U.S. Department of Labor

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

BRB No. 21-0265 BLA

JAMES C. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREENWICH COLLIERIES COMPANY	)	
	)	
and	)	
	)	
PENNSYLVANIA MINES CORPORATION	)	DATE ISSUED: 6/22/2022
	)	
Employer/Carrier-Respondents	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor

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

Ralph J. Trofino, Johnstown, Pennsylvania, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2019-BLA-05897) rendered on a claim filed on August 9, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established twenty-two years of qualifying coal mine employment. Because the record contains no evidence of complicated pneumoconiosis at 20 C.F.R. §718.304, she found Claimant could not 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) (2018). Because Claimant failed to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), the ALJ found he could 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 affirmatively establish entitlement under 20 C.F.R. Part 718. She therefore denied benefits.

On appeal, Claimant argues that the ALJ erred in finding he did not establish a totally disabling pulmonary or respiratory impairment. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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.[2] 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 tests, 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 the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232

[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(b).

[2] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 11-12, 34.

(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 that none of the pulmonary function or blood gas studies produced qualifying values[3] and the preponderance of medical opinions does not establish total disability. Decision and Order at 16; *see* 20 C.F.R. §718.204(b)(2)(i), (ii), (iv). She therefore found Claimant did not establish total disability based on the record as a whole.[4] Decision and Order at 16. Claimant argues the ALJ erred in finding the medical opinion evidence does not support a finding of total disability.[5]

Medical Opinions

Total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing, as non-qualifying testing may still render a miner incapable of performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Further, 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*.") (emphasis added); *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); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000)

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

[4] The ALJ further found there is no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 10.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-two years of qualifying coal mine employment but failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 5, 17.

(miner is totally disabled if he cannot perform the exertional requirements of his previous job).

The ALJ considered three medical opinions. Dr. Zlupko evaluated Claimant on behalf of the DOL on January 24, 2018. Director's Exhibit 11. He diagnosed Claimant with a totally disabling pulmonary impairment based on the non-qualifying pulmonary function study he obtained. Director's Exhibit 11 at 4-5. He explained, "[a]lthough [Claimant's testing] may not meet the disability regulatory standards from the Department of Labor, there is no question in my mind, that this patient would be unable to perform any work in the coal mine." Director's Exhibit 17.

Dr. Fino examined Claimant on May 3, 2018, and reviewed Dr. Zlupko's January 2018 examination report. Director's Exhibit 14. With regard to his own pulmonary function testing and Dr. Zlupko's pulmonary function study, Dr. Fino explained Claimant stopped exhaling "somewhere between four and five seconds" on all test efforts and "never exhaled all of the air in his lungs" and he believed these efforts caused the studies to underestimate Claimant's lung function. Employer's Exhibit 5 at 19, 21. Although Dr. Fino stated Claimant's lung volumes show "some restriction," he said he was unable to determine the degree because Claimant's failure to give "a maximum effort" on the studies produced inaccurate FVC and FEV1 values. Director's Exhibit 14 at 10.

Dr. Pickerill examined Claimant on June 29, 2020, and reviewed the examination reports of Drs. Zlupko and Fino. Employer's Exhibit 2. He opined the pulmonary function tests he and Dr. Fino conducted "showed a moderate restrictive defect, confirmed by decreased lung volumes." *Id* at 5. However, he did not specifically opine as to Claimant's disability status. *Id.* at 6.

Dr. Fino prepared a subsequent report based on his review of Dr. Pickerill's report and objective testing. Dr. Fino opined Claimant gave submaximal effort on Dr. Pickerill's pulmonary function study because he "stopped exhaling around one to one-and-a-half seconds." Employer's Exhibit 5 at 28.

In a subsequent deposition, Dr. Fino testified that all three pulmonary studies of record were invalid due to Claimant's submaximal effort. Employer's Exhibit 5 at 19-21, 27-28. He opined Claimant is not disabled "because [he] and the medical literature require valid lung function studies [in order to diagnose an impairment]." *Id.* at 24. However, when further questioned about his own pulmonary function study, Dr. Fino conceded that Claimant would be unable to perform the heavy exertional demands of his usual coal mine work *if* the study's results were valid.[6] *Id.* at 29-30.

[6] Dr. Zlupko also issued a supplemental report on February 27, 2019, based on his review of Dr. Fino's examination report. Director's Exhibit 16. He reiterated his total

The ALJ found Dr. Pickerill's opinion not probative because he did not specifically address whether Claimant could perform his last coal mine work. Decision and Order at 16. The ALJ found Dr. Zlupko failed to "provide a reasoned explanation as to why the [pulmonary function studies] are abnormal," and did not indicate "what Claimant's last coal mine employment was" or "note the exertion required." *Id.* at 15. By contrast, the ALJ found Dr. Fino's opinion to be well-reasoned and well-documented as Dr. Fino "explained why he deemed the [pulmonary function studies] invalid, providing specific information with respect to Claimant's efforts," and further reasoned that even without accurate numbers the results are above disability levels. *Id*. at 16. Thus, finding only Dr. Fino's opinion merits full probative weight, the ALJ concluded Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Claimant argues that the ALJ erred in summarily crediting Dr. Fino's invalidation of all three pulmonary function studies of record and this error affected her findings at 20 C.F.R. §718.204(b)(2)(iv). Claimant's Brief at 5. We agree.

The determination as to whether a pulmonary function study is valid turns on whether the study is in substantial compliance with the quality standards.[7] 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). Compliance with the quality standards in 20 C.F.R. Part 718, Appendix B, "shall be presumed" unless there is "evidence to the contrary." 20 C.F.R. §718.103(c). 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 her role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

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disability diagnosis and noted the values presented on both his own and Dr. Fino's "pulmonary function studies are almost exactly the same." *Id.* He further stated that Dr. Fino's study "should be considered valid" as "[Dr. Fino's] technician stated that the test met A[merican] T[horacic] S[ociety] standards." *Id.*

[7] An ALJ must consider a reviewing physician's opinion regarding a claimant's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

Although the ALJ ostensibly credited Dr. Fino's opinion in part because he "explained why he deemed the [pulmonary function studies] invalid," she failed to analyze his reasons for reaching that conclusion or explain why or whether she was crediting it to rebut the presumption that each pulmonary function study complies with the quality standards. 20 C.F.R. §718.103(c); *see Vivian*, 7 BLR at 1-361. When analyzing the pulmonary function studies, the ALJ did not reject any of them as invalid based on Dr. Fino's opinion. With respect to Dr. Fino's testing, she discredited his invalidation in part for failing to "reconcile" his opinion with the technician's notes that Claimant gave good effort and cooperation and the test meets American Thoracic Society standards. She further failed to consider all relevant evidence on this issue, including the administering technicians' comments and the medical opinions of Drs. Pickerill and Zlupko, who interpreted their own studies and Dr. Fino's as reliable measures of Claimant's lung function. Director's Exhibits 11 at 6, 14 at 14; Employer's Exhibit 2 at 8; *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). Further, because Dr. Fino's opinion could support a finding of total disability if the studies are reliable,[8] we agree with Claimant that the ALJ must further evaluate the medical opinion evidence. Consequently, we vacate the ALJ's conclusion that Claimant is not totally disabled because her analysis is inconsistent, incomplete, and does not address all relevant evidence.

Remand Instructions

On remand the ALJ must reconsider the pulmonary function studies and determine whether Dr. Fino's opinion is sufficiently reasoned to rebut the presumption that each of the three studies complies with applicable quality standards; as part of this analysis, she must consider all relevant evidence regarding whether those studies are valid. 20 C.F.R. §718.103(c); *see Vivian*, 7 BLR at 1-361. If the ALJ finds any study valid, she must reconsider the medical opinions as to whether Claimant is totally disabled; in doing so, she must address Dr. Fino's concession that, if valid, Claimant's non-qualifying values on Dr. Fino's own study would reflect a disabling impairment. *See Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52; *see also Cornett*, 227 F.3d at 578; Employer's Exhibit 5 at 29-30. In determining whether Claimant is totally disabled, the ALJ must explain her findings as the Administrative Procedure Act requires.[9] 5 U.S.C.

[8] Dr. Fino conceded his own testing resulted in higher values than those of Drs. Zlupko and Pickerill, *see* Director's Exhibit 14 at 10; Employer's Exhibit 5 at 28, and that Claimant would not have the respiratory capacity to perform his usual job duties if Dr. Fino's test results were valid. Employer's Exhibit 5 at 30.

[9] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

§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).

If the ALJ finds the medical opinions establish Claimant has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv), she must determine whether Claimant is totally disabled based on the evidence as a whole. *See Shedlock*, 9 BLR at 1-198. If the ALJ determines Claimant is totally disabled, he will have invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and the ALJ must then address whether Employer has rebutted it. If Claimant is unable to establish total disability, benefits are precluded. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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).