U.S. Department of Labor

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

BRB No. 20-0362 BLA

EDWARD M. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEHIGH VALLEY ANTHRACITE COAL LLC	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 11/29/2021
	)	
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 and Order Denying Motion for Reconsideration of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for Claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Denying Benefits and Order Denying Motion for Reconsideration (2019-BLA-05801) rendered on a claim filed on December 26, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Consequently, she determined Claimant 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 Part 718. She therefore denied benefits. In a subsequent Order, the ALJ denied Claimant's request for reconsideration.

On appeal, Claimant argues the ALJ erred in finding he is not totally disabled. He also contends the ALJ erred in failing to render specific findings regarding the length of his coal mine employment, the existence of pneumoconiosis, and the cause of his disability. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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. Statutory presumptions may assist claimants in establishing these elements when certain conditions are met, but failure to establish any

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018).

[2] 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); Director's Exhibit 3.

one precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (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.[3] 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 the relevant evidence supporting a finding of total disability against the 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).

The ALJ considered the pulmonary function studies, arterial blood gas studies, and medical opinions,[4] and concluded Claimant did not establish he is totally disabled based on any of this evidence. 20 C.F.R. §718.204(b)(2)(i), (ii), (iv).

Claimant argues the ALJ erred in finding the medical opinion evidence insufficient to establish total disability.[5] Claimant's argument has merit, in part.

The ALJ considered the medical opinions of Drs. Futerfas, Mishra, Hertz, and Fino. Director's Exhibit 11, Claimant's Exhibits 3, 6, 8, 10, Employer's Exhibits 1, 3. She found Dr. Futerfas was equivocal on whether Claimant is totally disabled and thus rejected his opinion.[6] Decision and Order at 10-11. She found Drs. Mishra and Hertz opined Claimant

[3] The ALJ found Claimant's usual coal mine employment, operating a front-end loader, involved heavy manual labor. Decision and Order at 4.

[4] The ALJ also found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 5 n.3.

[5] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant failed to establish total disability based on pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5 n.3, 5-7.

[6] Dr. Futerfas noted the objective studies do not meet disability criteria. Director's Exhibit 11. He nevertheless opined Claimant should meet disability criteria because he had been diagnosed and treated for lung cancer. *Id.* Claimant does not challenge the ALJ's

is totally disabled by a respiratory or pulmonary impairment, while Dr. Fino opined he is not. *Id.* at 11-12. She determined Dr. Mishra's opinion is not reasoned and thus entitled to reduced weight, while the opinions of Drs. Hertz and Fino are reasoned and documented. *Id.* at 11-12. The ALJ further found Dr. Hertz is Claimant's treating physician. *Id.* at 11.

Notwithstanding her finding that Dr. Hertz is Claimant's treating physician, the ALJ declined to assign his opinion more weight than Dr. Fino's opinion for two reasons: 1) she found his opinion internally inconsistent, and 2) she found he failed to reconcile his opinion with the non-qualifying objective evidence of record.[7] *Id.* Because she found Drs. Hertz's and Fino's opinions entitled to equal weight, the ALJ found the medical opinion evidence is in equipoise. *Id.*

Claimant first argues the ALJ erred in failing to assign more weight to Dr. Mishra's opinion as a treating physician. Claimant's Brief at 30-31. We disagree.

An ALJ may assign controlling weight to a treating physician's opinion based on the nature and duration of their relationship with the miner and the frequency and extent of their treatment. 20 C.F.R. §718.104(d); *see Soubik v. Director, OWCP*, 366 F.3d 226, 235 (3d Cir. 2004). The weight given to a treating physician's opinion, however, "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence, and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade"). In this case, the ALJ found Dr. Mishra's opinion not credible because: (1) he did not identify Claimant's usual coal mine employment, (2) he did not link Claimant's symptoms to any respiratory disease or impairment, and (3) he did not review any of the objective testing of record. *Id.* at 12. As Claimant does not challenge these credibility findings, we affirm them. *See Skrack*, 6 BLR at 1-711. Because the ALJ found Dr. Mishra's opinion unpersuasive, she was not required to assign his opinion controlling weight based on his status as a treating physician. *Williams*, 338 F.3d at 513.

The ALJ erred, however, in assigning only normal probative weight to Dr. Hertz's opinion. The ALJ found Dr. Hertz's opinion reasoned and documented and that he is

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finding discrediting Dr. Futerfas's opinion. Therefore we affirm it. *See Skrack*, 6 BLR at 1-711.

[7] 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).

Claimant's treating physician, but she declined to assign his opinion controlling weight. Decision and Order at 12. She specifically found his opinion not entitled to additional weight because his conclusion is contrary to the non-qualifying objective studies and manifested an internal inconsistency. Decision and Order at 11-12. Both of these reasons are erroneous.

The ALJ declined to assign more than normal probative weight to Dr. Hertz's opinion because she found he "did not specifically recognize that his opinion . . . is at odds with the objective testing of record" and he failed to "distinguish his opinion from those test results." Decision and Order at 11. Contrary to the ALJ's finding, however, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). The regulations specifically provide that even where the pulmonary function studies and blood gas studies are non-qualifying, "total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents . . . [him] from" performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv). Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

The ALJ also erred in finding Dr. Hertz's opinion internally inconsistent. Decision and Order at 11-12. The ALJ found Dr. Hertz inconsistently opined on the nature of Claimant's respiratory impairment because he concluded Claimant's pre-operative pulmonary function study[8] results showed obstructive airways disease, but later testified his pulmonary function testing evidenced a restrictive ventilatory defect. Decision and Order at 12. The ALJ's finding is not supported by substantial evidence.

In his initial report, Dr. Hertz noted Claimant's pre-operative pulmonary function studies showed mild obstructive airways disease evidenced by a reduced FEV_1 value of seventy-seven percent. Claimant's Exhibit 3. At deposition, Dr. Hertz testified the study *also* showed a restrictive airways disease evidenced by the results of a wholly separate lung

[8] Claimant underwent lung surgery, a right lower lobectomy, in March 2016. Claimant's Exhibits 3, 6.

function measurement, a reduced FVC value of seventy-nine percent. Claimant's Exhibit 6. As Dr. Hertz noted different impairments shown by separate lung function measurements, his opinion is neither inconsistent nor does it evince confusion regarding the nature of Claimant's impairment.

Contrary to the ALJ's finding, Dr. Hertz repeatedly stated Claimant exhibits dyspnea on exertion consistent with coal workers' pneumoconiosis and a restrictive defect shown on pulmonary function testing. Claimant's Exhibits 3, 6, 10. He has also consistently opined Claimant's respiratory symptom of dyspnea on exertion would prevent him from performing his usual coal mine employment.[9] *Id.* At no time did he alter this conclusion. *Id.* Because the ALJ's credibility findings are inconsistent with applicable law and not supported by substantial evidence, we must vacate them. *Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 587; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986).

Finally we conclude the ALJ erred by failing to resolve the conflict in the medical opinions or explain why the evidence is in equipoise, notwithstanding the above erroneous findings. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). As discussed above, the ALJ found the opinions of Drs. Hertz and Fino reasoned and documented, but entitled to equal weight. Decision and Order at 10-12. While a claimant fails to meet his burden of proof when the evidence is equally balanced, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 279-81 (1994), the ALJ must nevertheless explain her rationale for reaching that conclusion. The mere fact that the relevant evidence may be conflicting does not authorize the ALJ to declare Claimant failed to establish total disability. *See generally Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010) ("[ALJ] has a duty to explain, on scientific grounds, why a conclusion cannot be reached"). It is the ALJ's duty to evaluate conflicting evidence, draw appropriate inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

In light of the foregoing, we vacate the ALJ's determination that Claimant failed to establish the existence of total disability based on the medical opinion evidence and the

[9] The ALJ noted Dr. Hertz understood the exertional requirements of Claimant's usual coal mine employment and that his understanding is consistent with her finding on this issue. Decision and Order at 11. She further found "reasonable Dr. Hertz's opinion that Claimant would not be capable of performing his usual coal mine employment because his pulmonary abnormalities would prevent him from performing heavy labor." *Id.*

evidence as a whole.[10] 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, we also vacate the ALJ's denial of benefits and remand for further consideration.

The ALJ must reconsider whether the medical opinion evidence establishes the existence of total disability based on the opinions of Drs. Hertz and Fino.[11] 20 C.F.R. §718.204(b)(2)(iv). The ALJ must resolve the conflict in their opinions by addressing the physicians' explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Kertesz*, 788 F.2d at 163; *Crisp*, 866 F.2d at 185, *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983). The ALJ must also reconsider whether Dr. Hertz's opinion is entitled to additional weight in light of his status as Claimant's treating physician. *Soubik*, 366 F.3d at 235; *see* 20 C.F.R. §718.104(d).

The ALJ must then reweigh the evidence regarding total disability as a whole and fully explain her findings, as the Administrative Procedure Act requires. *See Wojtowicz*, 12 BLR at 1-165. If Claimant fails to establish total disability, benefits are precluded and the ALJ may reinstate her denial of benefits. *Trent*, 11 BLR at 1-27. If Claimant establishes he is totally disabled, the ALJ must determine if Claimant can invoke the Section 411(c)(4) presumption by establishing at least fifteen years of qualifying coal mine employment. 30 U.S.C. §921(c)(4) (2018). If she finds he does not have at least fifteen years of qualifying coal mine employment, she must determine his eligibility for benefits under Part 718. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

[10] To the extent that the ALJ found she would reach the same conclusion even if she had given Dr. Hertz's opinion greater weight, this finding is conclusory and unexplained. Decision and Order at 13 n.7. Thus it does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires an ALJ set forth her "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).

[11] In light of our vacating the ALJ's findings regarding total disability, we need not address Claimant's arguments regarding the ALJ's failure to render determinations regarding the length of Claimant's coal mine employment, the existence of pneumoconiosis, the cause of pneumoconiosis, and the cause of disability. On remand, should the ALJ find Claimant establishes total disability, she must consider those issues necessary to the outcome of the case.

Accordingly, the ALJ's Decision and Order Denying Benefits and Order Denying Motion for Reconsideration are 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

MELISSA LIN JONES
Administrative Appeals Judge