U.S. Department of Labor

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

BRB No. 21-0362 BLA

MICHAEL J. ADEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MONTEREY COAL COMPANY	)	
	)	DATE ISSUED: 7/29/2022
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Carrie Bland, District Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals District Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Denying Benefits (2019-BLA-06208) rendered on a claim filed on January 31, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established seventeen years of coal mine employment, working either underground or in conditions substantially similar to those in an underground mine. She determined, however, he did not establish a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.304. The ALJ thus denied benefits.

Claimant argues the ALJ erred in excluding Dr. Istanbouly's supplemental report in her Decision and Order after it had been admitted into evidence at the hearing without objection, maintaining the ALJ failed to consider relevant evidence that he is totally disabled and may invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting the ALJ's evidentiary error requires that the Benefits Review Board vacate the denial of benefits and remand the case for consideration of Dr. Istanbouly's supplemental report. Employer also replied to the Director's brief.[3]

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

[1] 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.

[2] The ALJ found Claimant does not have complicated pneumoconiosis and thus 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). Decision and Order at 5.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established seventeen 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.

with applicable law.[4] 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 or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A 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 weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 the preponderance of the pulmonary function studies did not establish total disability, crediting the most recent non-qualifying[5] December 5, 2019 study over the two earlier qualifying studies conducted on December 27, 2017 and April 9, 2018. Decision and Order at 6. The ALJ also found a preponderance of the blood gas studies did not establish total disability, as the record contained only one qualifying exercise study conducted on April 9, 2018; the resting study conducted on that date was non-qualifying and the December 5, 2019 resting and exercise studies were non-qualifying. *Id.* at 7. Additionally, she found the record contained no evidence of cor pulmonale with right-sided congestive heart failure. *Id.* at 7. Crediting Dr. Tuteur's opinion that Claimant does not have a pulmonary disability over Dr. Istanbouly's initial report that Claimant is totally disabled, she found the medical opinion evidence did not establish total disability. *Id.* at 9-10. She therefore found the evidence as a whole does not establish total disability and

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 9, 24; Director's Exhibit 7.

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

that Claimant could not invoke the Section 411(c)(4) presumption or establish entitlement at 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2); Decision and Order at 10.

Claimant and the Director assert the ALJ erred in excluding an April 16, 2020 supplement report prepared by Dr. Istanbouly, who conducted the Department of Labor's complete pulmonary evaluation.[6] Claimant's Brief at 2-4; Director's Brief at 2; Claimant's Exhibit 2. Employer asserts the ALJ's error is harmless because Dr. Istanbouly's supplemental report merely restates conclusions from his original report admitted into the record and thus is cumulative evidence that would not affect the case's outcome. Employer's Reply Brief at 2-3. Claimant's and the Director's arguments have merit.

At the hearing, the ALJ admitted into evidence, without objection, Dr. Istanbouly's April 16, 2020 supplemental report as Claimant's Exhibit 2. Hearing Transcript at 5, 7. However, in her decision, the ALJ erroneously referred to Dr. Istanbouly's supplemental report as Claimant's Exhibit 1 and misstated that it "referenced as the subject of the report" a different miner, not Claimant, and thus excluded it from the record. Decision and Order at 8 n.15. Contrary to the ALJ's ruling, Dr. Istanbouly: correctly identified Claimant's full name and birth date on page one of his supplemental report; referred to Claimant by name on each page of the report; and summarized Claimant's medical records, including the findings from his initial April 9, 2018 examination of Claimant. Claimant's Exhibit 2. Thus, the ALJ erred in concluding Dr. Istanbouly's supplemental report does not pertain to Claimant and in excluding it from the record.

Employer asserts the ALJ's evidentiary error is harmless because Dr. Istanbouly's supplemental report is repetitive of his initial report and does not change the outcome of this case. We disagree.

In denying benefits, the ALJ specifically rejected Dr. Istanbouly's opinion that Claimant is totally disabled on the grounds he had not considered the most recent non-qualifying December 5, 2019 pulmonary function study and blood gas studies, and thus she found his opinion "based upon less than a full review of the medical evidence of record." Decision and Order at 9-10. However, in his April 16, 2020 supplemental report, Dr. Istanbouly reviewed the December 5, 2019 pulmonary function and blood gas study,

[6] We affirm, as unchallenged, the ALJ's findings that Claimant did not establish total disability at 20 C.F.R. §§718.204(b)(2)(i)-(iii) or complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5, 6-7.

and maintained his opinion that Claimant is totally disabled.[7] Decision and Order at 8 n.15; Claimant's Exhibit 2.

Because the ALJ admitted into evidence Dr. Istanbouly's supplemental report but then mischaracterized it as pertaining to a different miner and then excluded it from the record, we reverse her evidentiary ruling excluding the report from the record. As the ALJ did not properly consider all relevant evidence as to whether Claimant is totally disabled, we vacate her finding at 20 C.F.R. §718.204(b)(2)(iv) and her conclusion that Claimant did not invoke the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2); 718.305; *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). Thus, we vacate the ALJ's denial of benefits.

Remand Instructions

The ALJ must reconsider on remand 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 and then reconsider all the medical opinions on total disability, including Dr. Istanbouly's April 16, 2020 supplemental report, in light of those requirements.[8] 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 U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004). If Claimant establishes total disability

[7] Dr. Istanbouly initially opined Claimant is totally disabled based on the results of his April 9, 2018 examination testing, which included a qualifying pulmonary function study showing severe obstruction and an exercise blood gas study showing hypoxemia. Director's Exhibit 11 at 17, 18.

[8] A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a miner is unable to do his last coal mine job. *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."); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may find total disability by comparing physician's impairment rating and any physical limitations due to that impairment with the exertional requirements of the miner's usual coal mine work).

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 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, 1-2 (1986) (en banc). In rendering her findings on remand, the ALJ must comply with the Administrative Procedure Act.[9] 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).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits, and we remand the case 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

[9] 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).