U.S. Department of Labor

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

BRB No. 21-0055 BLA

JIMMY D. MULLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS	)	
	)	
and	)	DATE ISSUED: 10/26/2021
	)	
Self-Insured through CONSOL ENERGY INCORPORATED c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Jimmy Mullins, Jenkins, Kentucky.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits (2019-BLA-05174) rendered on a subsequent claim[2] filed on October 16, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-four years of underground coal mine employment based on the parties' stipulation, but found he did not establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), or establish a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309. The ALJ therefore denied benefits.

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

[2] This is Claimant's third claim for benefits. Director's Exhibit 1. He withdrew his initial claim. Director's Exhibit 21. The district director denied his second claim, filed on August 20, 2014, for failure to establish total disability. Director's Exhibits 2, 29. Claimant took no further action until filing the current claim.

[3] 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 pulmonary or respiratory impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[4] When a miner files a claim more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he 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(d); *see 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(d)(2). Because the district director denied Claimant's last claim for failure to establish total disability, he had to submit new evidence establishing this element. *See White*, 23 BLR at 1-3.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Neither the Director, Office of Workers' Compensation Programs, nor Employer filed a response brief.

When a claimant files an appeal without the assistance of counsel, the Board considers whether substantial evidence supports the decision below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with 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).

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 if certain conditions are met, but 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).

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 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).

The ALJ considered the results of five pulmonary function studies dated October 31, 2017, June 26, 2018, December 6, 2018, January 14, 2019, and March 21, 2019. Decision and Order at 8-9, 19; Director's Exhibits 14, 22; Claimant's Exhibit 3; Employer's Exhibits 1, 8. He noted the studies reported differing heights for Claimant,

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Cite.

ranging from seventy-two to seventy-four inches,[6] and permissibly averaged the heights to determine Claimant's height is 72.8 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8-9. Using this height, he accurately determined that none of the pulmonary function studies was qualifying.[7] Decision and Order at 19. Because it is supported by substantial evidence, we affirm the ALJ's determination that the pulmonary function study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 19.

The ALJ next considered the results of three blood gas studies dated October 31, 2017, June 26, 2018, and January 14, 2019. Decision and Order at 9, 19; Director's Exhibits 14, 22; Employer's Exhibit 1. None of the studies produced qualifying values at rest. Director's Exhibits 14 at 19; 22 at 20; Employer's Exhibit 1 at 5. The October 31, 2017 study included two exercise studies, one of which produced qualifying values, and the exercise study conducted on January 14, 2019 produced non-qualifying values.[8] Decision and Order at 9, 19; Director's Exhibit 14 at 19; Employer's Exhibit 1 at 5.

The ALJ noted Dr. Forehand questioned the validity of the non-qualifying January 14, 2019 exercise study because it was performed using a single-stick method instead of an indwelling catheter. Decision and Order at 19; Claimant's Exhibit 8 at 3. According to Dr. Forehand, it is difficult to obtain a blood draw using the single-stick method during exercise, and delaying the blood draw until after exercise could yield inaccurate results. Claimant's Exhibit 8. However, as the ALJ correctly explained, Dr. Forehand "provided no evidence that [the January 14, 2019] exercise value was drawn after exercise had ceased, and the regulations do not require the use of an indwelling line when administering [a blood gas study]." *Id.*; *see* 20 C.F.R. §718.105(b). Substantial evidence thus supports the ALJ's

[6] Claimant's height was recorded as seventy-two inches in the October 31, 2017 and January 14, 2019 pulmonary function studies; seventy-three inches in the June 26, 2018 and March 21, 2019 studies; and seventy-four inches in the December 6, 2018 study. Director's Exhibits 14 at 12; 22 at 6; Claimant's Exhibit 6 at 1; Employer's Exhibits 1 at 8; 6 at 8.

[7] A "qualifying" pulmonary function study or arterial 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. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The June 26, 2018 blood gas study did not include an exercise study. Director's Exhibit 22 at 20.

finding that the January 14, 2019 study is valid. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004) (substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion); *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order at 19.

Because all of the resting studies and two of three exercise studies are non-qualifying, the ALJ found the blood gas study evidence does not establish total disability. Decision and Order at 19; 20 C.F.R. §718.204(b)(2)(ii). As this finding is supported by substantial evidence, it is affirmed. *See Soubik,* 366 F.3d at 234.

Next, the ALJ accurately found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 18. We therefore affirm the finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

Turning to the medical opinion evidence, the ALJ considered the opinions of Drs. Raj, Forehand, and Alam that Claimant has a totally disabling respiratory or pulmonary impairment, and those of Drs. Dahhan and Tuteur that he does not. Decision and Order at 19-21; Director's Exhibits 14, 22, 25; Claimant's Exhibits 7-8; Employer's Exhibits 1, 12. The ALJ permissibly discredited Dr. Forehand's opinion because "he failed to provide any explanation" for his "conclusory statement" that Claimant is disabled.[9] Decision and Order at 20; *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); Claimant's Exhibit 8 at 4. He further found the opinions of Drs. Raj and Dahhan well-reasoned and documented, but gave greater weight to Dr. Dahhan's opinion. Decision and Order at 21.

The ALJ erred, however, by mischaracterizing Dr. Alam's opinion and failing to address his specific statements on the issue of total disability. The ALJ indicated Dr. Alam "made no finding as to total disability." Decision and Order at 19. As the ALJ acknowledged elsewhere in his Decision and Order, Dr. Alam diagnosed Claimant with clinical pneumoconiosis and COPD, and he opined Claimant is disabled from a "pulmonary point of view" based on a reduced FEV1 and on "clinical grounds." Claimant's Exhibit 7 at 1; Decision and Order at 12. Therefore, we vacate the ALJ's determination that Claimant

[9] The ALJ also correctly noted Dr. Tuteur's opinion does not support Claimant's burden to establish total disability because although he opined Claimant is unable to perform his last coal mine work, he indicated this is due to low-back syndrome and dizziness rather than a pulmonary or respiratory impairment. *See* 20 C.F.R. §718.204(b)(1); Decision and Order at 20-21; Employer's Exhibit 11 at 3.

failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Balsavage*, 295 F.3d at 396-97; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We thus also vacate his finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) and failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §718.309. Because we vacate the ALJ's finding that Claimant failed to establish total disability, we also vacate his finding that Claimant failed to invoke the Section 411(c)(4) presumption.

On remand, the ALJ must fully address Dr. Alam's opinion, weigh that opinion against the other opinions of record, and determine whether Claimant is totally disabled by a respiratory or pulmonary impairment. He must take into consideration the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments, and he must explain the bases for his credibility determinations in accordance with the Administrative Procedure Act.[10] *Balsavage*, 295 F.3d at 396-97; *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Wojtowicz*, 12 BLR at 1-165. After reconsidering whether the newly submitted medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the ALJ must weigh all the relevant evidence together, like and unlike, to determine whether claimant has established the existence of a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will thereby establish a change in an applicable condition of entitlement, 20 C.F.R. §718.309, and will invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The ALJ must then consider whether Employer can rebut the presumption taking into consideration all relevant evidence. 20 C.F.R. §718.305(d)(1); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Alternatively, if Claimant does not establish total disability on remand, the ALJ may reinstate the denial of benefits.

[10] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

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