U.S. Department of Labor

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

BRB No. 21-0384 BLA

MICHAEL J. SCOPELLITI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UAE COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 03/17/2023
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
	)	
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 and Order Denying Claimant's Motion for Reconsideration of Scott R. Morris, Administrative Law Judge, Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for Claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits and Order Denying Claimant's Motion for Reconsideration (2019-BLA-06303) rendered on a claim filed on July 23, 2018[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had 22.45 years of qualifying coal mine employment, but found Claimant failed to establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.304(b)(2). He therefore found Claimant did 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), or establish entitlement under 20 C.F.R. Part 718. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.304. Thus, the ALJ denied benefits. Claimant subsequently filed a timely motion for reconsideration, which the ALJ denied.

On appeal, Claimant argues the ALJ erred in finding he failed to establish he is totally disabled, and therefore erred in finding he did not invoke the Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. 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 Orders if they are 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).

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

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[1] Claimant's previous claim for benefits was withdrawn. *See* 20 C.F.R. §725.306(b); Director's Exhibit 2. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[2] 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.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

(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).

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). 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.[4] 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).

Pulmonary Function Studies

The ALJ considered four pulmonary function studies conducted on December 28, 2016, November 6, 2018, September 27, 2019, and October 19, 2019. Decision and Order at 9-10. The December 28, 2016, November 6, 2018,[5] and September 27, 2019 studies yielded non-qualifying values.[6] Employer's Exhibits 3 at 11; 4; Director's Exhibit 10 at 2. The October 19, 2019 pulmonary function study was qualifying. Claimant's Exhibit 3. The ALJ determined it was not valid for determining total disability, however, as there was

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[4] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[5] The November 6, 2018 pulmonary function study also produced non-qualifying values after the administration of bronchodilators. Decision and Order at 9; Director's Exhibit 10.

[6] 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).

excessive variability in the FEV1 values. Decision and Order at 10. As there are no valid and qualifying pulmonary function studies, the ALJ found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Claimant argues the ALJ erred in finding the October 19, 2019 pulmonary function study invalid, contending the ALJ erroneously substituted his judgment for that of the medical experts. Claimant's Brief at 29-31. We agree.

Dr. Kraynak administered the October 19, 2019 pulmonary function study as part of his regular treatment of Claimant. Claimant's Exhibit 3. Dr. Fino reviewed the study and opined it was invalid and therefore should not be used for determining total disability as it underestimates Claimant's pulmonary function. Employer's Exhibit 2; Employer's Exhibit 48 at 14-15. He explained that the FVC tracings show: a lack of an abrupt onset to exhalation; a hesitancy and inconsistency in the expiratory flows; a premature termination to exhalation before five seconds; a lack of plateauing in the expiratory curves; a lack of reproducibility in the expiratory curves; and a complete lack of patient effort and cooperation. *Id.* Dr. Kraynak disagreed with each of Dr. Fino's findings, opining that Claimant's effort and cooperation were "very good," and that the study validly reflects Claimant's true pulmonary function. Claimant's Exhibit 6; Claimant's Exhibit 7 at 10-11. The ALJ independently determined that that the study was invalid due to excessive variability, as the variation in the two largest FEV1 values exceeds five percent of the largest value and more than 100mL. Decision and Order at 10.

As the trier-of-fact, the ALJ's function is to weigh the evidence, draw appropriate inferences, and determine the credibility of the evidence. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673 (4th Cir. 2017). But the interpretation of objective data is a medical determination and an ALJ may not substitute his opinion for that of a physician. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Rather than weighing the conflicting evidence, the ALJ appears to have inappropriately substituted his opinion for those of the medical experts in reaching his conclusion that the test was invalid. *See Schetroma*, 18 BLR at 1-23-24; *Marcum*, 11 BLR at 1-24; *see also* 20 C.F.R. Part 718, Appendix B(2)(ii)(G) (excessive variability in the FEV1 curves "should be clearly noted in the test report by the physician conducting or reviewing the test").

Moreover, the October 19, 2019 pulmonary function study was conducted as part of Dr. Kraynak's regular treatment of Claimant. Claimant's Exhibits 3; 7 at 6-7. Therefore, the quality standards do not apply to the study. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits and not to testing included as part of a miner's treatment"). The ALJ thus should have determined whether the study is

sufficiently reliable to support a finding of total disability. *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); *see also* 20 C.F.R. Part 718, Appendix B(2)(ii)(G) (study with excessive variability may still be submitted "[a]s individuals with obstructive disease or rapid decline in lung function will be less likely to achieve [a] degree of reproducibility").

As the ALJ provided no explanation or rationale for rejecting Claimant's treatment record pulmonary function study except to find it does not comply with one quality standard, we cannot affirm his finding it entitled to no probative weight. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); 65 Fed. Reg. at 79,928. We therefore vacate the ALJ's finding that the pulmonary function studies do not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ next considered the medical opinions of Drs. Futerfas, Kraynak, Fino, and Durrani. Decision and Order at 17-19. Dr. Futerfas opined Claimant is totally disabled from a pulmonary perspective despite his non-qualifying objective testing. Director's Exhibit 10. Dr. Kraynak also opined Claimant is totally disabled from performing his usual coal mine employment based upon his symptoms, physical examination, and objective testing, explaining that he could do some light activity or work at his own pace but could not perform the work of a miner. Claimant's Exhibits 4, 6-8. Dr. Fino opined Claimant has no respiratory impairment as the qualifying objective tests are invalid. Employer's Exhibits 6-9. Similarly, Dr. Durrani opined Claimant "does not have a respiratory impairment that can be clearly identified and validated." Employer's Exhibit 4.

The ALJ found Dr. Futerfas's opinion not well-reasoned or documented and accorded it little weight. Decision and Order at 17-18. He further credited the opinions of Drs. Kraynak, Fino, and Durrani as well-documented and reasoned, and accorded them normal probative weight. Decision and Order at 18-19; Order on Reconsideration at 4. However, he found the opinions of Drs. Fino and Durrani more persuasive as they were consistent with the objective testing. *Id.* Consequently, he found the medical opinion evidence does not establish total disability. *Id.*

Claimant argues the ALJ erred in his consideration of the medical opinion evidence. Claimant's Brief at 9-26. We agree.

Dr. Futerfas noted Claimant suffers from wheezing, a productive cough, and dyspnea with daily activities and using stairs that gets worse when carrying objects. Director's Exhibit 10. In addition, he noted a decrease in air movement and basilar crackles on examination and opined that, while non-qualifying, Claimant's objective testing demonstrates abnormalities in his pulmonary condition. *Id.* He concluded that Claimant's

exercise limitation would render him unable to perform his usual coal mine employment, including carrying a jackhammer, hoses, and hoisting. *Id.*

The ALJ discredited Dr. Futerfas's opinion solely because he did not consider the most recent objective testing. Decision and Order at 17-18. The more recent pulmonary function studies, however, show a continual decline in function.[7] Claimant's Exhibit 3; Employer's Exhibit 3. The ALJ has not adequately explained why the physician's opinion that Claimant is totally disabled despite non-qualifying test results would be rendered less persuasive because he did not consider subsequent testing with lower values. *See Wojtowicz*, 12 BLR at 1-165; *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests).

Independently, as the ALJ's weighing of the remaining medical opinions was dependent on his findings regarding the pulmonary function studies, we must vacate his determination that the opinions of Drs. Fino and Durrani are more persuasive than Dr. Kraynak's because they are more consistent with the objective testing.[8] 20 C.F.R. §718.204(b)(2)(iv).

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[7] Dr. Futerfas conducted both the December 28, 2016 and November 6, 2018 pulmonary function studies. Director's Exhibit 10; Employer's Exhibit 4. The subsequent September 27, 2019 study showed a decline in the FEV1, FVC, and FEV1/FVC ratio since the November 6, 2018 study. Director's Exhibit 10; Employer's Exhibit 3. The October 19, 2019 study showed further decline in the FEV1 and FEV1/FVC ratio. Claimant's Exhibit 3.

[8] However, we reject Claimant's argument that the ALJ erred in not giving more credit to Dr. Kraynak's opinion as being from Claimant's treating physician. Claimant's Brief at 11-13. An ALJ may assign controlling weight to a treating physician's opinion based on the nature and duration of the physician's relationship with the miner and the frequency and extent of the treatment. 20 C.F.R. §718.104(d); *see Soubik v. Director, OWCP*, 366 F.3d 226, 235 (3d Cir. 2004). The weight given to a treating physician's opinion, however, "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence, and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade"). The ALJ permissibly found Dr. Kraynak's opinion should not be accorded controlling weight based on his status as Claimant's treating physician because he had treated Claimant only three times over the course of a year, he is Board certified in only

We therefore vacate the ALJ's determination that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), that the evidence as a whole does not establish total disability at 20 C.F.R. §718.204(b)(2), and therefore that Claimant did not invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.304.

Remand Instructions

On remand, the ALJ must first reconsider whether the October 19, 2019 pulmonary function study is reliable for establishing total disability. *See* 65 Fed. Reg. at 79,928. In doing so, the ALJ must resolve the conflicts in the medical opinions without substituting his opinion for that of the experts. *See Marcum*, 11 BLR at 1-24. The ALJ must then determine if the pulmonary function studies establish total disability at 20 C.F.R. §718.204(b)(2)(i).

The ALJ must then reconsider whether Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). In doing so, he must reconsider all medical opinions on total disability in light of the exertional requirements of Claimant's usual coal mine employment.[9] *See Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997). In rendering his 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 Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Akers*, 131 F.3d at 441-42.

If Claimant establishes total disability through the pulmonary function studies or medical opinions, the ALJ must also reweigh the evidence as a whole and determine whether Claimant has established total disability and therefore 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

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osteopathic medicine, and he did not provide significant treatment for Claimant's pulmonary condition. *See Soubik*, 366 F.3d at 235; *Williams*, 338 F.3d at 513; Order on Reconsideration at 3.

[9] The ALJ determined Claimant's usual coal mine employment was working as a roof bolter and required heavy manual labor. Decision and Order at 7-8. On remand, the ALJ should consider Claimant's argument that Drs. Durrani and Fino did not have an accurate understanding of Claimant's usual coal mine employment. Claimant's Brief at 25-26.

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; *Perry*, 9 BLR at 1-2. In rendering his findings on remand, the ALJ must comply with the Administrative Procedure Act.[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165 (1989).

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.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[10] 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).