U.S. Department of Labor

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

BRB No. 21-0068 BLA

GEORGE BAKOS, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAYMOND M. EBERHART, JR.	)	
	)	
and	)	
	)	
PENNSYLVANIA STATE WORKERS' INSURANCE FUND	)	DATE ISSUED: 11/30/2021
	)	
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Donna M. Hojo Lowman (Rulis & Bochicchio, LLC) Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2020-BLA-05036) rendered on a subsequent claim filed on July 24, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 14.59 years of qualifying coal mine employment, and thus found Claimant could not invoke the rebuttable 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 whether Claimant established entitlement without the benefit of the Section 411(c)(4) presumption, the ALJ found Claimant did not establish either clinical or legal pneumoconiosis or a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202, 718.204. Consequently, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in calculating the length of his coal mine employment and in finding he did not establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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

[1] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the subsequent claim must also be denied unless the ALJ 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)(1); *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 July 11, 2016. Director's Exhibit 1. The district director denied it on March 31, 2017, because Claimant failed to establish any element of entitlement. *Id*. Consequently, Claimant had to submit new evidence establishing at least one element of entitlement to proceed with a review of the merits of his current claim. 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); 20 C.F.R. §718.305.

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 (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 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, 1-2 (1986) (en banc).

Invocation of the Section 411(c)(4) Presumption-Total Disability

A miner is totally disabled if his 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 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).

Claimant contends the ALJ erred in finding he did not establish total disability based on Dr. Holt's medical opinion, asserting that even though the ALJ found the pulmonary function study evidence insufficient to establish total disability, Dr. Holt identified a respiratory impairment that would preclude Claimant from performing his usual coal mine work. As discussed below, we reject Claimant's assertion that the ALJ erred in considering the medical opinions and finding the evidence as a whole insufficient to establish total disability.[4]

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[3] 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 5; Director's Exhibit 4.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas studies and that there is no evidence of cor pulmonale with right-sided congestive heart

Medical opinions

The ALJ considered the opinions of Drs. Holt and Fino as to whether Claimant is totally disabled. Dr. Holt performed the Department of Labor complete pulmonary evaluation on November 1, 2018, and opined that Claimant is totally disabled due to "a markedly abnormal spirometry as well as the presence of clinical symptoms." Director's Exhibit 16 at 2. However, because the qualifying[5] pulmonary function study obtained in conjunction with Dr. Holt's DOL examination was subsequently invalidated by a DOL reviewing physician, Claimant was given a second pulmonary function study on December 19, 2018, which was non-qualifying. In his supplemental report, Dr. Holt opined that while the second pulmonary function study was non-qualifying, Claimant would still be unable to return to his prior work as a brattice man because of the "physical nature" of the work, which required heavy labor, and Claimant's "clinical history."[6] Director's Exhibit 21 at 2.

Dr. Fino examined Claimant on June 4, 2019. He reviewed Claimant's treatment records, which included numerous pulmonary function tests, and Dr. Holt's reports. Employer's Exhibit 3 at 7-8. Of the designated pulmonary function studies, Dr. Fino opined all were invalid. But he identified several pulmonary function studies in Claimant's treatment records that he described as showing "[g]ood efforts and normal values." *Id*. at 8. He also noted Claimant's resting and exercise blood gas studies were non-qualifying. *Id*. at 9. He opined that "[f]rom a respiratory standpoint, [Claimant] is neither partially nor totally disabled from returning to his last mining job [as a brattice man] or a job requiring similar effort." *Id*. at 12. Dr. Fino concluded "[t]here is no respiratory impairment

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failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 17-18. The irrebuttable presumption of total disability due to pneumoconiosis is not applicable because there is no evidence in the record that Claimant has complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] Claimant submitted a third pulmonary function study dated October 11, 2019, that Dr. Holt administered at Claimant's request and was unrelated to the DOL complete pulmonary evaluation, which was qualifying for total disability. Dr. Holt did not offer a supplemental opinion based on that study. But the ALJ credited Dr. Fino's opinion that the October 11, 2019 study was invalid and Claimant does not allege error with regard to that determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

present." *Id.* at 12. He reiterated his opinion during his October 2, 2019 deposition and in a supplemental report dated July 1, 1990. Employer's Exhibits 1, 4.

The ALJ rejected Dr. Holt's opinion and credited Dr. Fino's opinion. Claimant generally contends the ALJ erred in discrediting Dr. Holt's opinion because it is based on a non-qualifying pulmonary function study.[7] Claimant's Brief at 7. Claimant also contends the "ALJ failed to discuss or consider Dr. Fino's lack of analysis in determining whether Claimant is disabled based on non-qualifying [pulmonary function tests]." *Id*. Claimant mischaracterizes the ALJ's findings and does not identify any error requiring remand.

The ALJ accurately observed both Dr. Holt and Dr. Fino indicated Claimant last worked as a brattice man, which the Dictionary of Occupational Titles (DOT) classifies as "heavy" exertional work.[8] Decision and Order at 18-20; *see* Director's Exhibits 16, 21; Employer's Exhibits 1, 3, 4. The ALJ found, however, that Claimant's last coal mining job for at least one year in duration was working as an aboveground equipment operator.[9] Decision and Order at 5, 18, 19; Director's Exhibits 3-5, Hearing Transcript at 25-26, 31-32. He noted the DOT classifies this job as "medium" work. Decision and Order at 19. The ALJ reasoned that because Dr. Fino concluded Claimant is able to perform "heavy" work, then necessarily he is able to perform "medium" work. *Id*. at 20. Conversely, the ALJ found that while Dr. Holt opined Claimant cannot perform heavy work, he did not address whether Claimant is able to perform "medium" work. *Id*. We see no error in the ALJ's rationale for his finding that Dr. Holt's opinion is less credible because it is based on an inaccurate understanding of the physical demands of Claimant's usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 18-20; Director's Exhibits 16, 21.

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[7] An ALJ may credit a reasoned opinion of total disability even if it is based on non-qualifying objective studies. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000).

[8] The ALJ informed the parties at the hearing that he would take official notice of the Dictionary of Occupational Titles, if necessary, and no party objected. Hearing Transcript at 6.

[9] We affirm the ALJ's finding that Claimant's usual coal mine work was as an equipment operator as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5, 18, 19; Director's Exhibits 3-5; Hearing Transcript at 25-26, 31-32.

Claimant's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because we discern no error in the ALJ's reasoning and his credibility findings are supported by substantial evidence, we affirm the ALJ's conclusion that 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. 20 C.F.R. §718.204(b)(2). Claimant's failure to establish total disability precludes an award of benefits.[10] *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[10] Because we affirm the ALJ's finding that Claimant is not totally disabled, Claimant is unable to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Although Claimant accurately points out the ALJ merely stated a conclusion without any analysis in finding that he established less than fifteen years of coal mine employment, the failure to establish disability precludes invocation, regardless of whether Claimant could establish the necessary years under a proper analysis. We therefore need not address the issue, as any error would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Brief at 2-3, 4-5. Moreover, as Claimant did not establish total disability, a requisite element of entitlement, we need not address the ALJ's findings on clinical or legal pneumoconiosis. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge