U.S. Department of Labor

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

BRB No. 21-0115 BLA

COLLIN WASHINGTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTERS RESOURCES, INCORPORATED – WALTER ENERGY	)	
	)	DATE ISSUED: 9/27/2022
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and Paisley Newsome (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

John C. Webb V and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Angela F. Donaldson's Decision and Order Denying Request for Modification (2020-BLA-05277) rendered on a request for

modification of a denial of a subsequent claim filed on February 5, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a February 22, 2018 Decision and Order Denying Benefits, ALJ Larry W. Price denied benefits because Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Claimant timely requested modification of that denial. 20 C.F.R. §725.310.

In the Decision and Order that is the subject of this appeal, ALJ Donaldson (the ALJ) accepted the parties' stipulation that Claimant has at least thirty-five years and eleven months of underground coal mine employment. However, she found Claimant failed to establish total disability, 20 C.F.R. §718.204(b)(2), and therefore failed to establish a mistake of fact in the prior denial or a change in conditions since the prior denial. 20 C.F.R. §725.310. She thus found Claimant did not establish entitlement under 20 C.F.R. Part 718, and denied benefits.

On appeal, Claimant argues the ALJ erred in finding the evidence did not establish a totally disabling pulmonary impairment. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response.[2]

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

[1] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, an ALJ must also deny the subsequent claim unless she 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(c); *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(c)(3). The district director denied Claimant's prior claim, filed on October 2, 2012, for failure to establish total disability. Director's Exhibit 1. Therefore, Claimant had to submit new evidence establishing this element to obtain review of the merits of his claim.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least thirty-five years and eleven months of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4.

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 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 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes an ALJ to grant modification of an award or denial of benefits based on a change in conditions or a mistake in a determination of fact. The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See USX Corp. v. Director, OWCP* [*Bridges*], 978 F.2d 656, 658 (11th Cir. 1992); *see also Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533 (7th Cir. 2002). The ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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

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 coal mine employment or surface coal mine employment in substantially similar dust conditions and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 34.

work[4] 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 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 v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). 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). Claimant contends the ALJ erred in finding the pulmonary function studies, medical opinion evidence, and evidence as a whole failed to establish total disability.[5] Claimant's Brief at 4-7.

Pulmonary Function Studies

The ALJ considered two previously submitted pulmonary function studies dated March 31, 2016, and July 5, 2017,[6] and two new pulmonary function studies dated February 18, 2019, and July 25, 2019.[7] Decision and Order at 8-10; Director's Exhibit 13; Claimant's Exhibits 5-6; Employer's Exhibit 2. She found the March 31, 2016 study did

[4] The ALJ accepted the parties' stipulation that Claimant's last coal mining job required heavy labor. Decision and Order at 4; Hearing Transcript at 34.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that the arterial blood gas studies do not support total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(ii)-(iii); Decision and Order at 11.

[6] The record also contains a previously submitted pulmonary function study dated September 27, 2016. 2016 Goldstein report (Employer's Exhibit 1 before ALJ Price). The ALJ on modification did not specifically state whether this study is qualifying; however, ALJ Price correctly indicated it is non-qualifying. 2018 Decision and Order at 5, 10; Decision and Order at 12-13.

[7] The ALJ noted varying recorded heights for Claimant and found his height to be 69.23 inches "for purposes of this claim," and applied the height of 69.3 inches provided in the table at Appendix B of 20 C.F.R. Part 718. Decision and Order at 8, *citing Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995). The parties do not challenge the ALJ's finding. *Skrack*, 6 BLR at 1-711; 2018 Decision and Order at 10.

not produce qualifying values.[8] Decision and Order at 9. The ALJ then independently assessed the July 15, 2017, February 18, 2019 and July 25, 2019 pulmonary function studies based on the quality standards in Appendix B of 20 C.F.R. Part 718. Decision and Order at 9-10, *referencing* 20 C.F.R. Part 718, App. B (2)(ii)(G) (pulmonary function test effort is unacceptable if the variation between the two largest FEV1 measurements exceeds 100 milliliters or five percent, whichever is greater). She found these three studies, with the exception of the July 15, 2017 non-qualifying post-bronchodilator study, to be "unacceptable" because the difference between the two largest FEV1 measurements exceeded 100 milliliters. Decision and Order at 9-10; Claimant's Exhibits 5-6; Employer's Exhibit 2. Further, she noted the July 25, 2019 study also was non-qualifying. Decision and Order at 10; Employer's Exhibit 2.

Claimant contends the ALJ erred in finding the July 15, 2017, February 18, 2019 and July 25, 2019 pulmonary function studies invalid based on the variability in the tracings. Specifically, Claimant argues the ALJ substituted her opinion for those of the medical experts by interpreting the studies and did not consider the documentation and statements from the technicians who performed the studies. Claimant's Brief at 4-6. Claimant further argues that even if the pulmonary function studies did not conform to the quality standards, that is a factor in determining the weight of the evidence but is not sufficient for excluding that evidence from consideration altogether. *Id.* at 5. Claimant's arguments are persuasive.

When weighing pulmonary function studies, the ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). 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). The ALJ must then, in her role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). However, interpretation of the factors provided in Appendix B requires medical expertise; the ALJ may not independently apply the Appendix B quality standard requirements to interpret the validity of pulmonary function studies, as interpretation of medical data is a matter for medical experts. *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22-24 (1993).

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

As Claimant argues, the ALJ impermissibly determined the July 15, 2017, February 18, 2019 and July 25, 2019 pulmonary function studies are invalid without evidence from any medical expert opining the studies were invalid or unreliable. *Schetroma*, 18 BLR at 1-23-1-24. Neither party points to an expert opinion indicating any of the pulmonary function studies are invalid or otherwise unreliable. However, as Claimant indicates, the technician[9] who administered the July 5, 2017 study commented "spirometry data is ACCEPTABLE and REPRODUCIBLE. [Patient] gave good effort with good understanding during test." Claimant's Exhibit 5 at 6 (emphasis in original). The same comments were made regarding the February 18, 2019 testing. Claimant's Exhibit 6. Similarly, the technician who performed the July 25, 2019 study noted good patient effort. Employer's Exhibit 2. Moreover, the Appendix B quality standard on which the ALJ relied specifically states that tests with "excessive variability" between the curves "may still be submitted for consideration in support of a claim" because "individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility."[10] 20 C.F.R. Part 718, Appendix B(2)(ii)(G).

[9] While Claimant indicates physicians provided the comments regarding the acceptability, reproducibility, and effort provided in the pulmonary function testing, it appears the administering technician provided these comments. Claimant's Brief at 5; Claimant's Exhibits 5-6; Employer's Exhibit 2. However, as Claimant correctly notes, the requesting physicians provided interpretations of these studies and made no comments suggesting the studies are invalid or otherwise unreliable. Claimant's Brief at 5; Claimant's Exhibits 5-6; Employer's Exhibit 2.

[10] Claimant correctly asserts that, even if the ALJ had permissibly found the pulmonary function studies did not precisely conform to the quality standards, remand would be required for the ALJ to determine if the non-conforming studies are nonetheless in "substantial compliance" with the quality standards, thus constituting "evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). It also appears that some of the pulmonary function studies the ALJ found invalid may have been obtained in the course of Claimant's treatment. Claimant's Exhibits 5-6; Director's Exhibit 54; Claimant's Evidence Summary Form; Decision and Order at 12 n.9. The quality standards do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation, but may support a finding of total disability if the ALJ deems them "sufficiently reliable." 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

Employer argues that even if the ALJ erred in invalidating the February 18, 2019 study, her findings are harmless given that it is the only qualifying study of record. Employer's Response at 2. The ALJ, however, did not determine or explain the weight she provided to the various studies, a finding the ALJ must make in the first instance. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004) (duty of the ALJ to evaluate and explain what weight is given to the evidence); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (same); *N. Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996) (same).

Because the ALJ erred by independently applying Appendix B's quality standards in the absence of medical evidence indicating the July 15, 2017, February 18, 2019 and July 25, 2019 pulmonary function studies are not in substantial compliance or are unreliable,[11] we must vacate her finding that Claimant has failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 11.

Medical Opinion Evidence and Weighing of the Evidence as a Whole

The only new medical opinion evidence submitted on modification was Dr. Goldstein's July 25, 2019 examination report.[12] Employer's Exhibit 2. Dr. Goldstein opined Claimant had a pulmonary impairment related to asthma but could return to his previous coal mining job "if his heart rate were faster." *Id.* Determining Dr. Goldstein's opinion did not indicate whether Claimant's pulmonary impairment would prevent him from returning to his usual coal mining work, the ALJ found the new medical opinion evidence on modification did not support Claimant's burden to establish total disability. Decision and Order at 13. Regarding the evidence ALJ Price previously considered,[13] the

[11] While the ALJ found the July 15, 2017 post-bronchodilator study "acceptable," she indicated it was not qualifying under the regulations and thus did not support a finding of total disability. Decision and Order at 10. It is unclear what weight the ALJ gave to either the pre-bronchodilator study or the post-bronchodilator study. 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." 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

[12] At one point, the ALJ indicated that Dr. Goldstein's most recent report was dated July 25, 2018. Decision and Order at 12. However, there are no medical opinions or testing with that date, so this appears to be a typographical error.

[13] ALJ Price considered the medical opinion of Dr. Barney, who found total disability, and the opinions of Drs. Fino and Goldstein, who opined that Claimant was not

ALJ found no mistake in his findings regarding the evidence on total disability. *Id.* at 13-14.

Claimant argues the ALJ did not consider whether Dr. Barney's opinion supports total disability and whether the contrary opinions of Drs. Goldstein and Fino are probative in light of the qualifying February 18, 2019 pulmonary function study. Claimant's Brief at 6-7. Claimant's arguments have merit, in part.

The ALJ did not independently address whether Drs. Barney's opinion supports total disability. However, she found no mistake of fact in ALJ Price's conclusion that Dr. Barney did not sufficiently explain why, in the absence of qualifying objective testing, Claimant's obstructive defect and shortness of breath render Claimant totally disabled or in his crediting of Drs. Fino's and Goldstein's opinions that Claimant can perform his last coal mining job.[14] 2018 Decision and Order at 11; Decision and Order at 13-14; 2016 Goldstein Report (Employer's Exhibit 1 before ALJ Price); 2017 Fino Report (Employer's Exhibit 2 before ALJ Price). Because the ALJ's weighing of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i) may have influenced her weighing of the medical opinion evidence, we vacate her determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Because we have vacated the ALJ's determination that the pulmonary function study evidence and the medical opinion evidence do not establish total disability, we further vacate her finding that the record as a whole does not establish total disability.

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totally disabled. 2018 Decision and Order at 5-7; Directors Exhibits 13, 18; 2016 Goldstein Report (Employer's Exhibit 1 before ALJ Price); 2017 Fino Report (Employer's Exhibit 2 before ALJ Price).

[14] Though Claimant is correct that the ALJ did not address whether Dr. Goldstein's July 25, 2019 opinion is entitled to probative weight given that he did not consider the February 18, 2019 pulmonary function study, Claimant's Brief at 6-7, the ALJ correctly observed Dr. Goldstein did not provide an opinion regarding whether Claimant has a pulmonary impairment that prevents him from performing his usual coal mining work. Decision and Order at 13; Employer's Exhibit 1. Dr. Goldstein's July 25, 2019 opinion thus does not support Claimant's burden to establish a totally disabling respiratory or pulmonary impairment, so any error in weighing his opinion is therefore harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

20 C.F.R. §718.204(b)(2); Decision and Order at 13. We thus also vacate her determination that Claimant did not invoke the Section 411(c)(4) presumption, vacate the denial of benefits, and remand this case for further consideration of the issue of total disability. 30 U.S.C. §921(c)(4).

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability. 20 C.F.R. §718.204(b)(2). She must initially reconsider whether the pulmonary function study evidence considered in isolation would support finding Claimant totally disabled, undertaking a qualitative and quantitative analysis of the evidence and providing an adequate rationale for how she resolves conflicts in relevant evidence. *Wojtowicz v. Duquesne Light Co.*, 12 BLR at 1-165; 20 C.F.R; §718.204(b)(2)(i). In light of her findings regarding the pulmonary function study evidence, the ALJ must also reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). The ALJ must address the physicians' explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Jones*, 386 F.3d at 992. When setting forth her findings on remand, the ALJ must identify the evidence on which she relies and set forth the rationale underlying her decision. *See Wojtowicz*, 12 BLR at 1-165. If the ALJ finds either the pulmonary function study evidence or medical opinion evidence supports a finding of total disability, she must then weigh all of the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b); *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 address whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1); *Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1287-88 (11th Cir. 2019). Alternatively, if the ALJ again finds Claimant is not totally disabled, she 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.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Request for Modification, and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge