U.S. Department of Labor

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

BRB No. 22-0251 BLA

JACKIE A. JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESLEY LEASING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/13/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2020-BLA-05162) rendered on a miner's initial claim filed on July 30, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with nineteen years of qualifying coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, she concluded Claimant invoked 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). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled and thus invoked the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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.[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 he has a pulmonary or respiratory impairment which, 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

[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] We affirm, as unchallenged on appeal, the ALJ's findings of nineteen years of qualifying coal mine employment and that Employer did not rebut the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 15.

[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 Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

based on qualifying[4] pulmonary function studies or 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Employer contends the ALJ erred in finding Claimant established total disability based on the medical opinions and in consideration of the evidence as a whole.[5] Decision and Order at 9-10.

Medical Opinions

The ALJ considered five medical opinions. Decision and Order at 10-12. Drs. Forehand, Raj, and Rajbhandari opined Claimant is totally disabled, whereas Drs. Jarboe and Zaldivar opined he is not. Director's Exhibit 8; Claimant's Exhibits 2-3; Employer's Exhibits 2, 4.

Dr. Forehand opined Claimant is totally disabled based on the qualifying blood gas study he obtained and Claimant's chest x-ray showing a fibrotic reaction that would impair oxygen absorption and prevent him from performing his usual coal mine work. Director's Exhibit 8 at 4. He further opined Claimant should have no further coal mine dust exposure. *Id.* Drs. Raj and Rajbhandari opined Claimant is totally disabled based on x-ray evidence of complicated pneumoconiosis, a qualifying blood gas study, and a non-qualifying, but abnormal, pulmonary function study, which they indicated show a mild to moderate

[4] 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).

[5] The ALJ found the five pulmonary function studies of record are non-qualifying. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8. With regard to the blood gas evidence, she found one of two exercise studies produced qualifying results, while two of the five resting studies produced qualifying results. *Id.* at 9. She concluded that the blood gas study evidence overall does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii). In doing so, the ALJ did not address Claimant's assertion that Dr. Zaldivar's non-qualifying exercise study is invalid because Claimant's blood was not drawn during exercise. Claimant's Closing Brief at 25. She further found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

respiratory impairment. Claimant's Exhibits 2 at 6, 3 at 5. Drs. Jarboe and Zaldivar indicated Claimant has a mild respiratory impairment on pulmonary function testing and abnormal blood gas exchange, but they opined he is not totally disabled from performing the heavy manual labor required of his usual coal mine work.[6] Employer's Exhibits 2 at 4, 4 at 5.

The ALJ noted Drs. Raj and Rajbhandari relied on positive x-ray evidence for complicated pneumoconiosis and qualifying blood gas studies, contrary to her findings that Claimant does not have complicated pneumoconiosis and the preponderance of the blood gas studies are non-qualifying. Decision and Order at 11. However, she determined they provided credible diagnoses of an obstructive pulmonary impairment "sufficient to support [their] finding[s] of total disability." *Id*. She then summarily concluded the medical opinions support a finding of total disability. *Id.* at 12.

We agree with Employer that the ALJ did not adequately explain her findings with regard to the individual medical opinions or her weighing of the medical opinion evidence as a whole. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employer's Brief at 5-8. It is well settled that even a mild impairment may be totally disabling *if* it precludes the performance of the miner's usual coal mine employment. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *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). In crediting Drs. Raj's and Rajbhandari's disability opinions, however, the ALJ did not explain why she concluded their diagnoses of a moderate obstruction necessarily precludes Claimant from performing his usual job duties. *See* 20 C.F.R. §718.204(b)(1), (2)(iv); *Eagle*, 943 F.2d at 512-13.

Further, while the ALJ summarized the opinions of Drs. Forehand, Jarboe and Zaldivar, she did not make any findings regarding whether they were adequately reasoned and documented nor specify the weight she accorded them. Decision and Order at 10-12. As the ALJ failed to consider each medical opinion and explain how she resolved the conflict in the evidence as to the degree of Claimant's impairment, her decision does not comply with the Administrative Procedure Act (APA).[7] *Wojtowicz*, 12 BLR at 1-165. We

[6] Dr. Zaldivar diagnosed a mild obstruction on pulmonary function study and hypercarbia based on a blood gas study, while Dr. Jarboe diagnosed a mild blood gas abnormality only. Employer's Exhibits 2 at 4, 4 at 2.

[7] The Administrative Procedure Act requires the ALJ to consider all relevant evidence in the record, and to set forth her "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).

therefore vacate her finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole.[8] *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 12. Consequently, we vacate her conclusion that Claimant invoked the Section 411(c)(4) presumption. *Id.* at 12-13.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2). She must first identify the exertional requirements of Claimant's usual coal mine employment and explain how she weighed the blood gas evidence, and resolved the conflicts in blood gas evidence, including Claimant's challenge to the validity of Dr. Zaldivar's exercise study, as these issues are intrinsically tied to the credibility of the physicians' medical opinions. *See* 20 C.F.R. §718.204(b)(2)(ii), (iv); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016) (ALJ must weigh the quality of evidence); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (ALJ may discount medical opinions that contradict her findings); *Eagle*, 943 F.2d at 512-13 (minimal impairment may be totally disabling where usual work required heavy labor); Claimant's Closing Brief at 25. Then she must reconsider whether the opinions of Drs. Forehand, Raj, Rajbhandari, Jarboe, and Zaldivar are reasoned and documented, and adequately explain whether Claimant has a respiratory impairment that prevents him from performing the exertional requirements of his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv). In rendering her credibility determinations, the ALJ must resolve the conflict in opinions and explain the weight she accords each opinion based on her consideration of the physicians' comparative qualifications, the explanations for their diagnoses, the documentation underlying their judgments, and the sophistication of, and bases for, their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ must consider all relevant evidence and adequately explain her rationale for crediting certain evidence); *Akers*, 131 F.3d at 441. If Claimant establishes total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must then weigh the evidence supporting a finding of total disability against the contrary evidence to reach a conclusion as to whether Claimant has a totally disabling respiratory or pulmonary impairment and thereby invokes the Section

[8] Although Employer asserts the opinions of Drs. Jarboe and Zaldivar are more consistent with the ALJ's findings on complicated pneumoconiosis and her weighing of the pulmonary function and blood gas studies, it is the province of the ALJ to determine their credibility on remand. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993).

411(c)(4) presumption. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If Claimant invokes the Section 411(c)(4) presumption, the ALJ may reinstate her award of benefits as Employer has not challenged her determination that Employer's evidence is insufficient to rebut the presumption. 20 C.F.R. §718.305(d)(1); *see Edd Potter Coal Co., v. Director, OWCP* [*Salmons*], 39 F.4th 202, 210 (4th Cir. 2022) (any issue that could have been but was not raised on appeal is waived and thus not remanded). Alternatively, if the ALJ finds Claimant is not totally disabled, she must deny benefits as Claimant will have failed to establish an essential element of entitlement. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). In rendering all of her findings on remand, the ALJ must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the ALJ's Decision and Order Granting Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge