U.S. Department of Labor

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

BRB No. 21-0317 BLA

LODGE JACKSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES	)	DATE ISSUED: 11/29/2022
	)	
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 Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

John R Jacobs and Cecelia B. Freeman (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

John C. Webb and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Tracy A. Daly's Decision and Order Denying Benefits (2019-BLA-05338) rendered on a claim filed on January 16, 2018, pursuant to Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 24.56 years of underground coal mine employment but did not establish total disability at 20 C.F.R. §718.204(b)(2) and thus did 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),[1] or establish entitlement under 20 C.F.R. Part 718. He therefore denied benefits.

On appeal, Claimant contends the ALJ erred in finding he is not totally disabled and did not invoke the Section 411(c)(4) presumption. Employer responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[2]

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.[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).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine 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.[4] 20 C.F.R. §718.204(b)(2)(i)-

[1] Section 411(c)(4) 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 24.56 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 6, 9.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 10.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that the blood gas studies do not support a finding of total disability and that there is no evidence of cor pulmonale

(iv). The ALJ must consider all relevant evidence and weigh the evidence supporting 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).

Claimant contends the ALJ erred in weighing the pulmonary function studies and medical opinions and in finding he did not establish total disability based on the evidence as a whole. We agree.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10-11. Dr. Barney's February 15, 2018 study produced non-qualifying[5] values before and after the administration of a bronchodilator. Director's Exhibits 10. Dr. Connolly's August 17, 2018 study produced qualifying pre-bronchodilator FEV1 and MVV values and included no post-bronchodilator results. Claimant's Exhibit 1. Dr. Goldstein's May 30, 2019 study produced qualifying FEV1 and MVV values before and after the administration of a bronchodilator. Employer's Exhibit 1.

In weighing the pulmonary function study evidence, the ALJ stated:

> When the average height is applied, both the pre and post-bronchodilator values of the PFT study by Dr. Goldstein result in qualifying values for the FEV1 and MVV. However, for the pre-bronchodilator test, only one (1) tracing for the MVV was done. In the post-bronchodilator test, the MVV had two (2) tracings and their values were within 10% of each other. Appendix B to Part 718, section (2)(iii) requires "at least three MVV's shall be carried out." Section 718.103(b) states that two tracings of the MVV whose values are within 10% of each other shall be sufficient. The undersigned finds the values in the pre-bronchodilator study to be unreliable, **but the values in the post-bronchodilator study were sufficient to consider reliable.**

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with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *Skrack.*, 6 BLR at 1-711 (1983); Decision and Order at 13.

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

> The pre-bronchodilator FEV1 and MVV values in Dr. Conolly's PFT study also resulted in qualifying values. However, there was only one MVV tracing, making the results unreliable. Additionally, the miner's "fair effort" during the testing provides an additional concern as to the reliability of the study overall. *See* App. B to Part 718, (2)(ii)(C).

Decision and Order at 11 (emphasis added).

Weighing the pulmonary function studies as a whole, the ALJ concluded Drs. Connolly's and Goldstein's studies are "unreliable because they have not met one or more of the standards" and gave them "little evidentiary weight in accordance with App. B to Part 718." Decision and Order at 12. The ALJ concluded "the [pulmonary function] studies overall do not support a finding of total respiratory or pulmonary disability by a preponderance of the medical evidence." *Id.*; *see* 20 C.F.R. §718.204(b)(2)(i).

Initially, we agree with Claimant that the ALJ failed to adequately explain why he gave no apparent weight to Dr. Goldstein's May 30, 2019 qualifying *post-bronchodilator* study, having specifically concluded it was a valid and reliable study. Claimant's Brief at 3-4. Decision and Order at 11-12. The ALJ also failed to adequately explain his discrediting of the August 17, 2018 and May 30, 2019 qualifying pre-bronchodilator studies. Claimant's Brief at 3; *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the reporting requirements of 20 C.F.R. §718.103 and the regulatory quality standards at 20 C.F.R. Part 718, App. B. 20 C.F.R. §§718.101(b), 718.103(c); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards at 20 C.F.R. Part 718, App. B, is presumed. 20 C.F.R. §718.103(c). If a study does not precisely conform to the requirements of 20 C.F.R. §718.103 and Appendix B, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in his role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

Here, although the ALJ found the August 17, 2018 and May 30, 2019 qualifying pre-bronchodilator studies non-conforming with 20 C.F.R §718.103(b) - due to the lack of at least two MVV tracings – he failed to properly address whether the studies were in substantial compliance with the quality standards and therefore sufficiently reliable to support a finding that Claimant is totally disabled.

Regarding Dr. Connolly's qualifying pre-bronchodilator study, the ALJ concluded it was less reliable because the administering technician commented that Claimant's effort was "fair." Decision and Order at 11 (citing App. B to Part 718, (2)(ii)(C) (effort during the administration of a pulmonary function test is unacceptable if patient did not continue to exhale for seven seconds *or* until a plateau has been attained in the volume-time curve)).[6] Contrary to the ALJ's finding, the reporting standards at 20 C.F.R. §718.103 require only that the physician or technician conducting a pulmonary function study set forth "the degree of a miner's effort" in performing the test; the regulations do not reference "fair effort" as a basis for finding a study non-conforming.[7] Interpretation of medical data is a matter for medical experts.[8] 20 C.F.R. §718.103 (specifically describing Appendix B

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[6] The ALJ did not explain his reference to this quality standard.

[7] The only reference to quality of "effort" in 20 C.F.R. §718.103 pertains to when a miner is deceased. It states in the case of a deceased miner if "no pulmonary function studies are in substantial compliance" with the reporting requirements, the ALJ may nonetheless credit the non-conforming studies if the ALJ finds the tests "demonstrate technically valid results obtained with good cooperation of the miner." 20 C.F.R. §718.103(c).

[8] The Appendix B quality standards also do not specify the effort required to deem a study valid. Section (2)(iii) of Appendix B which was referenced by the ALJ states:

> For the MVV, the subject shall be instructed before beginning the test that he or she will be asked to breathe as deeply and as rapidly as possible for approximately 15 seconds. The test shall be performed with the subject in the standing position, if possible. Care shall be taken on repeat testing that the same position be used. The subject shall breathe normally into the mouthpiece of the apparatus for 10 to 15 seconds to become accustomed to the system. The subject shall then be instructed to breathe as deeply and as rapidly as possible, and shall be continually encouraged during the remainder of the maneuver. Subject shall continue the maneuver for 15 seconds. At least 5 minutes of rest shall be allowed between maneuvers. **At least three MVV's shall be carried out**. (*But see §718.103(b*).) During the maneuvers the patient shall be observed for compliance with instructions. The effort shall be judged unacceptable when the patient:
>
> (A) Has not maintained consistent effort for at least 12 to 15 seconds; or
>
> (B) Has coughed or closed his glottis; or

standards as being presumptively satisfied in the absence of contrary evidence); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22-24 (1993).

By the ALJ's own acknowledgement there is no physician in the record that suggests that Dr. Connelly's study is either invalid or unreliable due to Claimant's effort. Indeed, the same technician specifically noted the "[s]pirometry data is ACCEPTABLE and REPRODUCIBLE." Claimant's Exhibit 1 at 7 (emphasis included); *see* Decision and Order at 11. We therefore vacate the ALJ's finding that the technician's reporting of "fair" effort called into question the reliability of the study in the absence of a supporting physician's opinion that explains how Claimant's effort effected the results of the study or otherwise invalidates them. *See Schetroma*, 18 BLR at 1-23-24 (1993).

Because the ALJ did not explain the inconsistency in his findings nor adequately explain his weighing of the pulmonary function studies as the Administrative Procedure Act (APA)[9] requires, we vacate the ALJ's conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). 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).

> (C) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or
>
> (D) Has an excessive variability between the three acceptable curves. The variation between the two largest MVV's of the three satisfactory tracings shall not exceed 10 percent.

App. B to Part 718, (2)(iii)(A)-(D) (emphasis added).

[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).

Medical Opinions

The ALJ also weighed the medical opinions of Drs. Barney[10] Goldstein[11] and Connolly.[12] Decision and Order at 14-19. He credited Dr. Barney's opinion because it is consistent with his overall finding that the pulmonary function studies do not support total disability at 20 C.F.R. §718.204(b)(2)(i). Because he found that Drs. Goldstein and Connolly relied on invalid pulmonary function studies, he gave their opinions little weight. Decision and Order at 16, 18-19. While Dr. Connolly did not address whether Claimant is totally disabled, his diagnosis of a severe respiratory impairment could support a finding of total disability when considered by the ALJ in conjunction with the exertional requirements of Claimant's usual coal mine work. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may infer total disability by comparing the severity of impairment or related physical limitations that a physician diagnoses with the exertional requirements of the miner's usual coal mine work); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (miner is totally disabled if he cannot perform the exertional requirements of his previous job). Thus, as the ALJ's erroneous findings as to the validity of the pulmonary function studies influenced his consideration of the medical opinions, we vacate his conclusion that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Remand Instructions

The ALJ must reconsider the pulmonary function studies and resolve the conflicts in the evidence. *Bradberry*, 117 F.3d at 1367. He must consider if the studies are in substantial compliance with the quality standards and explain the basis for his findings. He must then weigh the pulmonary function studies together and reach a determination as to whether Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Although the

[10] Dr. Barney performed the Department of Labor-sponsored pulmonary evaluation on April 24, 2018. Director's Exhibit 10. He did not diagnose a respiratory or pulmonary condition. *Id.* at 11.

[11] Dr. Goldstein evaluated Claimant on May 30, 2019. Employer's Exhibit 1. Based on the pulmonary function results he obtained, Dr. Goldstein opined Claimant has a mixed restrictive and obstructive defect that would not disable him from working in the mines. *Id.* at 4.

[12] Dr. Connolly evaluated Claimant on August 17, 2018. He diagnosed severe chronic obstructive pulmonary disease (COPD), a disabling blood gas impairment, and chronic respiratory failure. Claimant's Exhibit 3 at 15.

ALJ found that none of the physicians specifically diagnosed Claimant as totally disabled, he must still determine whether their diagnoses of a respiratory impairment when considered in conjunction with the exertional requirements of Claimant's usual coal mine work is sufficient to support a finding that Claimant is totally disabled. If Claimant establishes total disability at either 20 C.F.R. §718.204(b)(2)(i) or (iv) or both, the ALJ must make a determination as to whether the evidence as a whole establishes that Claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will have invoked the Section 411(c)(4) rebuttable presumption, and the ALJ must consider whether Employer has rebutted it.[13] 20 C.F.R. §718.305(d)(1)(i), (ii); *Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1287-88 (11th Cir. 2019). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. In rendering his decision on remand, the ALJ must explain the basis for his findings of fact and conclusions of law as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

[13] Although the ALJ found Claimant did not establish the existence of pneumoconiosis, if Claimant invokes the Section 411(c)(4) presumption on remand the burden shifts to Employer to affirmatively disprove the existence of the disease. 20 C.F.R. §718.305(d)(1)(i).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and reversed 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

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge