U.S. Department of Labor

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

BRB No. 21-0123 BLA

DWIGHT A. JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHENANDOAH COAL COMPANY	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	DATE ISSUED: 5/31/2022
	)	
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 of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Dwight A. Jones, Richlands, Virginia.

Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

ROLFE and GRESH, Administrative Appeals Judges:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order Denying Benefits (2018-BLA-05915) rendered on a claim filed on September 16, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 12.42 years of coal mine employment and thus found he 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, he found Claimant established clinical pneumoconiosis[3] arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203. However, he found Claimant did not establish a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), an essential element of entitlement, and thus denied benefits.[4]

On appeal, Claimant generally challenges the ALJ's denial of benefits; therefore, the Board addresses whether the ALJ's Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings if they are rational, supported by substantial evidence, and

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[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] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] Because the record contains no evidence of complicated pneumoconiosis, we affirm, as supported by substantial evidence, the ALJ's additional finding that Claimant could not invoke the irrebuttable presumption of total disability at Section 411(c)(3). *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 23.

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).

Section 411(c)(4) Presumption: Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's calculation of the length of coal mine employment if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's employment history forms, Social Security Administration (SSA) earnings records, 1994 W-2, and his testimony. Decision and Order at 3-7; Director's Exhibits 3, 5-8; Hearing Transcript at 14-15. Although Claimant alleged twenty-one years of coal mine employment in his application for benefits, Director's Exhibit 2, at the hearing he testified it "might have been a little more or a little less" than 12.34 years. Hearing Transcript at 14. The ALJ thus rationally relied on Claimant's SSA earnings records[6] and, given the absence of evidence regarding the specific beginning and ending dates of Claimant's coal mine employment, permissibly referenced Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual*[7] to

[5] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 31; Director's Exhibits 3, 6.

[6] For 1994, the ALJ relied on Claimant's W-2 instead of his SSA earnings records because Claimant testified the W-2 amount was accurate for that year. Decision and Order at 7; Hearing Transcript at 32; Director's Exhibits 5, 8.

[7] If the beginning and ending dates of a miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base."

determine the number of days Claimant worked in coal mine employment each year. 20 C.F.R. §725.101(a)(32)(iii). Then, dividing the number of days worked by 125, the ALJ found the record established a total of 12.42 years of coal mine employment for the years 1969 through 1994.[8] Decision and Order at 7-8.

Although this case arises within the jurisdiction of the Fourth Circuit, we need not determine whether the ALJ erred by crediting Claimant with coal mine employment based solely on a 125-day work-year. Any error is harmless, as calculating Claimant's coal mine employment based on a 125-day work-year without regard to whether he established a 365-day employment relationship results in additional years of coal mine employment credited to Claimant, not less. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because the ALJ found Claimant established only 12.42 years of coal mine employment, we affirm his finding Claimant did not invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i); *Muncy*, 25 BLR at 1-27.

20 C.F.R. Part 718: Total Disability

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). 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. *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); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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). 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 consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones &*

[8] The ALJ found the record established full years of employment from 1975 through 1977, 1980 through 1981, and 1990 through 1992, 0.03 year of employment in both 1969 and 1971, 0.87 year of employment in 1974, 0.83 year of employment in 1978, 0.30 year of employment in 1982, 0.22 year of employment in 1989, 0.32 year of employment in 1993, and 0.82 year of employment in 1994. Decision and Order at 7.

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).

The ALJ considered the results of three pulmonary function studies administered on November 30, 2015, January 17, 2017, and March 28, 2019. Decision and Order at 24. Correctly observing each study produced non-qualifying values,[9] he determined Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).[10] *Id.*; Director's Exhibit 16; Employer's Exhibits 1-2. We affirm this finding as supported by substantial evidence.

The ALJ next considered the results of three arterial blood gas studies administered on November 30, 2015, January 17, 2017, and March 28, 2019. Decision and Order at 24. The November 30, 2015 study produced qualifying values at rest and during exercise, the January 17, 2017 study produced qualifying values at rest, and the March 28, 2019 study produced non-qualifying values at rest.[11] The ALJ determined the preponderance of the blood gas study evidence demonstrates total disability at 20 C.F.R. §718.204(b)(2)(iii). We affirm this finding as supported by substantial evidence.

Turning to the medical opinion evidence, the ALJ considered the opinions of Drs. Forehand, Rosenberg, and Jarboe. Decision and Order at 24-26. Dr. Forehand examined Claimant on November 30, 2015, and opined Claimant has insufficient residual oxygen transfer capacity to perform his last coal mine job[12] and is thus totally disabled. Director's Exhibits 16 at 5; 18-19. Dr. Rosenberg initially opined Claimant is disabled due to a respiratory impairment. Claimant's Exhibit 7 at 3. However, following review of medical records of Claimant's dated after his April 18, 2017 coronary artery bypass surgery, Dr. Rosenberg concluded he has only a mild restrictive impairment, can perform his usual coal

[9] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The ALJ further found the evidence contains no evidence of cor pulmonale with right-sided heart failure and thus determined Claimant did not establish total disability at 20 C.F.R. §718.204(b)(iii). Decision and Order at 24.

[11] Claimant did not perform an exercise study as part of the March 28, 2019 blood gas study due to his "known severe heart disease." Employer's Exhibit 2 at 4.

[12] The ALJ determined Claimant's usual coal mine employment work as a roof bolter required heavy labor and that each physician understood the rigors of this work. Decision and Order at 25.

mine work as a roof bolter, and is not disabled.[13] Employer's Exhibits 7 at 14-16, 18-20, 25-27; 8 at 2-3. Dr. Jarboe diagnosed a mild restrictive impairment and concluded Claimant can perform his usual coal mine employment as a roof bolter. Employer's Exhibit 2 at 6. He explained the impairment documented in Claimant's blood gas studies performed prior to his bypass surgery was caused by his cardiac condition and that his condition markedly improved after surgery, as his March 28, 2019 blood gas study documented, such that he is not disabled. Employer's Exhibit 3 at 13-18.

The ALJ accorded little weight to Dr. Forehand's opinion and Dr. Rosenberg's initial report because they are based solely on examinations and objective testing conducted prior to Claimant's coronary bypass surgery and thus did not reflect his condition "at the time of the hearing." Decision and Order at 25, *citing Coffey v. Director, OWCP*, 5 BLR 1-404, 1-405 (1982). Relying solely on *Coffey* for the premise that evidence created in closer proximity to the hearing is entitled to greater weight than evidence predating it, he instead credited Dr. Rosenberg's supplemental report and Dr. Jarboe's opinion as "more recent" and therefore more reflective of Claimant's "current condition." Decision and Order at 25. This was error.

The ALJ applied *Coffey* out of context and for a sweeping purpose for which it was never intended. The interim presumption at issue in *Coffey* was repealed in 1980 and only applied to claims filed prior to that date. Under it, eligible miners who had ten or more years of coal mine employment and met certain medical requirements were presumed to be entitled to benefits. 20 C.F.R. §727.203. The presumption, however, could be rebutted through any of four methods, including establishing the miner "[was] doing his usual coal mine work," or "[was] able" to do such work. 20 C.F.R. §727.203(b)(1), (2).

Coffey involved rebuttal of the presumption under those two distinct methods in that specific context. The Board first held that the question of whether a miner *was* doing his usual coal mine work under subsection (b)(1) was a strictly factual matter determined by whether he was employed at the time of the hearing: "At the outset, we note that, since claimant was not employed at the time of the hearing, the administrative law judge erred in finding the presumption rebutted under 727.203(b)(1), and his finding is therefore reversed." *Coffey* at 1-405. As a corollary, the Board then held the question

[13] In explaining the change in his opinion, Dr. Rosenberg stated Claimant's cardiac functioning improved following his April 18, 2017 coronary bypass surgery; Dr. Rosenberg believed this improvement, in turn, caused his lung functioning to improve and render him not disabled. Employer's Exhibit 7 at 26-27.

of whether he *was able* to perform his usual coal mine work under subsection (b)(2), since he was not employed, similarly had to be assessed at the same time. *Id.* at 1-407.

Coffey's holding thus does not extend past explaining two practical methods of rebutting a presumption under a regulation that has long-since been repealed, and it has never been appropriately cited as establishing that evidence relating to disability should be evaluated solely according to its temporal proximity to the hearing. Instead, a long line of circuit court cases provides that ALJs must evaluate disability evidence both qualitatively and quantitively, without resorting to mechanically crediting later evidence and, when a miner's condition improves, without reference to its chronological order.

The Fourth Circuit, within whose jurisdiction this claim arises, has held that ALJs must evaluate evidence qualitatively and quantitatively without resorting to mechanically crediting later evidence showing improvement based on its recency. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (Given the progressive nature of pneumoconiosis, an ALJ must resolve conflicting evidence when the miner's condition improves "without reference to their chronological relationship."); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) ("A bare appeal to recency" in evaluating medical opinions "is an abdication of rational decisionmaking."); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993).

Although the ALJ summarized the medical opinions at length, Decision and Order at 14-20, his rationale for crediting the supplemental opinions of Dr. Rosenberg and the opinion of Dr. Jarboe over Dr. Forehand's opinion and the initial opinion of Dr. Rosenberg relied on the proximity of their opinions to the date of the hearing. *Id.* at 25. To the extent the ALJ qualitatively and quantitatively evaluated the medical opinion evidence, his impermissible reliance on the recency of the opinions necessarily tainted his analysis.[14]

[14] Our dissenting colleague argues the ALJ did not rely on recency to credit Dr. Rosenberg's later supplemental opinions and Dr. Jarboe's opinion over Dr. Forehand's opinion. But temporal proximity to the hearing was the only explicit reason he gave in his analysis of the issue. ALJ D&O at 25 ("I accord little weight to reports . . . [that] are not reflective of Claimant's condition at the time of the hearing . . . I rely on Dr. Rosenberg's supplemental report and deposition testimony as well as Dr. Jarboe's report and testimony, which are more recent and reflect Claimant's current condition.") (citation omitted). And even if the ALJ had provided additional reasons other than bare recency, it would still be impossible to discern whether (or how much) his reliance on recency affected those other reasons for us to determine whether substantial evidence still supports his credibility determinations. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

See Adkins, 958 F.2d 51-52 ("Later is better is not a reasoned explanation."). We therefore vacate the ALJ's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2). We further vacate his determination that the evidence as a whole does not establish the existence of a totally disabling respiratory or pulmonary impairment.[15]

On remand, the ALJ must reconsider the medical opinion evidence and evidence as a whole without regard to the recency of that evidence in order to determine whether Claimant established total disability; furthermore, he must explain the rationale for his conclusions. *See Adkins*, 958 F.2d 51-52; *Thorn*, 3 F.2d at 319-20; *see also* 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). The ALJ must then weigh all the relevant evidence together to determine whether Claimant established total disability at 20 C.F.R. §718.204(b). *See Rafferty*, 9 BLR at 1-232. If Claimant fails to establish total disability, benefits are precluded and the ALJ may reinstate the denial of benefits.

[15] We note the ALJ indicated in a footnote that, even if Claimant had established total disability, he would still find Claimant did not establish total disability due to pneumoconiosis. Decision and Order at 26 fn.14. We are unable to credit this footnote as an alternate, affirmable finding as the ALJ did not provide a rationale to explain why he would credit Dr. Jarboe's opinion and Dr. Rosenberg's deposition testimony. He further did not address Dr. Jarboe's diagnosis of legal pneumoconiosis, Employer's Exhibit 3 at 22, or explain why he would discredit Dr. Forehand's opinion that Claimant's clinical pneumoconiosis caused significant scarring in his lungs substantially contributing to his impairment. Director's Exhibit 16 at 6; 19 at 2.

Accordingly, the ALJ's Decision and Order Awarding 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.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the denial of benefits. The sole issue in this case is whether the ALJ erred in finding Claimant failed to establish total disability, and specifically whether the ALJ erred in crediting the opinion of Dr. Jarboe and supplemental opinions of Dr. Rosenberg over the opinion of Dr. Forehand and initial opinion of Dr. Rosenberg as well as in weighing the evidence as a whole. The ALJ's decision is consistent with law and supported by substantial evidence. It therefore must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965).

ALJs have wide latitude in assessing the credibility of medical opinions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Although an ALJ may not credit more recent negative, or non-qualifying tests solely on the basis of their recency, *see Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992)[16], the ALJ here did not consider only the bare

[16] *Adkins* relates to x-ray evidence of clinical pneumoconiosis, where an earlier positive x-ray interpretation and a later negative x-ray interpretation cannot both be right (absent surgical excision of the pneumoconiosis or lung transplantation); however, that is not true of respiratory disability, since respiratory condition can improve. Thus, arguably,

recency of the March 28, 2019 blood gas study and of Drs. Jarboe's and Rosenberg's opinions. Rather, he found this evidence "most persuasive" in light of the doctors' discussion of Claimant's treatment history and clear improvement in respiratory function following his cardiac bypass surgery. Decision and Order at 25. He further recognized that Dr. Forehand based his opinion on testing performed prior to Claimant's cardiac bypass surgery and that Dr. Rosenberg changed his position on total disability after reviewing the treatment evidence and later testing. *Id.*

Thus, contrary to the majority's conclusion, the ALJ did not evaluate the medical opinion evidence simply based on its proximity to the hearing. Rather, the ALJ engaged in a quantitative and qualitative analysis of the evidence and thus permissibly credited Dr. Jarboe's opinion and Dr. Rosenberg's supplemental opinions over the opinion of Dr. Forehand and initial opinion of Dr. Rosenberg. *See Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 441; *Adkins*, 958 F.2d at 51-52; Decision and Order at 25. I therefore would affirm the ALJ's finding that the medical opinion evidence and evidence as a whole do not establish total disability, 20 C.F.R. §718.204(b), an essential element of entitlement, and thus would affirm the ALJ's conclusion that Claimant failed to establish entitlement to benefits.

I therefore dissent.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

Adkins does not apply to the instant case. However, even assuming it does, the ALJ clearly has acted in accordance with its strictures.