U.S. Department of Labor

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

BRB No. 21-0465 BLA

LAWRENCE J. BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
B & W RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 10/25/2022
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Lawrence J. Bowling, Oneida, Kentucky.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Benefits (2019-BLA-05689) rendered on a claim filed on January 18, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found no evidence of complicated pneumoconiosis, and thus Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. He determined Claimant established at least twenty-nine years of coal mine employment but failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Therefore, the ALJ found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] or establish entitlement under 20 C.F.R. Part 718, and therefore denied benefits. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), argues the ALJ erred in his consideration of the medical opinion evidence.

In an appeal filed by an unrepresented claimant, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is

[1] Courtney Hughes, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but she does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] 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); *see* 20 C.F.R. §718.305.

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).

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 the elements of entitlement if certain conditions are met, but failure to establish any one of these elements precludes an award of benefits.[4] *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, 1-2 (1986) (en banc).

Total Disability

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 qualifying pulmonary function studies or arterial blood gas studies,[5] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[6] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

[4] The ALJ accurately found there is no evidence of complicated pneumoconiosis, and therefore Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 4.

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

[6] Because the record contains no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure, the ALJ properly found Claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 4.

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 found Claimant failed to establish total disability and thus could neither invoke the Section 411(c)(4) presumption nor establish entitlement under 20 C.F.R. Part 718. Decision and Order at 11.

Pulmonary Function Studies

The ALJ considered the results of four pulmonary function studies.[7] Decision and Order at 5. Because the ALJ accurately found there are no qualifying studies,[8] we affirm his determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).[9]

Blood Gas Studies

The ALJ considered the results of four arterial blood gas studies and properly concluded they were all non-qualifying.[10] Decision and Order at 6-7; Director's Exhibits

[7] Because the studies reported varying heights for Claimant ranging from 67.3 to 69 inches, the ALJ permissibly calculated an average height of 68.2 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 5. He then used the closest greater table height at Appendix B of 20 C.F.R. Part 718 of 68.5 inches in determining whether each study was qualifying. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 5.

[8] Dr. Baker's March 8, 2016 study produced non-qualifying pre-bronchodilator results, Director's Exhibit 24 at 6; the November 20, 2017 study conducted at St. Charles Respiratory Care Clinic produced non-qualifying pre-bronchodilator results, Employer's Exhibit 7; Dr. Ajjarapu's March 13, 2018 study produced non-qualifying pre-bronchodilator and post-bronchodilator results, Director's Exhibit 22 at 13; and Dr. Broudy's July 23, 2018 study produced non-qualifying pre-bronchodilator results, Employer's Exhibit 6 at 6.

[9] Dr. Ajjarapu recorded Claimant's height as sixty-nine inches, and she indicated the study was qualifying based on the closest greater table height at Appendix B of 69.3 inches. Director's Exhibit 22 at 13. The ALJ noted that even if he found Dr. Ajjarapu's study qualifying, it would not change his overall conclusion that the preponderance of the studies did not support a finding of total disability. *Id.* at 10 n.30.

[10] Dr. Baker's March 8, 2016 study produced non-qualifying values at rest. Director's Exhibit 24 at 4. Dr. Ajjarapu's March 13, 2018 study produced non-qualifying values at rest and with exercise. Director's Exhibit 22 at 9. Dr. Broudy's July 23, 2018

22 at 9, 24 at 4; Employer's Exhibits 6 at 5, 8 at 13. We therefore affirm the ALJ's finding that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinion Evidence

In addressing the medical opinions, the ALJ first found Claimant's usual coal mine employment required "heavy manual labor," which included lifting and carrying up to 100 pounds. Decision and Order at 7. The ALJ then considered the four medical opinions. Decision and Order at 7-11; Director's Exhibits 22, 24; Employer's Exhibits 6, 8, 9, 10.

Dr. Ajjarapu conducted the Department of Labor (DOL) complete pulmonary evaluation of Claimant on August 2, 2017. Director's Exhibit 22. She obtained non-qualifying pulmonary function and blood gas studies and noted Claimant reported having symptoms of whiteish sputum production, coughing, and shortness of breath after walking 100 to 300 feet on a level surface. *Id.* at 3, 6. In addition she noted Claimant's last coal mine employment was working as a surface mine foreman and relief man. *Id.* at 1. She indicated Claimant's pulmonary function study results "showed [a] severe pulmonary impairment," acknowledged his blood gas study showed resting hypoxia, and opined "[h]e doesn't have the pulmonary capacity to do his previous coal mine employment." *Id.* at 7.

Dr. Baker examined Claimant on March 8, 2016, in conjunction with a Kentucky workers' compensation claim. Director's Exhibit 24. He opined Claimant's pulmonary function study results were normal and that his blood gas study results showed mild resting hypoxemia. *Id.* at 3. In addition, he noted Claimant reported being able to walk 200 to 300 feet on a level surface before having to catch his breath. *Id.* at 1.

Dr. Broudy examined Claimant on July 23, 2018, and indicated Claimant's pulmonary function study results were at the "lower limits of normal," and his blood gas study results were normal. Employer's Exhibit 6 at 3. He opined "[Claimant] would retain the respiratory capacity to do his previous work or work requiring similar effort." *Id.* at 4; *see also* Employer's Exhibit 9 at 3-4.

Dr. Jarboe examined Claimant on November 1, 2018, and noted that while his pulmonary function studies showed a moderate restrictive defect, they were invalid and may not represent Claimant's lung function. Employer's Exhibit 8 at 2, 5. In addition, Dr. Jarboe noted Claimant reported having shortness of breath while walking on level ground

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study produced non-qualifying values at rest. Employer's Exhibit 6 at 5. Dr. Jarboe's November 1, 2018 study produced non-qualifying values at rest. Employer's Exhibit 8 at 13.

for less than 100 yards. *Id.* at 3. He concluded Claimant is not totally disabled from a respiratory or pulmonary impairment. *Id.* at 7; *see also* Employer's Exhibit 10.

The ALJ also reviewed Claimant's treatment records from the St. Charles Respiratory Care Clinic and Breathing Center and Mary Breckenridge Hospital but permissibly determined they did not establish the existence of a pulmonary or respiratory impairment or whether Claimant is capable of continuing his usual coal mine work. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 10-11; Claimant's Exhibit 4; Employer's Exhibits 11, 12, 13.

The ALJ discredited all of the medical opinions and found Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[11] Decision and Order at 10. He noted Dr. Ajjarapu's opinion was the only medical opinion supportive of a finding of total disability. Decision and Order at 8, 10. But he discredited her opinion because she relied on a pulmonary function study that he determined was non-qualifying. *Id*. at 8. In addition, he gave her opinion less weight for failing to discuss the exertional requirements of Claimant's usual coal mine work and for failing to explain how Claimant's impairment would impact his ability to meet the exertional requirements. *Id.* at 8. Thus, he found Claimant failed to establish total disability based on the medical opinions and the evidence as a whole. *Id.* at 10-11; *see* 20 C.F.R. §718.204(b)(2)(iv).

The Director contends the ALJ failed to fully address the evidence on total disability by comparing the exertional requirements of Claimant's usual coal mine employment with his pulmonary capacity as Dr. Ajjarapu described. Director's Brief at 2-3. We agree.

A miner may be found to be totally disabled based on a non-qualifying study when the non-qualifying study indicates a level of capability that is insufficient to meet the exertional requirements of the miner's usual coal mining employment. *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir.

[11] The ALJ found Dr. Baker's opinion merited no weight because he failed to address whether Claimant is totally disabled by a respiratory or pulmonary impairment. Decision and Order at 7-8, 10. He discredited Dr. Broudy's opinion that Claimant would be able to continue his last coal mine work because he failed to explain how Claimant could continue his last work in light of the impairment he identified. *Id.* at 8-9, 10. The ALJ also discredited Dr. Jarboe's opinion based on his reliance on an invalid pulmonary function study that was not of record. *Id.* at 10. We affirm these findings as unchallenged. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

1997). Moreover, 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 usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion*.") (emphasis added); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability).

Here, the ALJ failed to consider whether Dr. Ajjarapu's diagnosis of a "severe pulmonary impairment," if reasoned and documented and considered in conjunction with Claimant's description of having shortness of breath while walking, would preclude him from performing "heavy manual labor" and lifting and carrying up to 100 pounds as his usual coal mine work required. 30 U.S.C. §923(b) (ALJ must address all relevant evidence); *Cornett*, 227 F.3d at 578; *Budash*, 9 BLR at 1-51-52; *see also Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983) ("When the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case . . . rather than attempting to fill the gaps in the ALJ's opinion."); Director's Exhibit 22 at 1, 3, 6. Thus, we vacate the ALJ's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. Consequently, we vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption.

Remand Instructions

On remand, the ALJ must reconsider the medical opinions diagnosing an impairment and Claimant's respiratory symptoms in conjunction with the exertional requirements of Claimant's usual coal mine employment to determine whether Claimant is totally disabled. *Cornett*, 227 F.3d at 578; *Budash*, 9 BLR at 1-51-52. If he finds that Claimant establishes total disability, he must also determine whether Claimant's twenty-nine years of surface coal mine employment were performed at an underground mine or in conditions substantially similar[12] to conditions in an underground coal mine. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i); *see Island Creek Ky. Mining v. Ramage*, 737 F.3d

[12] Conditions at a surface coal mine are "substantially similar" to those in underground coal mine employment if the Miner was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

1050, 1058-59 (6th Cir. 2013) (miner working aboveground at an underground mine not required to prove comparable dust conditions). If Claimant establishes both fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, he will invoke the Section 411(c)(4) presumption. The ALJ would then have to consider whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(1). However, if the ALJ finds Claimant is not totally disabled, an essential element of entitlement, he may reinstate the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In rendering all his findings on remand, the ALJ must comply with the Administrative Procedure Act.[13] 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, 1-165 (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

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[13] 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).