

U.S. Department of Labor

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



BRB No. 22-0334 BLA

SHERRY L. SUTHERLAND)

Claimant-Petitioner)

v.)

J & E COAL COMPANY,)
INCORPORATED)

and)

EMPLOYERS INSURANCE OF WAUSAU)
c/o LIBERTY MUTUAL INSURANCE)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 03/10/2023

DECISION and ORDER

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

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

Sarah M. Karchunas (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2020-BLA-05648) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on May 8, 2019.¹

The ALJ found Claimant established 5.2 years of coal mine employment and thus determined she could not 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).² Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established a totally disabling respiratory or pulmonary impairment, but did not establish the existence of either clinical or legal pneumoconiosis.³ 20 C.F.R. §§718.202(a), 718.204(b)(2). Thus, she denied benefits.

¹ This is Claimant's fifth claim for benefits. Director's Exhibit 6. Claimant withdrew her previous claim. Director's Exhibit 4. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. The ALJ noted Claimant's next most prior claim is "unavailable" and she was "unable to determine the prior denial grounds." Decision and Order at 6. She thus stated she would "review each element of entitlement." *Id.*

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if she establishes 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 When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the 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); *see 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.

On appeal, Claimant argues the ALJ erred in finding she failed to establish legal pneumoconiosis and a total respiratory or pulmonary disability due to pneumoconiosis.⁴ Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to vacate the ALJ's findings on these issues, and remand the case for further consideration.

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 with applicable law.⁵ 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).

Entitlement - 20 C.F.R. Part 718

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 (pneumoconiosis substantially contributed to the disability).⁶ 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any element precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989);

§725.309(c)(3). The ALJ assumed Claimant did not establish any element of entitlement in her prior claim; thus, Claimant had to submit new evidence establishing an element of entitlement to obtain review of the merits of her current claim. *Id.*; Decision and Order at 6.

⁴ We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 5.2 years of coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 5, 12-13. Further, because Claimant established total disability, she established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed her coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 7, 9, 12; Hearing Tr. at 11.

⁶ The ALJ found Claimant failed to establish the existence of clinical pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(1), 718.202(a); Decision and Order at 6-7.

Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish she suffers from a chronic lung disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(2), (b).

The ALJ considered the medical opinions of Drs. Fino, Forehand, and Sargent. Decision and Order at 7-9. Dr. Forehand opined Claimant has legal pneumoconiosis⁷ whereas Drs. Fino and Sargent opined he does not.⁸ Director’s Exhibits 15, 25; Employer’s Exhibits 1, 2, 45, 46. The ALJ found all the medical opinions entitled to “some weight” but “overall” they do not support a finding that “Claimant suffers from a chronic pulmonary disease, or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” Decision and Order at 9. She thus concluded Claimant failed to establish the existence of legal pneumoconiosis. *Id.*

Claimant and the Director argue the ALJ erred by failing to explain her findings. Claimant’s Brief at 13-14; Director’s Response Brief at 1-2. We agree.

After briefly summarizing the medical opinions, the ALJ concluded:

Affording all three opinions some weight, the overall evidence does not support a finding that the Claimant suffers from a chronic pulmonary disease, or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Accordingly, I find that the Claimant has not established that she suffers from legal pneumoconiosis.

⁷ Dr. Forehand diagnosed a mixed restrictive-obstructive lung disease related to coal mine dust exposure. Director’s Exhibit 15 at 4.

⁸ Dr. Fino diagnosed a mild restrictive impairment unrelated to coal mine dust exposure. Director’s Exhibit 25 at 11-12; Employer’s Exhibits 2, 46. Dr. Sargent diagnosed a “disabling ventilatory impairment that is primarily restrictive in nature” and unrelated to coal mine dust exposure. Employer’s Exhibits 1 at 2; 45.

Decision and Order at 9.

The ALJ made no determination as to whether the medical opinions are reasoned and documented. Decision and Order at 7-9. Although she assigned the medical opinions “some weight,” she did not explain the basis for this finding. *Id.* at 9. Thus she erred by failing to critically analyze the physicians’ opinions, render any findings as to whether their opinions are reasoned and documented, or otherwise explain why she found their opinions credible as the Administrative Procedure Act (APA)⁹ requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea “B” Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must still conduct an appropriate analysis of the evidence to support his or her conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

While the burden remains on Claimant to establish the existence of legal pneumoconiosis, the ALJ did not explain why she found Drs. Fino’s and Sargent’s opinions outweigh Dr. Forehand’s contrary opinion. *Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 9. As discussed above, the ALJ’s finding that all the medical opinions are entitled to “some weight” is unexplained, and the mere presence of conflicting medical opinions is not a valid basis to conclude Claimant failed to meet her burden to establish the existence of legal pneumoconiosis. Decision and Order at 9; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281 (1994). The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *Addison*, 831 F.3d at 256-57; *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep’t of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz*, 12 BLR at 1-165.

In view of the foregoing errors, we vacate the ALJ’s finding that Claimant did not establish the existence of legal pneumoconiosis and remand the case for further consideration of the medical opinion evidence. 20 C.F.R. §718.202(a)(4); Decision and Order at 9.

⁹ 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).

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis is a “substantially contributing cause” of her totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has “a material adverse effect on the miner’s respiratory or pulmonary condition” or “[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.” 20 C.F.R. §718.204(c)(1)(i), (ii); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

The ALJ determined Claimant “cannot demonstrate that pneumoconiosis is a substantially contributing cause of her totally disabling respiratory or pulmonary impairment” because she previously found “the record does not support a finding of pneumoconiosis.” Decision and Order at 12. Because the ALJ’s errors in assessing legal pneumoconiosis affected her credibility findings on disability causation, we vacate her finding that Claimant did not establish total disability due to legal pneumoconiosis and remand for further consideration of this issue. 20 C.F.R. §718.204(c)(1); Decision and Order at 12.

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence establishes the existence of legal pneumoconiosis. 20 C.F.R. §§718.201(b), 718.202(a)(4). If the ALJ finds Claimant has established legal pneumoconiosis, she must consider whether the medical opinion evidence establishes Claimant’s total respiratory or pulmonary disability is due to pneumoconiosis. 20 C.F.R. §718.204(c). In reconsidering the medical opinion evidence on the issues of legal pneumoconiosis and disability causation, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. Further, she must consider all the relevant evidence in reaching her determinations. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *Addison*, 831 F.3d at 252-53; *McCune*, 6 BLR at 1-998. The ALJ must set forth her findings in detail, including the underlying rationale for her decision as the APA requires. *See Wojtowicz*, 12 BLR at 1-165. If the ALJ finds Claimant did not establish the existence of legal pneumoconiosis or total disability due to pneumoconiosis, she may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge