U.S. Department of Labor

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

BRB No. 22-0325 BLA

RICHARD J. BUEHL	)	
	)	
Claimant- Petitioner	)	
	)	
v.	)	
	)	
GILBERTON COAL COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	DATE ISSUED: 10/24/2023
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

Christopher D. Pavuk (The Chartwell Law Offices), Scranton, Pennsylvania, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits (2020-BLA-06075) rendered on a claim filed on January 22, 2019, pursuant to the Black Lung Benefits Act as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has forty years of above ground coal mine employment, all of which the ALJ determined was qualifying for invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] He found, however, Claimant could not invoke the presumption or establish entitlement under 20 C.F.R Part 718 because he failed to establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). The ALJ therefore denied benefits.

On appeal, Claimant contends he was denied due process based on an evidentiary ruling by the ALJ. He also argues the ALJ erred in finding he is not totally disabled and in failing to make findings regarding pneumoconiosis. In response, Employer urges affirmance of the denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has not filed 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.[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).

Due Process – Evidentiary Ruling

[1] 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.

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

[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); Director's Exhibit 3.

Claimant contends he was denied due process because the ALJ did not provide him sufficient time to respond to Employer's submission of "last[-]minute" evidence. Claimant's Brief at 28-29. Specifically, Employer submitted its medical opinion evidence[4] two business days before the twenty-day deadline for the submission of evidence under 20 C.F.R §725.456(b)(2). Claimant moved for time to respond to this evidence, which the ALJ granted, providing seven days from the date of his order for Claimant to submit his evidence. Claimant's Motion for an Enlargement of Time; Order Granting Claimant's Motion. At the hearing, Claimant argued seven days to obtain and submit evidence was an "impossible and unrealistic timeframe," and asserts the same argument on appeal. Claimant's Brief at 29; Hearing Transcript at 12-13. Employer responds that it timely submitted Dr. Manaker's report and Claimant was given the opportunity to respond; thus, there is no due process violation. Employer's Response at 4 (unpaginated).

Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn an ALJ's ruling must establish his action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). The Third Circuit has held that "due process, as incorporated into the [Administrative Procedure Act] requires an opportunity for rebuttal where it is *necessary to the full presentation of a case*." *N. Am. Coal Co. v. Miller*, 870 F.2d 948, 951-52 (3d Cir. 1989) (emphasis added); *see also Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987) (en banc) (ALJs must provide parties the opportunity to respond to surprise evidence submitted on the eve of the twenty-day deadline). In *Miller*, the court found the employer's due process rights violated because the ALJ provided no opportunity to respond to the submission of last-minute evidence – a physician's new examination of the claimant that post-dated the other examinations by three years. *Miller*, 870 F.2d at 949.

Here, the ALJ provided Claimant time to respond to Employer's evidence; however, Claimant argues the timeframe was unrealistic. But we need not determine if the ALJ abused his discretion. While Claimant generally asserts it is his right to respond to Employer's evidence and the ALJ's ruling made it impossible to do so, Claimant's Brief at 29, *Miller* does not provide an absolute right to respond to timely submitted evidence, even if it is submitted at the "last-minute." Rather, it holds that an opportunity to respond to such evidence may be required if necessary for a "full presentation of the case." *Miller*, 870 F.2d at 951-52.

[4] Although not specified by Claimant, the record reflects he is referring to Dr. Manaker's medical report. Employer's Exhibit 1; Hearing Transcript at 12-13.

Employer submitted Dr. Manaker's report to refute the medical opinions of Drs. Dotan and Hale. Employer's Exhibit 1. Unlike the facts in *Miller*, Dr. Manaker only reviewed medical records and reports, and did not provide any new testing or a new examination of Claimant which would constitute a "surprise." *Miller*, 870 F.2d at 949. Claimant has not alleged he was unaware of or lacked access to the evidence Dr. Manaker reviewed. Nor does he allege that his medical experts did not have an opportunity to offer an opinion on the elements of entitlement, including those addressed by Dr. Manaker. *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 149 (1991) ("submissions timely under the twenty-day rule should not, in the vast majority of cases, give rise to claims of unfair surprise and requests for further discovery, testimony, and time to respond"). Thus, regardless of Claimant's alleged inability to develop evidence within the ALJ's timeframe to submit evidence in response to Dr. Manaker's report,[5] Claimant has not explained how he has been prejudiced or prevented from fully presenting his case. *Miller*, 870 F.2d at 951-52; *Cox v. Benefits Review Bd.*, 791 F.2d 445, 446-47 (6th Cir. 1986); Claimant's Brief at 29.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. 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.[6] *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

[5] While Claimant asserts he only had seven days to obtain and submit responsive evidence, he was aware of Employer's evidence prior to the issuance of the ALJ's order. The twenty-day deadline was April 20, 2021. *See* Notice of Hearing. Employer submitted Dr. Manaker's report on the afternoon of Friday, April 16, 2021. Employer's Exhibit 1. Claimant submitted his motion for time to respond to Employer's evidence on April 20, 2021. Claimant's Motion for an Enlargement of Time. On April 30, 2021, the ALJ issued his order granting Claimant until May 7, 2021, to submit responsive evidence. Order Granting Claimant's Motion. Assuming Claimant's counsel could have begun working on obtaining a response on April 19, 2021, she would have had nineteen calendar days – or fifteen business days – to do so.

[6] The ALJ found Claimant's usual coal mine employment as a supervisor required medium to heavy exertion. Decision and Order at 7. The parties do not challenge this finding; thus, we affirm it. *See Skrack*, 6 BLR at 1-711.

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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock*, 9 BLR at 1-198. 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 found Claimant failed to establish total disability by any means.[7]

Medical Opinions

The ALJ considered the medical opinions of Drs. Dotan, Hale, and Manaker. Decision and Order at 11-15. Dr. Dotan opined that Claimant has moderate restrictive disease and would be unable to perform more than "mild" physical activity without shortness of breath. Director's Exhibit 14. Dr. Hale concluded that Claimant is disabled and "very limited" because of his lung disease. Claimant's Exhibit 1. Dr. Manaker opined that Claimant's objective studies are non-qualifying[8] and thus do not demonstrate disability but also stated Claimant "may currently be partially or even totally disabled." Employer's Exhibit 1 at 3. The ALJ found each opinion undermined for various reasons.[9] Decision

[7] Claimant does not challenge the ALJ's findings that the pulmonary function study and arterial blood gas study evidence do not support a finding of total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure; thus, we affirm these findings. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 9-10. While Claimant contends Drs. Levinson's and Manaker's opinions regarding the validity of the pulmonary function study exceed the applicable evidentiary limitations at 20 C.F.R §725.414, he admits any error by the ALJ in admitting them is harmless. Claimant's Brief at 29-31.

[8] 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).

[9] While Employer generally asserts that Dr. Manaker is the best-qualified expert and his "well-reasoned" report should be credited as to "both the existence of pneumoconiosis and whether there is any disability associated with the same," it does not contest the ALJ's finding that Dr. Manaker's opinion regarding total disability is equivocal and vague. Employer's Response at 9-10 (unpaginated); Decision and Order at 15. Thus, we affirm the ALJ's finding that Dr. Manaker's opinion is entitled to less weight. *See Skrack*, 6 BLR at 1-711; Decision and Order at 15.

and Order at 14-15. Thus, he found the medical opinion evidence does not support a finding of total disability. *Id.*

Claimant argues the ALJ erred in finding Drs. Dotan's and Hale's opinions inadequate to support a finding of total disability given that Dr. Manaker's contrary opinion was not credited. Claimant's Brief at 22, 28. Further, Claimant contends the ALJ failed to apply the appropriate standard for assessing total disability, failed to give proper deference to Dr. Hale as Claimant's treating physician, and substituted his opinion for those of the experts. *Id.* at 21-28. Claimant's arguments have merit, in part.

First, contrary to Claimant's argument, the ALJ is not required to credit a medical opinion simply because it is uncontradicted; rather, he "has broad discretion to determine the weight accorded each doctor's opinion." *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *see also Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). Thus, the ALJ was not required to credit Drs. Dotan and Hale simply because he discredited Dr. Manaker.

We also reject Claimant's argument that the ALJ was required to defer to Dr. Hale as Claimant's treating physician. Claimant's Brief at 26-27. A treating physician's opinion may be due additional deference based on the nature and duration of the physician's relationship with the miner and the frequency and extent of treatment. *See* 20 C.F.R. §718.104(d); *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' opinions get "the deference they deserve based on their power to persuade").

The ALJ addressed Claimant's contention that Dr. Hale's opinion warranted more weight for being Claimant's treating physician, but permissibly declined to provide his opinion increased weight because there is insufficient evidence in the record to determine the duration of their relationship[10] or the frequency and extent of treatment. *See Soubik*, 366 F.3d at 235; *Williams*, 338 F.3d at 513; Decision and Order at 14 n.19.

[10] The ALJ found no indication Dr. Hale had seen Claimant prior to December 17, 2019. Decision and Order at 14 n.19. Claimant contends Dr. Hale was the treating physician he saw regularly for four years; however, he points to no evidence or testimony supporting this assertion. Claimant's Brief at 10. Elsewhere, he indicates he began seeing Dr. Hale on December 17, 2019. *Id.* at 20. Dr. Hale's report is dated February 26, 2020. Claimant's Exhibit 1.

The ALJ further found Dr. Hale's opinion to be worthy of less weight because it was not well-reasoned or documented and "very vague," noting the physician found Claimant was "disabled" but did not indicate the extent of his impairment.[11] Decision and Order at 14. While the doctor indicated he evaluated Claimant, the ALJ noted he did not explain what was done in the evaluation or point to any testing performed, nor did he specify any other objective testing used to evaluate Claimant. *Id.* It is within the ALJ's discretion to weigh the credibility of the medical evidence and draw his own inferences, and substantial evidence supports the ALJ's credibility determinations with respect to Dr. Hale. *See Kertesz*, 788 F.2d at 163; *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). As the ALJ found it is unclear what evidence or observations Dr. Hale relied upon to reach his conclusions and did not adequately explain those conclusions, the ALJ permissibly found his opinion not well-reasoned or well-documented.[12] *See Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion).

However, we find merit in Claimant's argument that the ALJ did not adequately address whether Dr. Dotan's opinion supports total disability. Claimant's Brief at 23-24.

The ALJ found that "at best" one could infer Dr. Dotan found Claimant totally disabled, but that he did not "squarely" address the issue. Decision and Order at 14. Thus, the ALJ declined to credit his opinion. *Id.* However, 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 a doctor's report are 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

[11] Claimant objects to the ALJ's finding that Dr. Hale did not opine he was *totally* disabled, as Claimant need only establish that his disability prevents him from performing his usual coal mining work. Claimant's Brief at 25. But Claimant points to nothing in Dr. Hale's opinion that meets this standard. *Id.* at 25-26.

[12] Claimant generally argues that the ALJ's discrediting of Dr. Hale's opinion was based on "mere peripheral quibbles" and the ALJ substituted his opinion for that of the physician. Claimant's Brief at 25-27. However, Claimant does not explain this argument absent his general disagreement with the ALJ's credibility findings and lack of deference given to Dr. Hale as a "treating physician." *Id.*

limitations which lead to that conclusion."); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (even a mild impairment may be totally disabling).

As the ALJ noted, Dr. Dotan found moderate restriction[13] and shortness of breath at rest, and further determined Claimant could not perform more than mild physical activity without shortness of breath. Decision and Order at 12; Director's Exhibit 14.

Given the ALJ's finding that Claimant's usual coal mine employment required medium to heavy exertion, combined with Dr. Dotan's diagnosis of moderate restriction and his assessment that Claimant could not perform more than mild physical activity without shortness of breath, the ALJ erred in failing to address whether Dr. Dotan's opinion constitutes a finding of total disability, even if not expressly stated. *See Cornett*, 227 F.3d at 578; *Scott*, 60 F.3d at 1141. Consequently, 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. Decision and Order at 15.

Remand Instructions

On remand, the ALJ must reconsider Dr. Dotan's opinion and determine whether it is sufficiently reasoned and documented to support a finding of total disability. *Cornett*, 227 F.3d at 578; *Scott*, 60 F.3d at 1141. The ALJ must consider the physician's qualifications, the explanations for his opinion, the documentation underlying his medical judgment, and the sophistication of and bases for his diagnoses. *See Balsavage*, 295 F.3d at 396-97; *Kertesz*, 788 F.2d at 163. If the ALJ determines Dr. Dotan's medical opinion demonstrates total disability, he must reach a conclusion as to whether Claimant is totally disabled based on the evidence considered as a whole. *See* 20 C.F.R. §718.204(b)(2); *see also Defore*, 12 BLR at 1-28-29.

If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the ALJ must consider if Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). However, if Claimant does not establish total disability, an essential element of entitlement, the ALJ may reinstate the denial 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).

[13] The ALJ indicated that while Dr. Dotan noted a reduced FVC value on pulmonary function testing of 63 percent, he never explained its significance or relevance to total disability; however, Dr. Dotan explained that the study demonstrated moderate restriction. Decision and Order at 14; Director's Exhibit 14.

In rendering his findings on remand, the ALJ must comply with the Administrative Procedure Act.[14] 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, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[14] 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).