U.S. Department of Labor

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

BRB No. 21-0074 BLA

ROGER C. POLHAMUS Claimant-Petitioner v. TUNNELTON BLACK LUNG TRUST and PENNSYLVANIA STATE WORKERS' INSURANCE FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 7/29/2022 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Donna M. Hojo Lowman (Rulis & Bochicchio, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2019-BLA-05963) rendered on a claim filed on May 29, 2018,[1] 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 had 20.2 years of coal mine employment, at least fifteen of which he found were qualifying for purposes of invoking 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); 20 C.F.R. §718.305. However, the ALJ found Claimant failed to establish he is totally disabled and, therefore, could not invoke the presumption. The ALJ also found Claimant failed to establish pneumoconiosis and denied benefits.

On appeal, Claimant argues the ALJ erred in finding he failed to prove he has a totally disabling pulmonary or respiratory impairment and, therefore, erred in concluding he did not invoke the Section 411(c)(4) presumption. Employer and its Carrier (Employer) respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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.[3] 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). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with

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[1] Claimant filed two prior claims that he later withdrew. Director's Exhibits 2, 32. A withdrawn claim is considered not to have been filed. See 20 C.F.R. §725.306.

[2] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has 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).

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

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 all 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 contends the ALJ erred in finding the pulmonary function studies, medical opinions, and the evidence as a whole do not establish total disability.[4] Claimant's Brief at 3-6.

Pulmonary Function Study Evidence

The ALJ considered two pulmonary function studies conducted on July 12, 2018 and October 9, 2018. Director's Exhibits 15, 20. The ALJ found the July 12, 2018 study was non-qualifying before and after the administration of bronchodilators and the October 9, 2018 study, conducted only without bronchodilators, was non-qualifying. Decision and Order at 15. He therefore determined the pulmonary function study evidence does not establish total disability. *Id.* at 16; 20 C.F.R. §718.204(b)(2)(i).

Claimant contends the ALJ erred in finding the July 12, 2018 pulmonary function study produced non-qualifying results pre-bronchodilator and therefore erred in finding the pulmonary function study evidence does not establish total disability. Claimant's Brief at 2-5. We agree. For a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce both a qualifying FEV1 value and one of the following: either an FVC value or MVV value equal to or less than the values appearing in the tables set forth in Appendix B, or an FEV1/FVC ratio equal to or less than fifty-five percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). The qualifying values in Appendix B are based on gender, height, and age. 20 C.F.R. Part 718, Appendix B. In determining whether the July 12, 2018 study was qualifying, the ALJ used Claimant's reported height of 67.5 inches at the time of the exam to determine if the results meet the applicable table values listed in Appendix B of 20 C.F.R. Part 718. Decision and Order at 15. As this height falls between 67.3 inches and 67.7 inches in Appendix B, it appears the ALJ rounded down to the nearest lower height of 67.3 inches in determining the study was non-qualifying. Decision and Order at 15; 20 C.F.R. Part 718, Appendix B.

[4] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

However, because there were conflicting heights noted for Claimant in the record the ALJ erred in failing to resolve these discrepancies.[5] *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) ("If there are substantial differences in the recorded heights among all the studies, the administrative law judge must make a factual finding to determine claimant's actual height."); Decision and Order at 15. The ALJ also provided no explanation for his decision to round Claimant's height down to the nearest lower height instead of up. Decision and Order at 15; *see Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995) (noting the Office of Workers' Compensation Programs Procedure Manual specifically mandates using the closest greater height when a miner's actual height falls between heights listed in the table). Because the ALJ failed to resolve conflicts in the evidence and failed to identify the basis for his use of the lower of the two closest heights in Appendix B for each study, his decision fails to satisfy the Administrative Procedure Act (APA).[6] *See Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162, 1-165 (1989).

The ALJ's error was not harmless. In relying on Claimant's reported height and rounding down to the nearest lower height when addressing the July 12, 2018 study, the FEV1 results were non-qualifying by only 0.01L. 20 C.F.R. Part 718, Appendix B; Director's Exhibit 15. The FEV1 results would have been qualifying if the ALJ had rounded Claimant's height up to the next greater height; had used the greater reported height, from the October 9, 2018 study; or had used an average of the two studies' reported heights. 20 C.F.R. Part 718, Appendix B; Director's Exhibit 15. Moreover, the MVV results of this test are qualifying under any of these scenarios. 20 C.F.R. Part 718, Appendix B; Director's Exhibit 15.

We therefore vacate the ALJ's finding that Claimant did not establish total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i).

Claimant also argues the ALJ did not render a clear finding that the July 12, 2018 pulmonary function study is valid. Claimant's Brief at 5. We agree. Specifically, the ALJ noted Dr. Fino opined the study was invalid, while Drs. Zlupko and Gaziano opined it was valid. Decision and Order at 16. However, the ALJ found "none of the pulmonary function

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[5] Dr. Fino reported a height of 69.5 inches at the October 9, 2018 examination. Director's Exhibit 20.

[6] The Administrative Procedure Act requires every adjudicatory decision 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).

studies qualified," and he therefore found the pulmonary function study evidence did not establish total disability. *Id.* When weighing pulmonary function studies, the 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 must then, in his role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). Consequently, the ALJ erred in failing to first resolve the conflicts in these opinions and thus determine whether the July 12, 2018 pulmonary function study is valid.[7] *See Wojtowicz,* 12 BLR at 1-165.

Medical Opinion Evidence

The ALJ also considered medical opinions from Drs. Zlupko and Fino. Decision and Order at 17-19. Dr. Zlupko opined Claimant has a moderate obstructive pulmonary impairment and is totally disabled from performing his usual coal mine employment as a roof bolter.[8] Director's Exhibits 15, 22. Dr. Fino opined Claimant has no respiratory impairment and therefore would not be totally disabled from performing the "moderate" labor required of his usual coal mine employment as a roof bolter. Director's Exhibit 20; Employer's Exhibit 2. The ALJ credited Dr. Fino's opinion over Dr. Zlupko's because Dr. Fino better explained his findings in connection with the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 19.

Because the ALJ's weighing of the pulmonary functions studies at 20 C.F.R. §718.204(b)(2)(i) may have influenced his weighing of the medical opinion evidence,[9] we

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[7] The ALJ also failed to consider Dr. Fino's uncontradicted opinion that the October 9, 2018 pulmonary functions study, conducted as part of his examination of Claimant, was not valid. Director's Exhibit 20. Consequently, he erred in failing to determine if the study is valid or in substantial compliance with the quality standards and erred in failing to determine the probative weight to assign the study. 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).

[8] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant's usual coal mine employment was as a roof bolter and required "medium exertional work." Decision and Order at 17-18.

[9] Moreover, a determination on remand that the July 12, 2018 pulmonary function study is valid would undercut Dr. Fino's opinion, in which he agreed that if the study was

vacate the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19.

Because we have vacated the ALJ's determination that the pulmonary function study evidence and the medical opinion evidence do not establish total disability, we further vacate his finding that the record as a whole does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 19. We thus also vacate his determination that Claimant did not invoke the Section 411(c)(4) presumption, vacate the denial of benefits, and remand this case for further consideration of the issue of total disability.[10] 30 U.S.C. §921(c)(4).

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2).

He must first address whether a preponderance of the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i). In doing so, he should first determine whether the July 12, 2018 and October 19, 2018 studies are valid. *See Keener*, 23 BLR at 1-237. The ALJ must also render a finding as to Claimant's actual height and, if it falls between the applicable heights listed on the tables at Appendix B, identify the table height that he uses while setting forth the reasons for his choice. *See Protopappas*, 6 BLR at 1-223; *K.J.M. [Meade] v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *see also Toler*, 43 F.3d at 116 n.6. The ALJ must then determine, based on Claimant's gender, age, and height and the correct FEV1 and MVV values, whether each relevant pre-bronchodilator and post-bronchodilator value is qualifying under Appendix B of 20 C.F.R. Part 718.

In light of his findings regarding the pulmonary function study evidence, the ALJ must also reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). The ALJ must resolve the conflict in the evidence by addressing the physicians' explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz*

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valid then Claimant would be totally disabled from performing his usual coal mine employment based on that testing. Employer's Exhibit 2 at 17.

[10] In light of our vacating the ALJ's findings regarding total disability, we need not address Claimant's argument that the ALJ erred in finding the medical opinion evidence does not establish legal pneumoconiosis, as it is premature. Claimant's Brief at 6-7.

v. Director, OWCP, 788 F.2d 158, 163 (3d Cir. 1986). When setting forth his findings on remand, the ALJ must identify the evidence on which he relies and set forth the rationale underlying his decision in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. If the ALJ finds either the pulmonary function study evidence or medical opinion evidence supports a finding of total disability, he must then weigh all of the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will invoke the Section 411(c)(4) rebuttable presumption, and 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. 20 C.F.R. Part 718; *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). In reaching his conclusions on remand, the ALJ must explain the bases for his credibility determinations and findings of fact as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge