U.S. Department of Labor

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

BRB No. 21-0335 BLA

ROY LEE BREEDLOVE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANADA COAL CORPORATION	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE GROUP	)	DATE ISSUED: 6/23/2022
	)	
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 Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Robert P. Normann (Law Office of Cheryl Esposito Kaufman), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2020-BLA-05040) rendered on a subsequent claim filed on July 17, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ accepted the parties' stipulation that Claimant had twenty-one years of coal mine employment in underground mines and surface mines in conditions substantially similar to underground mines. However, she found Claimant failed to establish a totally disabling respiratory or pulmonary impairment and therefore could not invoke 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. She further found Claimant does not have pneumoconiosis. 20 C.F.R. §718.202. Because Claimant failed to establish these elements of entitlement, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he failed to establish total disability and therefore erred in finding he did not invoke the Section 411(c)(4) presumption. Employer and its Carrier (Employer) respond, urging affirmance of the

[1] Claimant filed two previous claims. On December 4, 2012, the district director denied his most recent claim because he failed to establish any element of entitlement. Director's Exhibit 1. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Therefore, Claimant had to submit new evidence establishing at least one element of entitlement in order to have the claim reviewed on the merits. 20 C.F.R. §725.309(c).

[2] 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); *see* 20 C.F.R. §718.305.

denial of benefits.[3] The Director, Office of Workers' Compensation Programs, has not filed a response.

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.[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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing these elements when certain conditions are met, but failure to establish any one precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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 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 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).

[3] We affirm, as unchallenged on appeal, the ALJ's determination Claimant had twenty-one 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.

[4] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 10.

The ALJ considered the pulmonary function studies,[5] arterial blood gas studies,[6] and medical opinions,[7] and concluded Claimant did not establish he is totally disabled based on any of this evidence. 20 C.F.R. §718.204(b)(2)(i), (ii), (iv).

Claimant argues the ALJ erred in finding the medical opinion evidence insufficient to establish total disability.[8] 20 C.F.R. §718.204(b)(2)(iv); Claimant's Brief at 9-14. We agree.

The ALJ weighed the opinions of Drs. Shah and Rosenberg. Decision and Order at 6-7. Dr. Shah opined Claimant is totally disabled by a combined obstructive and restrictive ventilatory defect, a gas exchange abnormality, and a reduced peak oxygen consumption during exercise. Director's Exhibit 14; Claimant's Exhibit 1. Dr. Rosenberg opined Claimant has no obstruction or restriction and is not totally disabled from a pulmonary perspective. Employer's Exhibit 1. The ALJ found Dr. Shah did not explain how she reconciled her opinion with the non-qualifying objective tests, and found her opinion is in

[5] The record contains the results of two pulmonary function studies. 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. *See* 20 C.F.R. §718.204(b)(2)(i). The August 21, 2018 study yielded non-qualifying values before and after the administration of a bronchodilator. Director's Exhibit 14. The May 21, 2019 study produced non-qualifying results pre-bronchodilator; a post-bronchodilator study was not performed. Employer's Exhibit 1.

[6] The record contains the results of two arterial blood gas studies. A "qualifying" blood gas study yields values that are equal to or less than the applicable table values in Appendix C of Part 718. A "non-qualifying" study yields values exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii). The August 21, 2018 study yielded non-qualifying values at rest and during exercise. Director's Exhibit 14. The May 21, 2019 study produced non-qualifying results at rest; an exercise study was not performed. Employer's Exhibit 1.

[7] The ALJ also found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 6.

[8] We affirm as unchallenged the ALJ's determination that Claimant failed to establish total disability based on pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack,* 6 BLR at 1-711; Decision and Order at 5-6.

equipoise with Dr. Rosenberg's opinion. Decision and Order at 7. The ALJ therefore found the medical opinion evidence does not establish total disability. *Id.*

We agree with Claimant's argument that the ALJ erred in discrediting Dr. Shah's opinion. Claimant's Brief at 9-14. Dr. Shah interpreted Claimant's pulmonary function testing as revealing a mild obstructive ventilatory defect and mildly reduced total lung capacity, residual volume, and single breath carbon monoxide diffusing capacity. Director's Exhibit 14 at 4-5. She also interpreted his arterial blood gas testing as revealing "borderline low oxygen" during rest and "abnormal oxygen transfer during exercise." *Id.* She noted Claimant underwent an incremental treadmill exercise study and was only able to achieve a peak oxygen consumption level of 15.4 milliliters/kilograms/minute (ml/kg/min) indicating a reduced oxygen consumption with exercise. *Id.* at 5. She further noted Claimant was "very short of breath" with a dyspnea level of nine on a scale of one to ten, with ten "being the worst dyspnea." *Id.* She concluded these studies all evidence a "loss of lung function as reflected by his ventilatory impairment showing obstructive and restrictive ventilatory defect, mechanical ventilatory limitation to exercise, gas exchange abnormality and diffusion abnormality with abnormal oxygen transfer." *Id.* at 6.

With respect to whether Claimant could perform his usual coal mine employment, Dr. Shah acknowledged Claimant's pulmonary function and arterial blood gas studies are non-qualifying, but nonetheless opined he is totally disabled by his overall loss of lung function. Director's Exhibit 14 at 6. She explained that a "worker involved in manual labor can work comfortably at approximately [forty percent] of his maximal/peak oxygen consumption" for an entire shift. *Id.* As Claimant was only able to achieve 15.4 ml/kg/min of peak oxygen consumption, forty percent of this would be 6.16 ml/kg/min. *Id.* She opined that level of oxygen consumption indicates Claimant "can do light intensity work but he cannot do [the] heavy or very heavy labor"[9] required of his usual coal mine employment.[10] *Id.*

In discrediting Dr. Shah's opinion, the ALJ summarily found the doctor "neither explained how she reconciled her conclusions with the Claimant's non-qualifying

[9] Dr Shah testified heavy work requires a maximum oxygen consumption of sixteen to twenty ml/kg/min and very heavy work requires twenty to thirty ml/kg/min. Claimant's Exhibit 1 at 17-19.

[10] Dr. Shah noted Claimant's usual coal mine employment was that of an "[e]lectrician, mechanic, and [w]elder," and he worked on equipment inside the mine four days a week and outside the mine one day a week. Director's Exhibit 14 at 2-3. She set forth the duties of his usual coal mine employment in her report. *Id.*

[pulmonary function] and [arterial blood gas] study results nor did she address why she valued gas exchange abnormality over the non-qualifying results." *Id.* Contrary to the ALJ's finding, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). The regulations specifically provide that even where the pulmonary function studies and blood gas studies are non-qualifying, "total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents . . . [him] from" performing his usual coal mine employment. 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 conclude that a miner is unable to do his last coal mine job.[11] *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). As Dr. Shah acknowledged Claimant's objective testing is non-qualifying but set forth her basis for concluding why he is still totally disabled by his overall loss of lung function, substantial evidence does not support the ALJ's finding that Dr. Shah did not explain "how she reconciled her conclusions with the Claimant's non-qualifying" objective testing. Decision and Order at 7; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); Director's Exhibit 14.

The ALJ also erred in her consideration of Dr. Rosenberg's opinion. While she summarized Dr. Rosenberg's opinion, she made no determination as to whether it is

[11] In determining whether a miner is totally disabled, the ALJ must compare the exertional requirements of the miner's usual coal mine work with a physician's description of the miner's pulmonary impairment and physical limitations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). Although the ALJ listed Claimant's last job in the mines as an electrician and mechanic, she did not make a finding regarding Claimant's usual coal mine work or the exertional requirements of such work or compare those requirements with the physicians' assessments to determine whether the evidence establishes total respiratory disability. *See Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

reasoned and documented. Decision and Order at 7. Although she assigned his opinion "some weight," she did not explain the basis for this finding. *Id*. Thus she erred by failing to critically analyze Dr. Rosenberg's opinion, render any findings as to whether his opinion is reasoned and documented, or otherwise explain why she found this opinion credible as required by the Administrative Procedure Act (APA).[12] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must still conduct an appropriate analysis of the evidence to support his or her conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Finally, we conclude the ALJ erred by failing to resolve the conflict in the medical opinions or explain why the evidence is in equipoise, notwithstanding the above erroneous findings. *Wojtowicz*, 12 BLR at 1-165. The ALJ found the opinions of both Dr. Shah and Dr. Rosenberg entitled to "some weight" and in equipoise. Decision and Order at 7. While a claimant fails to meet his burden of proof when the evidence is equally balanced, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 279-81 (1994), the ALJ must nevertheless explain her rationale for reaching that conclusion. The mere fact that the relevant evidence may be conflicting does not authorize the ALJ to declare Claimant failed to establish total disability. *See generally Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010) ("[ALJ] has a duty to explain, on scientific grounds, why a conclusion cannot be reached"). It is the ALJ's duty to evaluate conflicting evidence, draw appropriate inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc).

Thus, we vacate the ALJ's finding that the medical opinion evidence does not establish total disability, and that Claimant did not establish total disability based on all relevant evidence. 20 C.F.R. §718.204(2)(iv). We further vacate her finding Claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Accordingly, we vacate the denial of benefits.

[12] The Administrative Procedure Act provides 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).

On remand, the ALJ must first determine the exertional requirements of Claimant's usual coal mine work and consider the medical opinions in light of those requirements. *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *see also Cornett*, 227 F.3d at 578. In rendering her credibility findings, she must consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The ALJ must also reweigh the evidence as a whole, and determine whether Claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will invoke the Section 411(c)(4) 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. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR at 1-27. In rendering her 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.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge