U.S. Department of Labor

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

BRB No. 22-0347 BLA

LUKE HALBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 9/20/2023
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Luke Halbert, McDowell, Kentucky.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals ALJ Joseph E. Kane's Decision and Order Denying Benefits (2020-BLA-05378) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on April 19, 2016.[2]

The ALJ found Claimant did not establish complicated pneumoconiosis and thus 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); 20 C.F.R. §718.304. Additionally, he credited Claimant with twenty-four years of underground coal mine employment but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). The ALJ therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] or establish a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). Because Claimant failed to establish a requisite element of entitlement, the ALJ denied benefits.

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

[2] Claimant filed two prior claims. Director's Exhibits 1, 2. Claimant filed his previous claim on May 17, 2010, which the district director denied on January 8, 2011, for failure to establish total disability. 20 C.F.R. §718.204(b)(2); Director's Exhibit 2.

[3] 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.

[4] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he 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). Because the district director denied Claimant's prior claim for failure to establish total disability, he had to submit new evidence establishing that element in order to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.[5]

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 (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 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 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).

Invocation of the Section 411(c)(3) Presumption: Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gray v.*

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-four years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 5; Hearing Tr. at 12-13.

SLC Coal Co., 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

The ALJ correctly found the x-ray, treatment record, and medical opinion evidence contains no diagnosis of complicated pneumoconiosis, and the record contains no biopsy evidence. 20 C.F.R. §718.304(a)-(c); Decision and Order at 8-9. He weighed Dr. Halbert's reading of a December 4, 2015 computed tomography (CT) scan. 20 C.F.R. §718.304(c); Claimant's Exhibit 4. Dr. Halbert identified a "somewhat linear shaped density in the left apex [that] could be the earliest finding of complicated coal worker's pneumoconiosis." *Id*. The ALJ permissibly found the reading is equivocal and thus entitled to diminished weight. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 8. In addition, the ALJ permissibly found there is no evidence to establish the CT scan is medically acceptable and relevant to establishing Claimant's entitlement to benefits as required by 20 C.F.R. §718.107(b), and thus could not establish complicated pneumoconiosis even if he found it credible. Decision and Order at 8.

As it is supported by substantial evidence, we affirm the ALJ's conclusion that Claimant failed to establish complicated pneumoconiosis. *Gray*, 176 F.3d at 388-89; 20 C.F.R. §718.304; Decision and Order at 8-9.

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. 20 C.F.R. §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 or comparable gainful work.[7] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[8] pulmonary function or 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 Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231,

[7] The ALJ found Claimant's usual coal mine employment as a roof bolter required him to frequently lift fifty pounds and thus required "some heavy work." Decision and Order at 16. This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711.

[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).

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).

The ALJ found the pulmonary function studies, arterial blood gas studies, and medical opinions do not establish total disability.[9] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 9-16. Therefore, he found Claimant did not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 16-17.

Arterial Blood Gas Studies

The ALJ considered the results of two arterial blood gas studies dated May 9, 2016, and January 23, 2017, and accurately found neither produced qualifying values. Decision and Order at 7, 18; Director's Exhibits 14, 29. Thus we affirm his finding the blood gas study evidence does not support total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 11.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated May 9, 2016, January 23, 2017, and October 28, 2020. Decision and Order at 9-10; Director's Exhibits 14, 29; Employer's Exhibit 3. The May 9, 2016 and January 23, 2017 studies produced qualifying results before and after administration of bronchodilators. Director's Exhibits 14, 29. The October 28, 2020 study produced non-qualifying results before and after administration of bronchodilators. Employer's Exhibit 3.

The ALJ acknowledged two of the three studies are qualifying.[10] Decision and Order at 9-10. He further noted that the most recent study is non-qualifying but found he cannot credit it merely because Claimant performed it most recently.[11] *Id*. However, he

[9] The ALJ accurately found there is no evidence in the record containing a diagnosis of cor pulmonale with right-sided congestive heart failure. Decision and Order at 9.

[10] The ALJ permissibly found the objective studies from Claimant's prior claim are too "remote in time" and thus not credible. Decision and Order at 9-10 n.28; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

[11] The ALJ noted that "when later pulmonary function studies produce higher values than earlier studies, a disharmony exists among the . . . studies that cannot be resolved by the later evidence rule . . . ." Decision and Order at 10 n.32 (internal quotations omitted);

found the pulmonary function studies do not support a finding of total disability "in view of the equivocal results" between them. *Id.*

The ALJ has not adequately explained how the pulmonary function studies are equivocal as the May 9, 2016 and January 23, 2017 studies produced qualifying results and the October 28, 2020 study produced non-qualifying results. Director's Exhibits 14, 29; Employer's Exhibit 3. The mere presence of conflicting evidence is not a valid basis to conclude Claimant failed to meet his burden to establish total disability. It is the responsibility of the ALJ to resolve conflicts in the evidence and explain the basis for his findings. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJ has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal bases for his decision). Thus, his finding with respect to the pulmonary function testing does not satisfy the explanatory requirements of the Administrative Procedure Act (APA).[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Consequently we vacate his finding the pulmonary function studies do not support total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10.

Medical Opinions

With respect to the medical opinion evidence, the ALJ considered Dr. Ajjarapu's opinion that Claimant is totally disabled and the contrary opinions of Drs. Dahhan and Tuteur. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 8-13; Director's Exhibits 14, 17, 29; Employer's Exhibits 3, 5. He found Dr. Ajjarapu's opinion is reasoned and documented. Decision and Order at 15-16. Although the ALJ found Dr. Dahhan did not explain his basis for finding the May 9, 2016 pulmonary function study invalid, the ALJ nonetheless found the doctor's opinion reasoned and documented. *Id.* He determined Dr. Tuteur was equivocal on the issue of total disability and thus his opinion is entitled to diminished weight. *Id.* Ultimately, he concluded Dr. Dahhan's contrary opinion outweighs Dr. Ajjarapu's opinion because Dr. Ajjarapu did not review the October 28, 2020 non-

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see Woodward v. Director, OWCP, 991 F.2d 314, 319-20 (6th Cir. 1993); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 10 (June 27, 2023).

[12] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision 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).

qualifying pulmonary function study while Dr. Dahhan reviewed "all the relevant medical evidence." *Id.*

Because the ALJ's insufficiently explained weighing of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i) may have affected his weighing of the medical opinion evidence, we must vacate his finding that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv).

Further, the ALJ erred in failing to analyze whether Dr. Dahhan adequately explained his basis for finding Claimant totally disabled from his usual coal mine employment, notwithstanding whether the objective studies are non-qualifying. *See Rowe*, 710 F.2d at 254-55.

Dr. Dahhan acknowledged Claimant "frequently" carried items weighing fifty pounds as part of his usual coal mine employment. Employer's Exhibit 3 at 1. He also set forth the results of the objective studies he reviewed, including Dr. Ajjarapu's pulmonary function studies. *Id.* He stated the May 9, 2016 study that Dr. Ajjarapu conducted is invalid due to Claimant's poor effort. *Id.* Dr. Dahhan concluded Claimant "has no evidence of functional pulmonary disability as confirmed by the pulmonary function studies generated from my exam as well as all of the valid pulmonary function studies available in the records." *Id.* at 3. Further, he stated the arterial blood gas studies are all normal. *Id.* Thus he opined Claimant is not totally disabled. *Id.*

On remand, the ALJ must set forth his basis for finding Dr. Dahhan's opinion is reasoned and documented. *Wojtowicz*, 12 BLR at 1-165. In addition, the ALJ must reconcile his finding that Dr. Dahhan did not adequately explain his opinion that the qualifying May 9, 2016 pulmonary function study is invalid[13] with the ALJ's determination that his opinion is reasoned and documented. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Consequently, we vacate the ALJ's determination that Claimant did not establish total disability overall at 20 C.F.R. §718.204(b)(2). Decision and Order at 16-17. We therefore also vacate the ALJ's findings that Claimant did not invoke the Section 411(c)(4) presumption and failed to establish a change in an applicable condition of entitlement, and the ALJ's denial of benefits. 20 C.F.R. §725.309(c).

[13] The ALJ recognized that Dr. Gaziano validated the May 9, 2016 pulmonary function study. Decision and Order at 10 n.30; *see* Director's Exhibit 20.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on a preponderance of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i). Thereafter, he must weigh the medical opinions, taking into consideration the exertional requirements of Claimant's usual coal mine work and other relevant evidence. *Cornett*, 227 F.3d at 578. In weighing the medical opinions, he must consider the physicians' qualifications, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Rowe*, 710 F.2d at 255. In reaching his credibility determinations, the ALJ must set forth his findings in detail and explain his rationale in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165. The ALJ must then weigh the categories of evidence together to determine if Claimant has established total disability based on a preponderance of the evidence. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability and thus invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption. 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. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-2.

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.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge