U.S. Department of Labor

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

BRB No. 22-0210 BLA

TERRY WALDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY BEAR RUN SERVICES, LLC	)	DATE ISSUED: 03/08/2023
	)	
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 on Remand of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits on Remand (2017-BLA-05958) rendered on a miner's claim filed

on April 21, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In his initial Decision and Order Denying Benefits, the ALJ found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he could 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 to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2).

On appeal, the Board affirmed as unchallenged the ALJ's finding that Claimant established at least twenty-five years of qualifying coal mine employment. *Walden v. Peabody Bear Run Services*, BRB No. 19-0324 BLA, slip op. at 7 n.7 (Jul. 23, 2020) (unpub.).[2] The Board also affirmed as unchallenged that Claimant did not establish total disability based on the pulmonary function and blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. *Id.* at 4 n.4. However, the Board determined the ALJ erred in discrediting Dr. Cohen's opinion on total disability, and thus vacated his findings that Claimant did not establish total disability based on the medical opinion evidence and therefore did not invoke the Section 411(c)(4) presumption. *Id.* at 4-6.

On remand, the ALJ again denied benefits, finding the medical opinion evidence and evidence as a whole failed to establish total disability.

On appeal, Claimant asserts the ALJ erred in finding he failed to establish a totally disabling respiratory or pulmonary impairment. Employer responds in support of the denial of benefits. The Director did not file a substantive response.

The 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

[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.

[2] The Board also affirmed that Employer did not rebut the presumption that Claimant timely filed his claim. *Walden*, BRB No. 19-0324 BLA, slip op. at 4.

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, 362 (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). Because the Board previously affirmed that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), his sole avenue for establishing total disability is the medical opinion evidence.[4] 20 C.F.R. §718.204(b)(2)(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).

On remand, the ALJ determined the medical opinions and evidence as a whole do not establish total disability. Decision and Order on Remand at 6-7. Claimant contends, however, that the ALJ again erred in discrediting Dr. Cohen's opinion on total disability. We agree.

In weighing the medical opinion evidence, the ALJ reconsidered Dr. Cohen's opinion and found it reasoned and documented "to the extent he relied on [an accurate understanding of] the exertional requirements" of Claimant's usual coal mine work. Decision and Order on Remand at 5. The ALJ acknowledged that doctors are permitted to rely on objective testing evidence not specified in the regulations so long as they explain the basis of their findings. *Id*. However, he found Dr. Cohen's opinion conclusory and entitled to little weight because it lacked an explanation for why he found Claimant's diffusion capacity totally disabling. *Id.* In contrast, he credited the contrary opinions of

[3] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine employment in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 2; Hearing Tr. at 11.

[4] The ALJ noted that there is no evidence of complicated pneumoconiosis and therefore Claimant is unable to establish total disability based on the irrebuttable presumption at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1); Decision and Order on Remand at 3.

Drs. Selby and Spagnolo that Claimant is not totally disabled as reasoned and documented because they are consistent with the non-qualifying objective studies.[5] *Id*. at 6-7.

As an initial matter, the ALJ did not, as the Board directed, resolve the conflict in the medical opinion evidence as to whether Claimant is totally disabled based on his diffusion capacity measurements (diffusing capacity of lung for carbon dioxide (DLCO) values). *Walden*, BRB No. 19-0324 BLA, slip op. at 6; Decision and Order on Remand at 5-7. In evaluating Claimant's respiratory or pulmonary function, Dr. Cohen indicated that the DLCO is a medically acceptable diagnostic technique and all of the physicians discussed Claimant's DLCO values. In addition, while the ALJ noted the conflict between the physicians concerning the use of the diffusing capacity divided by the alveolar volume (DLCO/VA) when evaluating the effect of Claimant's diffusion impairment,[6] the ALJ declined to address it because he found Dr. Cohen's opinion that diffusion impairment establishes total disability was conclusory. Decision and Order on Remand at 5 n.35. This was error.

[5] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] Drs. Selby and Spagnolo observed Claimant's reduced diffusion capacity or DLCO value. Employer's Exhibits 5; 6; 7 at 12, 25-26, 32. Dr. Selby indicated that when "corrected for alveolar volume," Claimant's diffusing capacity value is "essentially normal or only slightly abnormal." Employer's Exhibit 7 at 12. He explained that both the DLCO and DLCO/VA "come out on the printout" and that the DLCO was historically available first but then physicians decided to "compare the diffusion capacity for the amount of lung tissue that's present" to see if the tissue available is functioning well, as indicated by a normal DLCO/VA value. *Id*. at 25-26. Dr. Spagnolo attributed the reduction in the DLCO value to Claimant's "crushed chest injury and his obesity." Employer's Exhibit 5; *see* Employer's Exhibit 8 at 19. In his supplemental report, based on a review of Drs. Selby's and Spagnolo's opinions, Dr. Cohen indicated Claimant's pulmonary function studies dated September 28, 2012, March 7, 2014, October 2, 2014, March 11, 2015, April 8, 2016, October7, 2016, and October 5, 2017, "all show moderate diffusion impairment" and that "[t]he fact that the [DLCO/VA] is normal means nothing and does not negate the fact that the DLCO is seriously abnormal." Claimant's Exhibit 3. He also stated that "Dr. Spagnolo and Selby attach great importance to the DLCO/VA" value but that "[t]he [American Thoracic Society] does not recommend using the DLCO/VA to make such determinations." *Id*.

In determining that Dr. Cohen's opinion is conclusory, the ALJ not only failed to follow the Board's remand instructions to resolve the conflict in the evidence, he did not sufficiently address the entirety of Dr. Cohen's opinion. As the Board noted in its prior decision, Dr. Cohen concluded Claimant is totally disabled from performing the heavy manual labor associated with his usual coal mine employment based on his diffusion impairment *and* blood gas exchange abnormalities. Claimant's Exhibit 3 at 6; *see also* Director's Exhibits 16, 34.[7] Although the ALJ noted Dr. Cohen relied on Claimant's exercise blood gas studies to diagnose hypoxemia, he determined they did not produce qualifying values and that the results of Claimant's most recent resting blood gas study improved from Dr. Cohen's previous non-qualifying resting study. Decision and Order on Remand at 6. The ALJ also indicated Dr. Cohen opined Claimant's pulmonary function studies showed "[r]educed FVC with moderately severely reduced FEV1," but he did not give this portion of Dr. Cohen's opinion weight as the FVC value was well above qualifying and the FEV1 and FVC were non-qualifying in all of the pulmonary function studies performed after Dr. Cohen's July 21, 2016 exam. *Id*., *quoting* Director's Exhibit 16.

However, as Claimant argues and the Board previously instructed, "a physician may offer a reasoned opinion diagnosing total disability even though the objective studies are non-qualifying." *Walden*, BRB No. 19-0324 BLA, slip op. at 5; Claimant's Brief at 12; *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). Thus, the ALJ erred in again discrediting Dr. Cohen's opinion because he found it was not consistent with the non-qualifying objective studies. Decision and Order on Remand at 6-7; *see Walden*, BRB No. 19-0324, slip op. at 5-6.

The ALJ failed to assess the credibility of the medical opinions in light of the physicians' explanations for their diagnoses, the documentation underlying their medical judgements, and the sophistication of, and basis for, their conclusions as the Board directed. *Id*. at 6. For example, as the Board previously noted, Dr. Cohen explained that the diffusion capacity measurement is "'a significant predictor of work capability' and Claimant's moderate diffusion impairment 'is in and of itself totally disabling.'" *Walden*, BRB No. 19-0324 BLA, slip op. at 6, *citing* Claimant's Exhibit 3. Instead of assessing the relevant medical opinion evidence as a whole, the ALJ counted heads and failed to resolve the

[7] In his initial report, Dr. Cohen identified a "moderately severe obstructive defect with moderate diffusion impairment" and "a gas exchange limitation to exercise with significant resting and exercise hypoxemia," which is totally disabling based on the exertional requirements of Claimant's last coal mine job. Director's Exhibit 16.

conflict in the opinions as to whether Claimant's respiratory impairment is totally disabling regardless of the studies' non-qualifying values.[8] *Id.*; *see* Claimant's Brief at 11-12.

We therefore vacate the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv) or based on a weighing of the evidence as a whole at 20 C.F.R. §718.204(b)(2). Decision and Order on Remand at 7. Thus, we also vacate his finding that Claimant did not invoke the Section 411(c)(4) presumption and his denial of benefits.

Reassignment

Finally, in light of the Board's previous remand of this case and the ALJ's failure to follow the Board's instructions and repetition of errors, we conclude that "review of this claim requires a fresh look at the evidence . . . ." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537 (4th Cir. 1998) (instructing that review of the claim required a fresh look at the evidence, unprejudiced by the various outcomes of the ALJ, where he made errors of law including failing to consider all of the relevant evidence and to adequately explain his rationale for crediting certain evidence); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Thus, we direct the case be reassigned to a different ALJ on remand.

Remand Instructions

On remand, the new ALJ must reconsider the medical opinions on the issue of total disability taking into consideration the explanations for their diagnoses, the documentation underlying their medical judgments, and the sophistication and bases for, their conclusions. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). In so doing, the new ALJ must resolve the conflict in the medical opinion evidence concerning Claimant's diffusion impairment values and evaluate whether Claimant established a disabling diffusion impairment—independent of whether the pulmonary function and blood gas studies are qualifying—considering the exertional requirements[9] of his usual coal mine work. If Claimant establishes total disability based on the medical opinion evidence, the new ALJ must determine whether he is totally disabled taking into

[8] The ALJ stated "[t]wo out of the three medical opinions found that Claimant was not disabled, and their opinions were consistent with the non-qualifying [pulmonary function studies] and [blood gas studies]." Decision and Order on Remand at 6.

[9] The ALJ determined Claimant's usual coal mine work had "moderate to heavy exertional requirements." Decision and Order on Remand at 5.

consideration all relevant evidence. 20 C.F.R. §718.204(b)(2)(iv); *Rafferty*, 9 BLR at 1-232.

If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the new ALJ must then determine whether Employer is able to rebut it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. If Claimant does not establish total disability, an essential element of entitlement, the new ALJ may reinstate the denial 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). The new ALJ must set forth his or her findings in detail, including the underlying rationale for his or her decision in accordance 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); *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 vacated, and the case is remanded to the Office of Administrative Law Judges for reassignment to a different ALJ for further consideration in accordance with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge