U.S. Department of Labor

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

BRB No. 20-0511 BLA

FINNIE D. COLEMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 09/24/2021
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Finnie D. Coleman, Haysi, Virginia.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge (ALJ) Drew A. Swank's[2] Decision and Order Denying Benefits (2018-BLA-05803) rendered on a claim filed on June 30, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act.[3] 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He found Claimant established 25.8 years of underground coal mine employment but failed to establish total disability. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018), or establish entitlement pursuant 20 C.F.R. Part 718. He therefore denied benefits.

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

[2] ALJ Jennifer Whang conducted the hearing in this matter, admitted post-hearing evidence, and accepted closing briefs. Decision and Order at 2. Due to Judge Whang's unavailability, the case was thereafter reassigned to ALJ Swank for decision. *Id.*

[3] Because the record contains no evidence of complicated pneumoconiosis, we affirm the ALJ's finding that Claimant failed to invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 6.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds, urging affirmance of the denial.[5] The Director, Office of Workers' Compensation Programs (the Director), has filed a response, arguing the ALJ erred in finding Claimant did not establish total disability.

In an appeal filed without the assistance of counsel, the Board considers 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 rational, supported by substantial evidence, and in accordance with applicable law.[6] 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 a claimant in establishing these elements when certain conditions are met, but failure to establish any element 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

[5] Employer stipulated to 22.8 years of underground coal mine employment. Decision and Order at 3; Hearing Transcript at 5. After considering Claimant's Social Security Earnings Statement, employment history forms, and testimony, the ALJ found Claimant established 25.8 years of underground coal mine employment. Decision and Order at 5. Because the ALJ used a reasonable method of calculation and his calculation is supported by substantial evidence, we affirm his finding that Claimant established 25.8 years of underground coal mine employment. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 22.

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 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).

The ALJ correctly found the record contains no qualifying[7] pulmonary function studies[8] and no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 8; Director's Exhibit 19; Employer's Exhibits 12-13. We therefore affirm his findings that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii).

The ALJ next considered the results of three resting arterial blood gas studies dated August 1, 2017, February 26, 2018, and May 22, 2019. Decision and Order at 8-9. The August 1, 2017 and February 26, 2018 studies produced qualifying values, while the May 22, 2019 study did not. Employer's Exhibits 12, 19; Employer's Exhibit 13. The ALJ gave the greatest weight to the non-qualifying May 22, 2019 arterial blood gas study because it is the most recent blood gas study in the record. Decision and Order at 9. He thus concluded the arterial blood gas study evidence does not establish total disability. *Id.*

We agree with the Director that the ALJ erred in giving the greatest weight to the May 22, 2019 arterial blood gas study solely because it was the most recent. Director's Response at 2. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held it is rational to credit more recent evidence, solely on the basis of recency, only if the more recent evidence shows that a miner's condition has progressed or worsened. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (case involving x-rays); *see Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993) (applying the holding in *Adkins* to medical opinions and noting "[a] bare appeal to 'recency' is an abdication of rational decisionmaking"); *see also Woodward v. Director,*

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

[8] The ALJ considered three pulmonary function studies dated August 1, 2017, February 26, 2018, and May 22, 2019. Decision and Order at 7-8. Each produced non-qualifying values both before and after the administration of bronchodilators. Director's Exhibit 19; Employer's Exhibits 12, 13.

OWCP, 991 F.2d 314, 319-20 (6th Cir. 1993). Conversely, it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows a miner's condition has improved given the irreversible nature of pneumoconiosis. *See Adkins*, 958 F.2d at 51-52. In such situations, "[e]ither the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier." *Id.* at 52. As the ALJ's sole rationale for crediting the non-qualifying May 22, 2019 study over the two prior qualifying studies was its recency, his finding conflicts with *Adkins*. *Id.* We thus vacate his finding that Claimant did not establish total disability based on the arterial blood gas study evidence. 20 C.F.R. §718.204(b)(2)(ii); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (an ALJ must consider all relevant evidence and adequately explain his or her rationale for crediting certain evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 8.

Turning to the medical opinion evidence, the ALJ considered the opinions of Dr. Green that Claimant is totally disabled and those of Drs. McSharry and Sargent that he is not. Decision and Order at 16; Director's Exhibit 19; Employer's Exhibits 12-14. While the ALJ found Dr. Green's opinion well-reasoned and supported based on the testing the physician reviewed, he gave it only "some weight" because Dr. Green did not consider the May 22, 2019 non-qualifying arterial blood gas study. Decision and Order at 16-17. The ALJ determined Dr. Sargent's opinion is not well-reasoned because he relied solely on the non-qualifying blood gas study and therefore gave it no weight. *Id.* at 17. He found Dr. McSharry's opinion the "most-well reasoned" because Dr. McSharry considered all of the evidence, including the May 22, 2019 blood gas study.[9] *Id.* He therefore found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Because we have vacated the ALJ's determination regarding the arterial blood gas studies, we vacate his determination regarding the medical opinions and his finding that Claimant did not

[9] The ALJ further found the opinions of Drs. Sargent and McSharry "better-supported" than the opinion of Dr. Green because they "provided specific and persuasive reasons for concluding the qualifying results on blood gas study were due to Claimant's obesity and not to his coal dust exposure." Decision and Order at 16. As the Director correctly notes, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant's respiratory or pulmonary impairment precludes the performance of his usual coal mine work. 20 C.F.R. §718.204(b)(1); Director's Response at 2. The cause of that pulmonary impairment is a separate inquiry, which is addressed at 20 C.F.R. §718.204(c) or in consideration of whether Employer can rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1)(ii). The ALJ erred, therefore, in crediting the opinions of Drs. Sargent and McSharry on this basis.

establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand for further consideration of the medical opinion evidence.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. He must initially reconsider the blood gas studies, undertaking a qualitative and quantitative analysis of the evidence in rendering his findings and providing an adequate rationale for how he resolves the conflict in the relevant evidence. 20 C.F.R. §718.204(b)(2)(i); *see Thorn*, 3 F.3d at 718; *see also Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); *Woodward*, 991 F.2d at 319-20; *Wojtowicz*, 12 BLR at 1-165. He must also explain the weight he accords the conflicting medical opinions of Drs. Green, Sargent, and McSharry on total disability, taking into account the physicians' qualifications, the explanations given for their findings, the documentation underlying their judgments, and the sophistication of, and bases for, their diagnoses.[10] *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). If the ALJ finds either the blood gas studies or medical opinions support a finding of total disability, he must weigh all of the relevant evidence together to determine whether Claimant is totally disabled and can invoke the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21. The ALJ must explain the bases for his credibility determinations in accordance with the Administrative Procedure Act.[11] *See Wojtowicz*, 12 BLR at 1-165.

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must address whether Employer can rebut it. 20 C.F.R. §718.305(d)(1); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Alternatively, if the ALJ again finds Claimant is not totally disabled, he must deny benefits as Claimant will have failed to establish an essential element of entitlement. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[10] In considering whether the medical opinions are well-reasoned, the ALJ should determine if they are consistent with his finding that Claimant's usual coal mine employment required heavy exertion. Decision and Order at 5; *see Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997).

[11] 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).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge