U.S. Department of Labor

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

BRB No. 20-0352 BLA

ADAM V. MCKEAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEMACOLIN MINES CORPORATION	)	
	)	DATE ISSUED: 11/30/2021
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 of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Sean B. Epstein (Thomas, Thomas & Hafer, LLP), Pittsburgh, Pennsylvania, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2019-BLA-05576) 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 October 25, 2017.[1]

The ALJ accepted the parties' stipulation that Claimant has 10.84 years of underground coal mine employment and therefore found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering entitlement to benefits under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish pneumoconiosis or total disability and thus failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish legal pneumoconiosis[3] and total disability. Employer responds in support of the denial of

[1] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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). Claimant filed a prior claim on October 15, 2014. The district director denied it on June 15, 2015 because Claimant failed to establish any element of entitlement. Decision and Order at 2 n.3, 7-8; Director's Exhibit 1. Consequently, Claimant had to submit new evidence establishing at least one element of entitlement to proceed with a review of the merits of his claim. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

[2] 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); *see* 20 C.F.R. §718.305.

[3] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions,[6] 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 one of these elements 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 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has 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(b).

The ALJ considered the medical opinions of Drs. Allen and Fino. Dr. Allen conducted the Department of Labor complete pulmonary evaluation on April 3, 2018. Director's Exhibit 16. She performed a physical examination, obtained objective testing,

[4] We affirm, as unchallenged, the ALJ's finding that Claimant did not establish clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15-20.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.5; Director's Exhibit 5; Hearing Transcript at 17, 36.

[6] The ALJ found there is no evidence of complicated pneumoconiosis and thus Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 15 n.13.

and reported Claimant's work and smoking histories. *Id*. Dr. Allen diagnosed chronic bronchitis by history and mixed restrictive/obstructive lung disease based on the pulmonary function testing. *Id*. She related both of her diagnoses to Claimant's twenty-one pack years of smoking[7] and twelve years of coal mine dust exposure. *Id*.

The ALJ found Dr. Allen's opinion neither reasoned nor documented. She noted that while Dr. Allen acknowledged it was difficult to determine the presence of restrictive lung disease without measurements for lung volumes and diffusion capacity, which she did not obtain, Dr. Allen nonetheless opined Claimant has a mixed restrictive and obstructive respiratory disease. Decision and Order at 18. Because the ALJ found Dr. Allen "provided a diagnosis [of a restrictive impairment] despite her admitted lack of necessary information to do so," she determined Dr. Allen's opinion did not credibly support Claimant's burden of proof. *Id*. at 18-19.

We affirm the ALJ's rejection of Dr. Allen's diagnosis of a restrictive component to Claimant's respiratory disease as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18. Claimant correctly argues, however, that the ALJ failed to adequately address Dr. Allen's diagnosis of chronic bronchitis and an obstructive respiratory impairment, which she attributed, in part, to coal mine dust exposure. Claimant's Brief at 6-7; *see* 20 C.F.R. §718.201(a)(2) (defining legal pneumoconiosis as either an obstructive or restrictive disease or impairment arising out of coal mine employment); 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We therefore vacate the ALJ's findings at 20 C.F.R. §718.202(a)(4), and remand this case for the ALJ to properly consider the totality of Dr. Allen's opinion and determine whether her diagnosis of chronic bronchitis and an obstructive respiratory impairment is reasoned, documented, and sufficiently persuasive to support a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(b).

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 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

[7] The ALJ found Claimant has a twenty year smoking history of two to three packs a day. Decision and Order at 6.

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).

The ALJ considered two pulmonary function studies. Dr. Allen's April 3, 2018 study had qualifying pre-bronchodilator and non-qualifying post-bronchodilator values. Director's Exhibits 13, 16. Dr. Fino's September 18, 2018 study was qualifying and no-bronchodilator was administered; however, he invalidated the study due to premature termination to exhalation and lack of reproducibility in the tracings. Director's Exhibit 2; Employer's Exhibit 2. Dr. Fino also opined Dr. Allen's study is invalid because he felt the tracings show sub-maximal effort. Employer's Exhibit 2. The ALJ rejected Dr. Fino's opinion and found Dr. Allen's April 3, 2018 pre-bronchodilator study valid and qualifying and sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i).[8] Decision and Order at 8-11. Employer has raised no objection to this finding. Decision and Order at 8-11; Director's Exhibit 16.

The ALJ found the two blood gas studies of record non-qualifying and no evidence of cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 9 n.8, 11. The ALJ also weighed the medical opinion evidence. Decision and Order at 12-14.

Dr. Allen stated in the employment history portion of her report that Claimant worked approximately nine years in coal mine employment as both a fire boss and roof bolter. Director's Exhibit 16 at 1. She noted that Claimant's job as a fire boss required Claimant to walk the returns and maintain escape ways, while his work as a roof bolter involved heavy manual labor. *Id.* In the section of her report on disability, Dr. Allen stated:

> [Claimant] would be disable[d] from his last job as a fireboss [sic] due to pulmonary issues. His [pulmonary function tests] show decreased FEV1 and FVC [values] that partially correct which is concerning for air trapping or undertreated asthma. This would prevent him from perform[ing] the activities of a fireboss for 6 days a week, 8 hours a day. He would not be able to shovel and repair equipment as required.

Id. at 4.

Dr. Fino identified Claimant's last coal mine work as a roof bolter and rock duster. He opined Claimant is not totally disabled based on either invalid or normal pulmonary

[8] The ALJ noted Dr. Gaziano validated the study and Dr. Allen relied on it in her report. Decision and Order at 11; Director's Exhibit 13.

function studies contained in treatment records and the prior claim evidence, normal blood gas studies, and a normal six minute walking pulse oximetry test. Director's Exhibit 22 at 2, 7, 9-10; Employer's Exhibits 4 at 2, 7, 9-10; 5 at 8, 9-10, 11, 12, 14, 17-22.

The ALJ gave Dr. Allen's opinion reduced weight because "although she noted at the beginning of her report that Claimant's last position was as a roof bolter, at the portion of her report where she discussed disability, she considered the miner's last mining work to be as a fire boss." Decision and Order at 14. The ALJ thus found Dr. Allen's opinion "internally inconsistent as to the miner's last coal mining work." *Id*. In contrast, the ALJ found Dr. Fino's opinion reasoned and entitled to "normal" weight because Dr. Fino "adequately explained why he considered the miner to have no pulmonary disability and relied upon objective testing, symptoms and the miner's last position as a roof bolter in his assessment." *Id*. Thus, the ALJ found Claimant did not establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) or in consideration of the evidence as a whole. *Id*.

We agree with Claimant that the ALJ did not rationally explain how she resolved the conflict in the medical opinions since Dr. Allen's opinion is based on a pulmonary function study the ALJ found valid and qualifying while Dr. Fino's opinion is premised on his belief that Claimant has no valid pulmonary function studies showing an impairment, contrary to the ALJ's findings at 20 C.F.R. §718.204(b)(2)(i). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Moreover, even if Dr. Allen did not properly identify Claimant's usual coal mine work, the ALJ failed to consider whether the physical limitations Dr. Allen identified as precluding Claimant's work as a fire boss are also sufficient to establish that he is unable to perform heavy manual labor associated with his last coal mine work as a roof bolter.[9] *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to the miner's work capabilities). Claimant maintains the logical conclusion is that if he

[9] The ALJ found Claimant's usual coal mine work as a roof bolter required heavy labor because "as part of his duties, [he] was required to lift 50 to 80 pounds daily, rock dust with 30 to 35 pound bags, run the roof bolting machine, lift 25 to 30 pound resin and bolts around 30 or 40 times per day, lift and carry supplies weighing up to 120 pounds, and walk around the section several times each shift." Decision and Order at 5; Director's Exhibit 5; Hearing Transcript at 17, 18-19, 30.

is unable to perform the less strenuous job of a fire boss, he is also unable to perform the heavy work required as a roof bolter.[10] Claimant's Brief at 5-6.

Additionally, the ALJ failed to address whether Dr. Fino's disability opinion is credible to the extent Dr. Fino discredited the April 3, 2018 pulmonary function study, contrary to the ALJ's finding it is valid and qualifying for total disability.

For all of these reasons, we vacate the ALJ's reliance on Dr. Fino's opinion and her discrediting of Dr. Allen's opinion. We therefore vacate the ALJ's determination that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), or on the record as a whole. Thus, we vacate the ALJ's denial of benefits.

Remand Instructions

The ALJ must reconsider whether Dr. Allen's opinion is sufficient to support a finding that Claimant has legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The ALJ must also reconsider whether the medical opinion evidence in totality supports a finding of total disability in accordance with 20 C.F.R. § §718.204(b)(2)(iv). The ALJ must then weigh all of the evidence together, like and unlike, to reach a determination as to whether Claimant established total disability overall at 20 C.F.R. §718.204(b)(2). *See Rafferty*, 9 BLR at 1-232; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Gray v. SLC Corp.*, 176 F.3d 382, 389 (6th Cir. 1999).

If the ALJ finds Claimant established legal pneumoconiosis and total disability, she must consider whether Claimant established his legal pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c)(1). However, if Claimant does not establish either legal pneumoconiosis or total disability, the ALJ may reinstate her denial of benefits. In rendering all of her credibility findings on remand the ALJ must explain the bases for her conclusions as the Administrative Procedure Act requires.[11] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see also Wojtowicz*, 12 BLR at 1-165.

[10] Claimant also maintains that Dr. Allen's reference to "fireboss" in the disability section of her report is likely a typographical error since she was aware he did roof bolting.

[11] The Administrative Procedure Act requires every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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 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, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge