenberg relied on the June 7, 2011 pulmonary function study which "does not meet disability standards." Decision and Order at 10.

[11] The Administrative Procedure Act requires every adjudicatory decision to include "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).

[12] Although we have affirmed the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), we agree with Employer's contention on cross-appeal that the ALJ incorrectly determined that "one of the two" valid pulmonary function studies yielded qualifying results and that the results of the pulmonary function studies are thus in "equipoise." Decision and Order at 7; Employer's Response at 18-19. Contrary to the ALJ's finding, although the July 2, 2009 study produced a qualifying MVV value, the overall study was not qualifying under the regulations because the FEV1 result is not equal to or less than the applicable value listed in Appendix B to

On remand, the ALJ must first determine if the April 11, 2011 blood gas study is reliable and establishes total disability.[13] 20 C.F.R. §§718.101(b), 718.103(c), 725.455(b)-(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). He must then reconsider the medical opinions in light of the objective testing, the physicians' understanding of the exertional requirements of Claimant's usual coal mine employment, the physicians' qualifications, the explanations given for their findings, the documentation underlying their judgements, and the sophistication of, and bases for, their diagnoses; he must also provide an explanation as to his determinations, including how he resolves conflicts among the opinions. *See Rowe*, 710 F.2d at 255; *Wojtowicz*, 12 BLR at 1-165. Should the ALJ find that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) or (iv), he must then weigh all the relevant evidence together, like and unlike, to determine whether Claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will have invoked the Section 411(c)(4) presumption, in which case the ALJ must 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.[14] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR at 1-27. In

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20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6; Director's Exhibit 11. Consequently, we vacate the ALJ's findings that one of the two valid pulmonary function studies yielded qualifying results and, therefore, that the results of the pulmonary function studies are in equipoise.

[13] The quality standards do not apply to objective tests conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment). The ALJ must still determine, however, if the treatment record blood gas study is sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[14] Contrary to Claimant's arguments, if he cannot establish total disability, benefits are precluded, and the ALJ need not consider whether he has established the existence of pneumoconiosis. *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); Claimant's Brief at 17-18.

rendering his findings on remand, the ALJ must comply with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

Cross-Appeal: The Appointments Clause

On cross-appeal, Employer argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Response at 19-25. It thus contends the district director lacked the authority to designate Employer as the responsible operator and the Black Lung Disability Trust Fund, not Employer, must assume responsibility for the payment of benefits. *Id.* For the reasons set forth in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 4-10 (Oct. 25, 2022) (en banc), we reject employer's arguments. Thus, we affirm the ALJ's determination that Employer is the properly designated responsible operator.[15]

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority decision with the exception of its statement that Employer's delay in raising its Appointments Clause argument is arguably distinguishable from the Board's holding in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip

[15] There are facts regarding whether Employer properly raised its Appointments Clause argument that arguably could distinguish it from the majority's holding in *Bailey*. Regardless of whether Employer properly preserved the argument, however, we would hold it is without merit for the reasons stated in the concurrence in that case.

op. at 4-10 (Oct. 25, 2022) (en banc). As in *Bailey*, Employer failed to challenge the district director's appointment at any time while the claim was pending before the district director; raised the issue for the first time while the claim was before the OALJ, long after the district director had transferred the case; and failed to identify any reason why the issue was not "reasonably ascertainable" while the claim was before the district director. *See Bailey*, slip op. at 5-6 ("Absent application of the exception for issues not reasonably ascertainable, failure to contest an issue before the claim is transferred to the OALJ constitutes forfeiture of the issue."); 20 C.F.R. § 725.463 (ALJ hearing "shall be confined" to issues raised before the district director or new issues "not reasonably ascertainable" before the district director). The Board's holding in *Bailey* and 20 C.F.R. §725.463 control. I therefore would hold Employer forfeited its challenge to the district director's appointment and decline to consider the merits of its argument.[16]

GREG J. BUZZARD
Administrative Appeals Judge

[16] Consistent with my opinion in this claim and the Board's holding in *Bailey*, the Director argues Employer forfeited its Appointments Clause argument by failing to raise it prior to the claim's transfer to the OALJ. *See* Director's Brief at 3-4. Notably, the employer in *Bailey* forfeited the issue by first raising it *thirteen months* after the claim was transferred from the district director to the OALJ. *See Bailey*, slip op. at 6. Employer in this claim waited nearly *eleven years* after the claim was originally transferred to the OALJ in 2010; nearly *six years* after it was transferred to the OALJ a second time in 2015; and over *three years* after it became clear from ALJ Temin's 2018 order, issued at Employer's request, that the claim would remain at OALJ for a hearing and not be remanded back to the district director for further factual development. *See* Mar. 13, 2018 Order Vacating Remand; Apr. 2, 2021 Joint Stipulations at 3; Director's Exhibits 25, 29.