U.S. Department of Labor

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

BRB No. 22-0292 BLA

STEVEN GANNON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PREPARATION MAINTENANCE, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 6/12/2023
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson, Kentucky, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Denying Benefits (2020-BLA-05659) rendered on a claim filed on March 11, 2019, pursuant to the Black lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined Claimant established 21.88 years of underground coal mine employment but failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). He therefore found Claimant 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. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.304. The ALJ thus denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish a totally disabling respiratory or pulmonary impairment. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has declined to file a response.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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 21.88 years of underground 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 Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See*

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis 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 if certain conditions are met, but failure to establish any one of these elements precludes an award 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).

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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. *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 consider all relevant evidence and weigh the evidence supporting total disability against the 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). The ALJ found Claimant did not establish total disability based on any category of evidence or in consideration of the record as a whole. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 15-18.

Blood Gas Studies[4]

The ALJ considered two blood gas studies dated June 11, 2019, and February 5, 2020. Decision and Order at 8; Director's Exhibit 14; Employer's Exhibit3. Dr. Gaziano's

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 15-18.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that the pulmonary function studies do not support total disability, and there is no 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 15-16.

June 11, 2019 study produced non-qualifying values at rest and during exercise.[5] Director's Exhibit 14. Dr. Zaldivar's February 5, 2020 study produced non-qualifying values at rest and did not include any exercise blood gas testing. Employer's Exhibit 4. The ALJ therefore found the blood gas study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 15. In challenging this finding, Claimant asserts Dr. Gaziano's exercise study should be considered qualifying because it was only one point over the qualifying value in Appendix C of Part 718 and Dr. Gaziano relied on it in diagnosing Claimant as totally disabled. Claimant's Brief at 4, 8-10. We disagree.

The language of the regulation is clear: to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), a miner's arterial PO2 must be "equal to or less than" the values set out in 20 C.F.R. Part 718, Appendix C. 20 C.F.R. Part 718, App. C; 20 C.F.R. §718.204(b)(2)(ii). As substantial evidence supports the ALJ's finding that none of Claimant's blood gas studies produced qualifying values, we affirm it. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); Decision and Order at 15. We therefore affirm that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 15.

Medical Opinions

Notwithstanding non-qualifying objective testing, total disability may be established by a reasoned medical opinion that the miner is unable to perform his usual coal mining work. 20 C.F.R. §718.204(b)(2)(iv); *see Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000). A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982). The ALJ determined Claimant last worked as a superintendent of operations and safety director, which required him to lift up to sixty pounds. Decision and Order at 5. He found this job required "moderate" exertion. *Id.* The parties do not challenge these findings; thus, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ considered the medical opinions of Drs. Gaziano, Zaldivar, and Spagnolo. Decision and Order at 9-11, 15-16. Dr. Gaziano diagnosed a moderate gas exchange

[5] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

impairment with exercise and moderate diffusion impairment, which in sum he considered totally disabling.[6] Director's Exhibits 14, 17. Dr. Zaldivar diagnosed Claimant with a mild obstruction, moderate diffusion impairment, and resting hypoxemia. Employer's Exhibit 4 at 2-4. Although he also conceded Dr. Gaziano's blood gas study demonstrated an "unexpect[ed] drop" in oxygenation with exercise, he opined Claimant is not totally disabled.[7] Employer's Exhibit 8 at 28-33. Dr. Spagnolo conducted a medical records review and opined that none of the abnormalities seen on Claimant's diffusion capacity tests or exercise blood gas study are sufficient to prevent him from returning to his prior coal mining job. Employer's Exhibit 7 at 9.

The ALJ found Dr. Gaziano correctly understood the exertional requirements of Claimant's last coal mine job. Decision and Order at 17. But he found Dr. Gaziano's opinion "conclusory" and not well-reasoned as the physician failed to adequately explain why he found Claimant "totally disabled despite objective test results exceeding [Department of Labor] DOL's total disability criteria" and failed to explain "why the [American Medical Association] AMA standard [for assessing diffusion capacity impairment] was better or more reliable than the DOL criteria in this case." *Id.* By contrast, he found that although Dr. Zaldivar "speculated as to the effect of Claimant's cancer on multiple tests," his report overall is well-reasoned and documented as it is "consistent with the objective medical data." *Id.* The ALJ found Dr. Spagnolo's opinion not well-reasoned because he based it on a requirement of light physical work, contrary to the ALJ's finding that Claimant's last job required moderate exertion. *Id.* The ALJ thus concluded Claimant did not establish total disability by a reasoned medical opinion. *Id.*

Claimant argues the ALJ mischaracterized Dr. Gaziano's opinion as suggesting the AMA standard better assesses total disability and erred in affording it less weight than Dr. Zaldivar's opinion. Claimant's Brief at 4, 6. We agree that the ALJ's credibility determinations cannot be affirmed.

[6] Dr. Gaziano noted Claimant's exercise blood gas study exceeded the qualifying table value at Appendix C of 20 C.F.R. Part 718 by one point and that his diffusion capacity, which was fifty-five percent of predicted, represents a moderate pulmonary function impairment based on American Medical Association standards. Director's Exhibit 17.

[7] Dr. Zaldivar explained Claimant's pulmonary function and blood gas studies are non-qualifying, that the "Department of Labor does not use the diffusion [capacity test to assess total disability]," and Claimant's diffusion impairment and exercise hypoxemia are due to his metastatic prostate cancer. Employer's Exhibit 8 at 29-33.

The regulations specifically provide that a physician may base a reasoned medical judgment of total disability upon "medically acceptable clinical and laboratory diagnostic techniques . . . ."[8] 20 C.F.R. §718.204(b)(2)(iv); *see also Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991) (ALJ erred in discrediting a physician's diagnosis of total disability based on a diffusion capacity test merely because that test was not listed in the regulations). Moreover, total disability may be established with reasoned medical opinion evidence, even "[w]here total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i) [and] (ii) . . . of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); s*ee Eagle*, 943 F.2d at 512-13; *Cornett*, 227 F.3d at 587.

As Claimant asserts, Dr. Gaziano's report does not state that the AMA is a better method for assessing respiratory or pulmonary impairments than the established DOL criteria. Claimant's Brief at 9. Nor did he indicate that the assessment methods are mutually exclusive or that he relied on the diffusion capacity test over Claimant's pulmonary function or blood gas studies. To the contrary, Dr. Gaziano explicitly stated he based his opinion that Claimant could not perform his last coal mining work on his near-qualifying exercise gas-exchange impairment in conjunction with a diffusing capacity impairment that the AMA standards categorize as moderate. Claimant's Brief at 8; Director's Exhibits 14 at 4, 17. As the ALJ found Dr. Gaziano correctly understood the exertional requirements of Claimant's usual coal mine work, but did not fully consider his opinion that the sum of Claimant's diffusion and exercise blood gas testing indicate a respiratory or pulmonary impairment that precludes that work, we vacate the ALJ's finding that Dr. Gaziano's opinion is not well-reasoned. *See Eagle*, 943 F.2d at 512-13; *Walker*, 927 F.2d at 184-85; Decision and Order at 17.

We additionally agree with Claimant that substantial evidence does not support the ALJ's determination to credit Dr. Zaldivar's opinion as well-reasoned. Claimant's Brief at 5-7. The proper inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has established a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether the Section 411(c)(4) presumption has been rebutted. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii). The applicable regulation further provides that "if a non-pulmonary or non-respiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition

[8] Employer does not argue that a diffusion capacity test is not a medically acceptable clinical or laboratory diagnostic technique. Moreover, both Drs. Zaldivar and Spagnolo interpreted Claimant's diffusion capacity test as "reduced" or demonstrating a "moderate diffusion abnormality." Employer's Exhibits 4 at 2, 7 at 9, 8 at 29.

or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).

Despite diagnosing a moderate diffusion impairment and admitting that Dr. Gaziano's exercise blood gas test shows at least a mild impairment with exercise, Dr. Zaldivar argued these impairments are not totally disabling because they are due to metastatic prostate cancer.[9] Employer's Exhibit 8 at 29-30, 32-34. In failing to address this aspect of Dr. Zaldivar's opinion, the ALJ failed to consider whether Dr. Zaldivar actually opined that Claimant's impairments are not totally disabling or simply avoided the question by saying they are due to cancer. *See* 20 C.F.R. §718.204(a)-(c). Further, although the ALJ accurately observed Dr. Zaldivar's opinion is consistent with Claimant's non-qualifying objective studies, Claimant correctly asserts the ALJ failed to consider Dr. Zaldivar's statement that he does not know whether Claimant still has hypoxemia with exercise given that he did not conduct an exercise blood gas test. Claimant's Brief at 5-6; Employer's Exhibit 4 at 2. Because the ALJ did not consider these aspects of Dr. Zaldivar's opinion, we vacate his determination to credit it. *See Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951) ("substantiality of evidence must take into account whatever in the record fairly detracts from its weight"); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997) (same).

In light of our determination to vacate the ALJ's credibility findings with respect to Drs. Gaziano and Zaldivar, we vacate his findings that Claimant did not establish total disability by a reasoned medical opinion at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the record as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Remand Instructions

On remand, the ALJ must reweigh Drs. Gaziano's and Zaldivar's opinions on total disability at 20 C.F.R. §718.204(b)(2)(iv). The ALJ must compare the physicians' diagnosed pulmonary impairments with the exertional requirements of Claimant's usual coal mine work and explain the weight he accords their opinions based on his consideration of their comparative credentials, the explanations for their medical findings, the documentation underlying their medical judgements, and the sophistication of and bases for their conclusions. *See* 20 C.F.R. §718.204(b)(2)(iv); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Akers*, 131 F.3d at 441; *Eagle*, 943 F.2d at 512-13;

[9] Dr. Zaldivar acknowledged that prostate cancer "will affect the lungs" because "the cancer . . . travels through the capillaries" and "there is not going to be a lot of oxygen exchange." Employer's Exhibit 8 at 23, 29.

Walker, 927 F.2d at 184-85; *Cornett*, 227 F.3d at 578. If Claimant establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must determine whether the evidence as a whole establishes that Claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

Because Claimant established 21.88 years of underground coal mine employment, if the ALJ finds Claimant established he is totally disabled, he will have invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The ALJ then must consider whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(1). However, if Claimant is unable to establish total disability, benefits are precluded and the ALJ may reinstate the denial of benefits. 20 C.F.R. Part 718; *see Anderson*, 12 BLR at1-112; *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In rendering his findings on remand, the ALJ must comply with the Administrative ProcedureAct.[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[10] 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).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge