U.S. Department of Labor

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

BRB No. 22-0395 BLA

ROBERT M. KEISER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 9/07/2023
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits (2020-BLA-05780) rendered on a claim filed on September 14, 2018,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found no evidence of complicated pneumoconiosis, and thus Claimant 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) (2018); 20 C.F.R. §718.304. In addition, the ALJ found Claimant established thirteen years of coal mine employment and, therefore, concluded he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore denied benefits.[3]

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Neither Employer nor the Director, Office of Workers' Compensation Programs, filed a response brief.[4]

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] Claimant filed two prior claims but withdrew them. Director's Exhibits 1, 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that the 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.

[3] Because the ALJ determined that Claimant did not establish total disability, he did not consider the other elements of entitlement pursuant to 20 C.F.R. Part 718 or determine whether Employer was the responsible operator. Decision and Order at 19 n.113.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that there is no evidence of complicated pneumoconiosis and that Claimant established less than fifteen years of coal mine employment and, thus, could not invoke the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3 n.17, 17.

accordance with applicable law.[5] 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 claimants 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, 1-2 (1986) (en banc).

Total Disability

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,[6] 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 did not establish total disability based on any category of evidence.[7] 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 17-19. Claimant

[5] 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 Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10; Director's Exhibit 5.

[6] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields results that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] We affirm, as unchallenged on appeal, the ALJ's findings that the pulmonary function studies and arterial blood gas studies do not support a finding of total disability

alleges the ALJ erred in finding the medical opinions did not establish total disability. Claimant's Brief at 4-7. We agree.

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Feicht,[8] Rosenberg,[9] and Tuteur.[10] Decision and Order at 7-16, 18-19. Dr. Feicht opined that Claimant is totally disabled, while Drs. Rosenberg and Tuteur opined that he is not. Director's Exhibits 17, 20, 22, 23; Employer's Exhibits 3-6. In rejecting Dr. Feicht's opinion, the ALJ noted only that Dr. Feicht "failed to address" that the pulmonary function and blood gas studies he obtained were non-qualifying and thus found his opinion not well-documented or reasoned. Decision and Order at 18. In contrast, the ALJ found Drs. Tuteur's and Rosenberg's

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and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 17-18.

[8] Dr. Feicht conducted the Department of Labor complete pulmonary evaluation of Claimant on October 18, 2018. Director's Exhibit 17. He obtained non-qualifying pulmonary function and blood gas studies and opined the results were abnormal. *Id.* at 5-6, 10, 13. Initially, he diagnosed resting and exercise hypoxia and mild chronic obstructive pulmonary disease (COPD), but later opined Claimant has moderately severe COPD. *Id.* at 6; Director's Exhibit 23 at 1. Further, he noted Claimant reported having "moderately severe" respiratory symptoms and described having difficulty ascending two flights of stairs or walking on an incline. Director's Exhibit 17 at 4. He opined that Claimant is totally disabled from a pulmonary perspective. *Id.* at 6; Director's Exhibits 20, 22, 23.

[9] Dr. Rosenberg reviewed Claimant's objective testing and Dr. Feicht's reports. Employer's Exhibit 3. He opined Claimant "potentially has" a mild restriction and concluded Claimant is not disabled from a pulmonary perspective. *Id.* at 3-4; Employer's Exhibit 5 at 9, 15-16. At his deposition, he opined there "may be . . . a very minimal" obstruction. Employer's Exhibit 5 at 15-16.

[10] Dr. Tuteur reviewed Claimant's objective testing and Dr. Feicht's reports. Employer's Exhibit 4. He initially opined Claimant has a mild obstructive defect with no significant gas exchange impairment at rest or with exercise; at his deposition, he opined the pulmonary function study results could be interpreted as either a mild obstruction, restriction, or both, but he believed Claimant has a restrictive defect. *Id.* at 3, 10-11; Employer's Exhibit 6 at 24-25, 34-37, 48-53. Dr. Tuteur concluded Claimant is not disabled from a pulmonary perspective but that he would be unable to continue his usual coal mine employment based on his knee replacements and the limitations due to his bilateral shoulder prostheses. Employer's Exhibits 4 at 3, 10-11; 6 at 9-12, 26.

opinions were well-documented and reasoned as they were supported by the non-qualifying objective testing. *Id.* at 18-19. Consequently, he found Claimant failed to establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. *Id.* at 18-19; *see* 20 C.F.R. §718.204(b)(2).

Claimant contends the ALJ did not give a valid reason for rejecting Dr. Feicht's opinion and did not adequately explain his weighing of the medical opinion evidence. Claimant's Brief at 4-7. We agree.

Contrary to the ALJ's analysis, total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing, as non-qualifying testing may still render a miner incapable of performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); Decision and Order at 18-19; Claimant's Brief at 4-6. Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer 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 doctor's report 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 limitations which lead to that conclusion*.") (emphasis added); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may infer total disability by comparing the severity of impairment or related physical limitations that a physician diagnoses with the exertional requirements of the miner's usual coal mine work).

Here, the ALJ erred in failing to make a specific finding regarding the exertional requirements of Claimant's usual coal mine work. Instead of focusing on whether the physicians' opinions were supported by qualifying or non-qualifying objective tests, he was required to compare the physicians' assessments of Claimant's respiratory impairment or physical limitations with those exertional requirements to determine if Claimant is totally disabled. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Claimant's Brief at 6-7. As the ALJ did not conduct the proper analysis, we vacate his conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 18-19.

Remand Instructions

On remand, the ALJ must determine the exertional requirements of Claimant's usual coal mine employment. *See Cornett*, 227 F.3d at 578; *Ward*, 93 F.3d. at 218-19. He must then reweigh the medical opinions, resolve any conflict regarding the degree of Claimant's respiratory impairment, and determine whether the physicians have identified an impairment or physical limitations that would preclude Claimant from performing his usual coal mine work and thereby establish that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 578. In weighing the medical opinions, the ALJ must consider the qualifications of the respective physicians, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). If Claimant establishes total disability based on the medical opinion evidence, the ALJ must weigh the evidence as a whole to determine whether Claimant is totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2); *see also Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, the ALJ will need to address the additional elements of entitlement pursuant to 20 C.F.R. Part 718, and also determine whether Employer is the responsible operator. However, if the ALJ finds the evidence insufficient to establish total disability, he may reinstate the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In rendering all his findings on remand, the ALJ must comply with the Administrative Procedure Act.[11] 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).

[11] 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).

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 decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge