U.S. Department of Labor

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

BRB No. 22-0280 BLA

TEDDY C. TOOLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOPKINS COUNTY COAL, LLC	)	
	)	DATE ISSUED: 7/10/2023
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 Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Denying Benefits (2020-BLA-05689) rendered on a claim filed on March 19, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined Claimant did not establish complicated pneumoconiosis and therefore failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018). She found Claimant established thirty-seven years of underground coal mine employment but did not establish a totally disabling respiratory or pulmonary impairment. Thus, the ALJ concluded Claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018)[1] or establish entitlement under 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he does not have complicated pneumoconiosis. Claimant further argues the ALJ erred in finding he did not establish total disability and thereby could not invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[2]

The Benefits Review 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 361-62 (1965).

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

[1] 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-seven years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 26; Director's Exhibit 4.

(c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

X-ray Evidence – 20 C.F.R. §718.304(a)

The ALJ considered six interpretations of four x-rays. Decision and Order at 5-6. She found that all the interpreting physicians are dually-qualified B readers and Board-certified radiologists. *Id.* at 6.

Dr. Crum interpreted the November 20, 2017 x-ray as positive for complicated pneumoconiosis with a 1.5 cm Category A opacity in the right upper lung lobe. Claimant's Exhibit 2. As no other physician interpreted this x-ray, the ALJ found it positive for complicated pneumoconiosis. Decision and Order at 6.

Dr. Crum interpreted the December 15, 2017 and May 20, 2019 x-rays as positive for Category A complicated pneumoconiosis, while Dr. Meyer interpreted them as negative for the disease despite noting the presence of a large nodule in Claimant's right upper lung zone.[4] Director's Exhibits 13, 16; Claimant's Exhibit 1; Employer's Exhibit 1. Given the readers' similar radiological qualifications, the ALJ found the readings of both x-rays in equipoise. Decision and Order at 6.

Dr. Meyer read the November 19, 2020 x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 5. As Dr. Meyer was the only physician to interpret this x-ray, the ALJ found it negative for complicated pneumoconiosis. Decision and Order at 6. Thus, having found one x-ray positive for complicated pneumoconiosis, the readings of two x-rays in equipoise, and one x-ray negative for the disease, the ALJ concluded "the preponderance of the x-ray readings as a whole fail to establish the existence of any form of complicated or clinical pneumoconiosis." *Id*.

Claimant contends the ALJ failed to consider the quality and character of the x-ray evidence. Claimant's Brief at 2 (unpaginated). Specifically, Claimant contends the ALJ failed to discuss that all of the physicians identify a large nodule or opacity exceeding one

[4] Dr. Meyer noted a 1.2 cm nodule on Claimant's December 15, 2017 x-ray and a 1.4 cm nodule on his May 20, 2019 x-ray. Director's Exhibit 18; Employer's Exhibit 1. Although Dr. Crum did not specify the size or location of the Category A opacity he identified on Claimant's December 15, 2017 x-ray, he asserted the May 20, 2019 x-ray showed a "1.5 cm RUL A opacity." Director's Exhibit 13; Claimant's Exhibit 1.

centimeter in his right upper lung zone, which Claimant maintains is sufficient to establish he has complicated pneumoconiosis. *Id.* at 2-5 (unpaginated).

Contrary to Claimant's contention, the existence of an opacity measuring greater than one centimeter opacity on x-ray does not, in and of itself, establish the presence of complicated pneumoconiosis. *See Gray*, 176 F.3d at 389-90; *Melnick*, 16 BLR at 1-33-34. Rather, "complicated pneumoconiosis" is established by the application of statutorily defined criteria. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. "Complicated pneumoconiosis" is a chronic dust disease of the lung which, when diagnosed by chest x-ray, "yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labour Organization" (ILO System). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Although Dr. Meyer identified a large nodule in Claimant's right lung that exceeds one centimeter, he specifically noted on the ILO forms for his readings of Claimant's December 15, 2017, May 20, 2019, and November 19, 2020 x-rays that there are "0" large opacities consistent with pneumoconiosis. Thus we see no error in the ALJ's findings that Dr. Meyer's x-ray readings are negative for complicated pneumoconiosis. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.201, 718.304(c); *Melnick*, 16 BLR at 1-33; Employer's Exhibits 1, 5.

Further, because the ALJ permissibly conducted both a qualitative and quantitative review of the conflicting x-ray evidence, taking into consideration the qualifications of Drs. Crum and Meyer, we affirm the ALJ's finding that there is one positive x-ray, one negative x-ray, and the readings of the other two x-rays are in equipoise. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993); Decision and Order at 6. Consequently, we affirm the ALJ's overall finding at 20 C.F.R. §718.304(a) that the weight of the x-ray evidence is in equipoise and does not satisfy Claimant's burden to establish complicated pneumoconiosis. *See Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); Decision and Order at 9.[5]

Other Evidence – 20 C.F.R. §718.304(c) and Weighing the Evidence as a Whole

We affirm, as unchallenged on appeal, the ALJ's finding the one computed tomography scan of record does not identify complicated pneumoconiosis and her discrediting of Dr. Majmudar's opinion diagnosing complicated pneumoconiosis because he relied on Dr. Crum's positive x-ray readings and did not review all of the x-ray evidence, which the ALJ found to be in equipoise. *See* 20 C.F.R. §718.304(b), (c); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-9. Further, as it is supported by substantial evidence, we affirm the ALJ's overall conclusion that Claimant

[5] The ALJ accurately noted there is no biopsy evidence. 20 C.F.R. §718.304(b).

does not have complicated pneumoconiosis and is unable to invoke the irrebuttable presumption. *See Gray*, 176 F.3d at 389-90; Decision and Order at 9.

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 and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[6] 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).

Arterial Blood Gas Studies[7]

The ALJ considered three arterial blood gas studies. Decision and Order at 12. The July 30, 2018 study produced non-qualifying values at rest and did not include any exercise blood gas testing. Director's Exhibit 14. The May 22, 2019 study produced non-qualifying values at rest and qualifying values with exercise. Director's Exhibit 13. The November 19, 2020 study produced non-qualifying values at rest and did not include any exercise blood gas testing. Employer's Exhibit 4. Noting three studies are non-qualifying and only one is not, and that the most recent study is non-qualifying, the ALJ concluded Claimant did not establish total disability by a preponderance of evidence at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 12.

Claimant argues the ALJ failed to properly consider whether the qualifying exercise blood gas study establishes he is unable to perform the exertional requirements of his usual coal mine work. Claimant's Brief at 6 (unpaginated). This argument has merit.

[6] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] 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). *See Skrack*, 6 BLR at 1-711; Decision and Order at 11-12.

The applicable regulations indicate that total disability may be established by a qualifying resting or exercise blood gas test. 20 C.F.R. §§718.105(b), 718.204(b)(2)(ii). Here, the ALJ specifically found the qualifying exercise study valid and there is no other exercise study to contradict it.[8] Decision and Order at 12.

Further, given her finding that Claimant's usual coal mine work involved heavy exertion, the ALJ did not adequately address whether Claimant's qualifying exercise study is more probative of his ability to perform the heavy manual labor required of his job in comparison to the non-qualifying resting studies.[9] *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co*., 2 BLR 1-972, 1-977 (1980); Decision and Order at 12. While the regulations do not specifically state that a single exercise value may outweigh three nonqualifying resting values, they also do not preclude the ALJ from making such a finding. 20 C.F.R. §718.204(b)(2)(ii). Further, the Board has held an ALJ may permissibly give more weight to an exercise study than the resting studies if it is more indicative of the miner's ability to perform his usual coal mine employment. *See Coen*, 7 BLR at 1-31-32 (exercise blood gas study may be given more weight than resting blood gas studies). Because the ALJ has not explained why the exercise blood gas study is outweighed by the resting studies, her decision does not satisfy the Administrative Procedure Act (APA).[10] We therefore vacate the ALJ's conclusion that the blood gas study evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinion Evidence and Weighing the Evidence as a Whole

[8] The ALJ noted Dr. Westerfield opined in his supplemental report that the exercise blood gas study "appears" to be a "mixed venous" sample and "does not represent a true arterial blood gas." Decision and Order at 12 (quoting Employer's Exhibit 7 at 7). However, the ALJ found Dr. Westerfield "has offered nothing else to substantiate this medical conclusion, and the basis for the conclusion is unclear." *Id.* She further noted Dr. Michos validated the study. *Id.*; *see* Director's Exhibit 13 at 2. Thus, the ALJ rejected Dr. Westerfield's opinion and found Dr. Majmudar's qualifying exercise study valid. Decision and Order at 12.

[9] The ALJ found Claimant's last coal mine job required heavy labor. Decision and Order at 4.

[10] The Administrative Procedure Act requires the ALJ to consider all relevant evidence in the record and to set forth her "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).

The ALJ also considered three medical opinions. Decision and Order at 13-15. Dr. Majmudar performed the Department of Labor's complete pulmonary evaluation of Claimant and opined that he is totally disabled from performing his usual coal mine employment based on his qualifying exercise blood gas study. In contrast, Drs. Westerfield and Selby each examined Claimant and opined he is not totally disabled. Director's Exhibits 13-14; Employer's Exhibits 4, 7.

The ALJ found all three physicians' opinions well-documented and well-reasoned. Decision and Order at 15. However, because she found Drs. Selby and Westerfield reviewed more evidence than Dr. Majmudar and that their conclusions were better supported by the non-qualifying objective evidence, she gave their opinions controlling weight. *Id.* Thus, she found the medical opinion evidence does not support a finding of total disability at 20 C.F.R. §718.204(iv). Decision and Order at 15.

To the extent the ALJ's erroneous weighing of the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) affected her credibility determinations as applied to the conflicting medical opinions, we vacate them and her findings at 20 C.F.R. §718.204(b)(2)(iv). We further vacate the ALJ's overall conclusion that Claimant is not totally disabled and did not invoke the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 15.

Remand Instructions

On remand, the ALJ must consider whether the arterial blood gas studies establish total disability and adequately explain her rationale for the weight accorded to that evidence. 20 C.F.R. §718.204(b)(2)(ii). She must then consider the medical opinions of Drs. Majmudar, Westerfield, and Selby and address whether they are reasoned and documented as well as whether Claimant is capable of performing the heavy manual labor required in his usual coal mine work when considering his limitations.[11] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

If either the arterial blood gas studies or medical opinions, in isolation, support a finding of total disability, the ALJ should then weigh all the relevant evidence together to determine whether Claimant has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Shedlock*, 9 BLR at 1-198. If she finds Claimant is totally disabled, he will invoke the

[11] Having specifically found Dr. Westerfield's opinion not credible as to the validity of Claimant's qualifying exercise blood gas study, the ALJ must reconsider whether it is credible regarding Claimant's ability to perform heavy manual labor. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Section 411(c)(4) presumption. The ALJ must then consider whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(1).

However, if the ALJ finds Claimant is not totally disabled, 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). In rendering all her findings on remand, the ALJ must comply with the APA. 5 U.S.C. §557(c)(3)(A); *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 decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge