U.S. Department of Labor

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

BRB No. 21-0466 BLA

DANA D. ALLEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY, c/o CONSOL CNX CENTER	)	
	)	
and	)	DATE ISSUED: 03/23/2023
	)	
CONSOL ENERGY	)	
	)	
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 on Modification of a Subsequent Claim of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits on Modification of a Subsequent Claim (2020-BLA-05420) rendered on a request for modification of a denial of a subsequent claim filed on February 23, 2017,[1] pursuant to the Black Lungs Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a January 7, 2019 Decision and Order Denying Benefits, ALJ Natalie A. Appetta denied benefits because Claimant failed to establish a totally disabling respiratory or pulmonary impairment or the existence of pneumoconiosis and thus failed to establish a change in an applicable condition of entitlement. 20 C.F.R. §§718.202, 718.204(b)(2), 725.309. Claimant timely requested modification of that denial. 20 C.F.R. §725.310.

In the Decision and Order that is the subject of this appeal, ALJ Swank (the ALJ) accepted the parties' stipulation that Claimant has at least fifteen years of qualifying coal mine employment. He also found Claimant established the existence of legal pneumoconiosis, thereby establishing a change in an applicable condition of entitlement, and that granting modification would render justice under the Act. 20 C.F.R. §§718.202, 725.309, 725.310. However, he found Claimant failed to establish total disability, 20 C.F.R. §718.204(b)(2), and therefore found he could not invoke the presumption of total

[1] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, an ALJ must also deny the subsequent claim unless she finds that "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). This is Claimant's third claim for benefits. On June 12, 2002, the district director denied his prior claim, filed on January 31, 2001, because he did not establish any element of entitlement. Director's Exhibit 5. Therefore, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3.

disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4), or establish entitlement under 20 C.F.R. Part 718. Thus, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding the evidence did not establish a totally disabling pulmonary impairment. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response.[3]

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).

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

A miner is considered totally disabled if he has a respiratory or pulmonary impairment that, 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 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 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R.

[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] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established at least fifteen 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.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 7; Director's Exhibits 4, 9.

§718.204(b)(2). Claimant contends the ALJ erred in finding the medical opinion evidence and evidence as a whole failed to establish total disability.[5] Claimant's Brief at 4-6.

Before weighing the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the ALJ addressed the exertional requirements of Claimant's usual coal mine work as an end loader operator. Decision and Order at 7. He considered Claimant's testimony that, as part of his duties, he was required to climb, load coal, dig, conduct maintenance on the end loader, shovel mud and debris, clean the tracks, and move into and out of the end loader. *Id.*; Hearing Tr. at 16. Taking official notice of the *Dictionary of Occupational Titles*, the ALJ found the job duties Claimant described required "moderate labor,"[6] which he defined as requiring work at the medium exertional level.[7] Decision and Order at 7 & n.8.

On modification, Claimant submitted the new medical opinions of Drs. Aulick and Saludes that Claimant is totally disabled, while Employer submitted the medical opinions of Drs. Jaworski, Tuteur, and Vuskovich that he is not. Director's Exhibits 15 (before us as Director's Exhibit 18),[8] 38; Employer's Exhibits 4, 7-9. The ALJ determined the opinions of Drs. Saludes, Jaworski, Tuteur, and Vuskovich are well-reasoned and thus gave them more weight, but he found Dr. Aulick's opinion not well-reasoned and thus gave it less weight. Decision and Order at 15-16. Weighing the opinion evidence together, the ALJ found the medical opinion evidence does not establish total disability.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that the pulmonary function studies and blood gas studies do not support total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 10-13.

[6] We affirm as unchallenged the ALJ's finding that Claimant's usual coal mine work as an end loader operator required "moderate labor" at the medium exertional level. *See Skrack*, 6 BLR at 1-711; Decision and Order at 7 & n.8.

[7] The ALJ noted the *Dictionary of Occupational Titles* describes medium work as requiring exerting twenty to fifty points of force occasionally and ten to twenty-five pounds of force frequently. Decision and Order at 7 n.8.

[8] The ALJ identifies Dr. Jaworski's opinion as Director's Exhibit 15, whereas it is marked as Director's Exhibit 18 in the record before us.

Claimant asserts the ALJ erred in discrediting Dr. Aulick's opinion "based merely on the fact that Dr. Aulick found disability based on a non-qualifying"[9] pulmonary function study. Claimant's Brief at 6. We agree.

Dr. Aulick explained that, although the October 6, 2020 pulmonary function study was non-qualifying, its results were close to qualifying, with a qualifying FEV1, and demonstrated Claimant has a moderate obstructive lung defect that would prevent him from performing the exertional requirements of his last coal mining job. Claimant's Exhibit 1 at 4. The ALJ noted Dr. Aulick's rationale but discredited his opinion, stating only that "the pulmonary function test result cited" is non-qualifying and that "Dr. Aulick does not provide other evidence to support his conclusion of total disability." Decision and Order at 16.

Contrary to the ALJ's rationale, the regulations provide that despite non-qualifying pulmonary function studies or blood gas studies, total disability may be established if a physician, exercising reasoned medical judgment based on medically acceptable diagnostic techniques, concludes the miner's respiratory or pulmonary condition prevented him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Thus, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying, *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *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, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

Claimant also argues the ALJ erred in crediting the opinions of Drs. Jaworski, Tuteur, and Vuskovich. Claimant's Brief at 5-6. We agree, in part.

As the ALJ observed, based on the results of his July 11, 2017 examination and objective testing, Dr. Jaworski opined there is no evidence of any significant respiratory impairment which would prevent Claimant from performing his last coal mining job as an equipment operator. Decision and Order at 15; Director's Exhibit 15 at 4 (before us as Director's Exhibit 18). The ALJ concluded Dr. Jaworski's opinion is entitled to more weight as it is consistent with his objective testing as well as the ALJ's conclusions that

[9] 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).

the pulmonary function studies and blood gas studies do not establish total disability. Decision and Order at 15. Similarly, the ALJ found Drs. Tuteur's and Vuskovich's opinions that Claimant is not disabled well-reasoned because both found the objective testing does not establish the existence of a totally disabling respiratory impairment, consistent with the ALJ's findings. Decision and Order at 15-16; Employer's Exhibits 7 at 21; 8 at 12.

Contrary to Claimant's assertion, Claimant's Brief at 5-6, the ALJ was not required to discredit Dr. Jaworski's opinion because he did not review the qualifying May 1, 2019 pre-bronchodilator pulmonary function study. A medical opinion need not be discounted merely because the physician did not review additional medical evidence of record. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986) (ALJ properly considered whether objective data offered as documentation adequately supported the opinion); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (it is within the ALJ's discretion to determine whether a physician's opinion is reasoned); Director's Exhibit 15 (before us as Director's Exhibit 18).

We agree, however, that while the ALJ determined Drs. Jaworski's, Tuteur's, and Vuskovich's opinions are consistent with his finding that the overall weight of the pulmonary function study results are non-qualifying,[10] that conclusion does not answer the pertinent question of whether they offered reasoned opinions that Claimant is unable to perform his previous coal mine work. 20 C.F.R. §718.204(b)(2) (relevant inquiry is whether the miner's respiratory impairment prevents him from performing his usual coal mine work); *see Cornett*, 227 F.3d at 587 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Given the ALJ's crediting of Dr. Saludes's opinion that Claimant is totally disabled based on the qualifying April 4, 2018 study, and his obligation to reconsider on remand whether Dr. Aulick credibly opined Claimant is totally disabled based on the non-qualifying October 6, 2020 study, there

[10] The ALJ weighed four pulmonary function studies. The July 12, 2017, April 4, 2018, and October 6, 2020 studies were non-qualifying pre-bronchodilator, while the May 1, 2019 study was qualifying pre-bronchodilator. Decision and Order at 11. All post-bronchodilator values were non-qualifying; however, the ALJ may determine post-bronchodilator values have less probative value on the question of whether Claimant has a disabling impairment. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [but] it may aid in determining the presence or absence of pneumoconiosis"); *Milburn Colliery Co. v. Hicks*, 13 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

remains an unresolved conflict in the medical opinions as to whether Claimant's pulmonary function study values render him totally disabled. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d at 316-17 (it is the ALJ's duty to resolve conflicts in the evidence); *Hicks*, 138 F.3d at 533 (ALJ must adequately explain his reasons for crediting a physician). We are thus unable to affirm the ALJ's crediting of Drs. Jaworski's, Tuteur's, and Vuskovich's opinions as well-reasoned.

Finally, Claimant correctly argues the ALJ erred by not providing an adequate rationale to explain why he credited the opinions of Drs. Jaworski, Tuteur, and Vuskovich over that of Dr. Saludes. Claimant's Brief at 6. An ALJ may not rely solely on a head count of the physicians providing assessments; he must also conduct a qualitative analysis of their opinions. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Adkins v. Dir., OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016) (ALJ may not base a determination on numerical superiority of the same items of evidence). Although the ALJ determined each physician offering an opinion has similar credentials and that Drs. Saludes, Jaworski, Tuteur, and Vuskovich all provided well-reasoned opinions entitled to more weight, Decision and Order at 15-16, he failed to explain why Dr. Saludes's opinion that Claimant is disabled is outweighed by the contrary opinions of the other physicians. We therefore vacate the ALJ's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), as well as his finding that Claimant therefore did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and remand the case for further consideration.

On remand, the ALJ must reweigh the medical opinions on total disability, comparing the exertional requirements of Claimant's usual coal mine work with the descriptions of his pulmonary impairment and physical limitations. *Scott*, 60 F.3d at 1142. Specifically, the ALJ must consider whether Dr. Aulick's opinion is well-reasoned even though it relies on non-qualifying objective testing. *Id.*; 20 C.F.R. §718.204(b)(2)(iv). He must further consider whether the opinions of Drs. Jaworski, Tuteur, and Vuskovich adequately address whether Claimant is unable to perform his previous coal mine work. 20 C.F.R. §718.204(b)(2); *see Cornett*, 227 F.3d at 587. In weighing the opinions, the ALJ must take into consideration the physicians' explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions, and he must explain his rationale for crediting one opinion over another. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the ALJ finds the evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the relevant evidence together, like and unlike, to determine whether Claimant has established the existence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 198.

If the ALJ finds the evidence establishes total disability, Claimant will have invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the ALJ must then determine if Employer is able to rebut it. 20 C.F.R. §718.305(d). Alternatively, if Claimant does not establish total disability, benefits must be denied as he has failed to establish an essential element of entitlement. *See 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).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits on Modification of a Subsequent Claim, and remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge