U.S. Department of Labor

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

BRB No. 22-0434 BLA

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<tr><td>TROY H. HERRON

Claimant-Petitioner

v.

VIRGINIA FUEL CORPORATION

and

NEW HAMPSHIRE INSURANCE COMPANY/AIG

Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DECISION and ORDER</td></tr>
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Appeal of the Decision and Order Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Troy H. Herron, Keokee, Virginia.

Sarah Y. M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2020-BLA-05841) rendered on a claim filed on March 29, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 19.45 years of underground or substantially similar surface coal mine employment. However, she found Claimant did not establish a totally disabling respiratory or pulmonary impairment and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. She also found Claimant did not establish pneumoconiosis. 20 C.F.R. §718.202. Because Claimant failed to establish essential elements of entitlement, she denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to respond.[3]

In an appeal filed without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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

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

[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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 19.45 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.

applicable law.[4] 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, 362 (1965).

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

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(i). 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. 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 found Claimant failed to establish total disability by any method.[6] 20 C.F.R. §718.204(b)(2); Decision and Order at 7-11.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated December 11, 2017, March 14, 2019, June 25, 2019, and December 10, 2019. Decision and Order at 7-8. The ALJ found the December 11, 2017, March 14, 2019, and June 25, 2019 studies produced qualifying pre-bronchodilator results, while the December 10, 2019 study produced non-

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[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 10.

[5] A "qualifying" pulmonary function study or arterial blood gas study yields results 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 yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The ALJ considered one arterial blood gas study, dated June 25, 2019, that produced non-qualifying results, and she found it does not establish total disability. Decision and Order at 8; Director's Exhibit 14 at 18. As this finding is supported by substantial evidence, we affirm it. 20 C.F.R. §718.204(b)(2)(ii). Further, the ALJ correctly found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 8.

qualifying pre-bronchodilator results. *Id.* at 7; Director's Exhibits 14, 19; Employer's Exhibit 5. She also found the June 25, 2019 and December 10, 2019 studies produced non-qualifying post-bronchodilator results. Director's Exhibit 14; Employer's Exhibit 5. The December 11, 2017 and March 14, 2019 studies do not contain post-bronchodilator results. Director's Exhibit 19.

The ALJ assigned greater weight to the non-qualifying post-bronchodilator results than the qualifying pre-bronchodilator results because she determined pneumoconiosis is a "fixed condition" that would "not be susceptible to bronchodilator therapy." Decision and Order at 8. She further gave more weight to the June 25, 2019 and December 10, 2019 studies because they are the most recent. *Id.* at 7-8. Thus she found the overall weight of the pulmonary function study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 7-8. We are unable to affirm the ALJ's analysis.

The ALJ's rationale for crediting the post-bronchodilator results improperly focuses on the etiology of any pulmonary or respiratory impairment and not whether the impairment is totally disabling. Specifically, the ALJ found that the improvement in Claimant's impairment following administration of bronchodilator therapy is inconsistent with the presence of pneumoconiosis as that disease is not "susceptible to bronchodilator therapy."[7] Decision and Order at 8. On that basis, she credited the post-bronchodilator results. *Id.* Contrary to the ALJ's finding, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the miner has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023). In addition, the Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." *See* 45 Fed. Reg. 13, 678, 13,682 (Feb. 29, 1980).

[7] In addition, the ALJ failed to cite any credible medical evidence to support her finding that pneumoconiosis is a "fixed condition" that would "not be susceptible to bronchodilator therapy." Decision and Order at 8. Thus she improperly substituted her opinion for that of a medical expert. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Further, the ALJ inaccurately characterized the December 10, 2019 study's pre-bronchodilator results as non-qualifying.[8] Decision and Order at 7. The ALJ correctly noted the study produced an FEV_1 value of 2.38, an FVC value of 4.03, and an MVV value of 43.4, and that Claimant performed the test when he was fifty-two years old.[9] *Id.*; *see* Employer's Exhibit 5. In addition, she found the pulmonary function studies reported varying heights for Claimant falling between 72.0 inches and 73.0 inches, and she permissibly calculated an average height of 72.5 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 7 n.8. She then properly used the closest greater table height set forth at Appendix B of 20 C.F.R. Part 718 of 72.8 inches for determining whether the studies were qualifying. *See Carpenter v. GMS Mine & Repair Maint. Inc.*, BLR , BRB No. 22-0100 BLA, slip op. at 4-5 (Sept. 6, 2023); Decision and Order at 7 n.8.

The qualifying values for a fifty-two-year-old miner who is 72.8 inches tall are an FEV_1 value of 2.41, an FVC value of 3.03, and an MVV value of 96. 20 C.F.R. Part 718, Appendix B. Because the December 10, 2019 pre-bronchodilator study produced FEV_1 and MVV values that are less than the applicable Appendix B table values, the study is qualifying for total disability and the ALJ mischaracterized it as non-qualifying. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (explaining if the ALJ misconstrues relevant evidence, the case must be remanded for reevaluation of the issue to which the evidence is relevant); 20 C.F.R. Part 718, Appendix B; Decision and Order at 7; Employer's Exhibit 5.

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[8] For a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce both a qualifying FEV_1 value and one of the following: either an FVC value or MVV value equal to or less than the values appearing in the tables set forth in Appendix B, or an FEV_1/FVC ratio equal to or less than fifty-five percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). The qualifying values in Appendix B are based on gender, height, and age. 20 C.F.R. Part 718, Appendix B.

[9] The ALJ incorrectly noted an FEV_1/FVC ratio of 73% where the correct ratio is 59%. Decision and Order at 7; Employer's Exhibit 5. However, the ALJ's error is harmless as neither value is qualifying. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.204(b)(2)(i)(C).

In view of the forgoing errors, we vacate the ALJ's finding that Claimant did not establish total disability based on the pulmonary function study evidence and remand the case for further consideration of that evidence.[10] 20 C.F.R. §718.204(b)(2)(i).

Medical Opinion Evidence

The ALJ next considered the medical opinions of Drs. Harris, McSharry, and Dahhan. Decision and Order at 9-11.

Dr. Harris diagnosed Claimant with a significant pulmonary impairment evidenced by his symptoms of daily productive cough, wheezing, and dyspnea on exertion, as well as the markedly reduced lung function seen on his pulmonary function study. Director's Exhibit 14 at 8. He further explained that, at the time of his examination, Claimant "could walk about [fifty] yards on level ground before stopping due to dyspnea and . . . was unable to walk for more than [thirty] seconds before developing a severe coughing fit." Director's Exhibit 22. Thus he opined Claimant could not perform the exertional requirements of his usual coal mine employment. *Id.*

Dr. McSharry diagnosed significant chronic obstructive lung disease and opined a "[p]ulmonary impairment is certainly present," noting several pulmonary function studies with results below total disability standards. Employer's Exhibit 6. He further opined that, although Claimant exhibits marked bronchodilator responsiveness, he still has a significant fixed airflow obstruction. *Id.* However, he ultimately concluded Claimant's impairment is not totally disabling based on his belief that the December 10, 2019 pulmonary function

[10] The ALJ also did not address the validity of the June 25, 2019 study and thus failed to render a necessary factual finding. *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). As Employer points out, Dr. Harris stated that the pre-bronchodilator MVV values on the June 25, 2019 pulmonary function study are suboptimal based on a clarification letter from the district director. Employer's Reply at 10, 12, 17; Director's Exhibit 22. Because that study is qualifying based on the FEV_1 and MVV results, the ALJ must determine whether the study is in substantial compliance with the quality standards. 20 C.F.R. §§718.101, 718.103, 718.204(b)(2)(i). When assessing the validity of a pulmonary function study, compliance with the quality standards is presumed and the party challenging the validity of the study has the burden to establish the results are unreliable. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). Thus, the ALJ, in her role as fact-finder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

study was non-qualifying before and after bronchodilators, and that the June 25, 2019 pulmonary function study is invalid. *Id.*

Dr. Dahhan diagnosed an obstructive ventilatory impairment but opined Claimant is not totally disabled based on his non-qualifying post-bronchodilator pulmonary function study results and his understanding that the December 10, 2019 pulmonary function study yielded non-qualifying FEV_1 and FVC results. Employer's Exhibit 7 at 3, 6, 10, 16.

The ALJ found that Dr. Harris opined Claimant is totally disabled, and Drs. Dahhan and McSharry opined he is not. Decision and Order at 9-11; Director's Exhibit 14 at 6; Employer's Exhibits 6, 7. After summarizing each opinion, she stated, "[a]ffording each opinion some weight, I find that the medical opinion evidence does not support a finding of total disability." Decision and Order at 11. Again, we are unable to affirm the ALJ's analysis of the medical opinion evidence.

The ALJ made no determination as to whether the medical opinions are reasoned and documented. Decision and Order at 8-11. Although she assigned the medical opinions "some weight," she did not explain the basis for this finding. *Id.* at 11. Thus, she erred by failing to critically analyze the physicians' opinions, render any findings as to whether their opinions are reasoned and documented, or otherwise explain why she found their opinions credible as the Administrative Procedure Act (APA)[11] requires. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must conduct an appropriate analysis of the evidence to support his or her conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Furthermore, the ALJ did not explain why she found the opinions of Drs. Dahhan and McSharry outweigh Dr. Harris's opinion on the issue of total disability. *Addison*, 831 F.3d at 252-53; *Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11. The ALJ's unexplained finding that all the medical opinions are entitled to "some weight" and her apparent reliance on a head count of contrary opinions is an insufficient basis to find Claimant failed to meet his burden to establish total disability.

[11] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include 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, 1-165 (1989).

Decision and Order at 11; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *Addison*, 831 F.3d at 256-57; *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz*, 12 BLR at 1-165.

Thus we vacate her finding Claimant did not establish total disability based on the medical opinions, 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); Decision and Order at 11. We also therefore vacate the ALJ's finding Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and the denial of benefits.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. In weighing the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), the ALJ must first address the evidence regarding the validity of the pulmonary function studies. She should then determine, with sufficient explanation, whether the pulmonary function studies support total disability. In doing so, she must properly characterize the pulmonary function study evidence and undertake a quantitative and qualitative analysis of the conflicting results in rendering her findings of fact. *See Addison,* 831 F.3d at 252-53; *Adkins v. Director, OWCP*, 958 F.2d 49, 552 (4th Cir. 1992); *see also Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence").

The ALJ must also reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). In doing so, she must first determine the exertional requirements of Claimant's usual coal mine work and consider the medical opinions by taking into account those requirements.[12] *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical

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[12] A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). Although the ALJ acknowledged Claimant worked underground and as a truck driver, she did not make a finding regarding the exertional requirements of his work. Decision and Order at 6. Thus she erred by failing to make this necessary factual finding and must do so on remand. *McCune*, 6 BLR at 1-998.

opinions as to the miner's work capabilities); *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). She must determine whether the opinions of Drs. Harris, McSharry, and Dahhan are reasoned and documented, explaining the weight she accords each medical opinion based on her consideration of the physicians' comparative credentials, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Hicks*, 138 F.3d at 537 (ALJ must consider all relevant evidence and adequately explain her rationale for crediting certain evidence); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

If Claimant establishes total disability through the pulmonary function studies or medical opinions, the ALJ must also reweigh the evidence as a whole and determine whether Claimant has established total disability.[13] *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 invoke the Section 411(c)(4) presumption, and the ALJ must consider whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See 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). In rendering her findings on remand, the ALJ must explain the bases for her findings in accordance with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

[13] As the burdens of proof on remand may shift, we decline to address, as premature, the issues of disease and disability causation. 20 C.F.R. §§718.202, 718.203, 718.305(d).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge