U.S. Department of Labor

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

BRB No. 22-0422 BLA

ROY E. HILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRESLEY TRUCKING COMPANY, INCORPORATED	)	DATE ISSUED: 9/20/2023
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Granting Benefits (2017-BLA-05615) 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 June 8, 2017,[1] and is before the Benefits Review Board for a second time.

In her initial Decision and Order Awarding Benefits, the ALJ found Employer is the responsible operator. She credited Claimant with thirteen and one-quarter years of coal mine employment. Thus she found Claimant could 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).[2] Considering entitlement under 20 C.F.R. Part 718, she found the evidence establishes clinical pneumoconiosis and legal pneumoconiosis[3] and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). She thus found Claimant established a change in an applicable condition of entitlement and entitlement to benefits. 20 C.F.R. §725.309.

In consideration of Employer's appeal, a majority of the Board's three-member panel affirmed the ALJ's responsible operator finding.[4] *Hill v. Presley Trucking Co., Inc.*, BRB No. 20-0123 BLA, slip op. at 3-9 (Sept. 16, 2021) (unpub.) (Boggs, J., concurring in

[1] This is Claimant's third claim for benefits. Director's Exhibits 1, 2. On December 3, 2009, the district director denied Claimant's prior claim because he failed to establish any element of entitlement. Director's Exhibit 2.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[4] Chief Administrative Appeals Judge Judith S. Boggs would have vacated the ALJ's responsible operator finding. *Hill v. Presley Trucking Co., Inc.*, BRB No. 20-0123 BLA, slip op. at 14-18 (Sept. 16, 2021) (unpub.) (Boggs, J., concurring in part and dissenting in part).

part and dissenting in part). The Board rejected Employer's constitutional challenge to the Section 411(c)(4) presumption. *Id*. at 14. In addition, the Board affirmed the ALJ's finding that Claimant established total disability and thus a change in an applicable condition of entitlement. *Id*. at 2 n.3; *see* 20 C.F.R. §§718.204(b)(2), 725.309. However, because the ALJ failed to adequately explain her findings with respect to the length of Claimant's cigarette smoking and coal mine employment histories, the Board vacated her findings with respect to these issues. *Hill*, BRB No. 20-0123 BLA, slip op. at 9-13. Noting the ALJ's findings regarding these histories may affect her credibility findings on the issues of legal pneumoconiosis and disability causation, the Board vacated her finding Claimant established these elements of entitlement and the award of benefits. *Id.* at 12.

The Board also vacated the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption. *Hill*, BRB No. 20-0123 BLA, slip op. at 12. Thus, the Board remanded the case, instructing the ALJ that, if she finds the evidence establishes at least fifteen years of coal mine employment, she must address whether the evidence establishes Claimant's coal mine employment took place in underground coal mines or surface coal mines in conditions substantially similar to those in an underground coal mine. *Id*.; *see* 20 C.F.R. §718.305(b)(1)(i), (2). If she were to find at least fifteen years of qualifying coal mine employment, Claimant will have invoked the Section 411(c)(4) presumption. The Board declined to address, as premature, Employer's arguments pertaining to the weighing of the evidence on the issue of clinical pneumoconiosis as the burdens of proof may change on remand. *Hill*, BRB No. 20-0123 BLA, slip op. at 12-13.

On remand, the ALJ found the Claimant established 24.75 years of coal mine employment with only 12.46 in underground coal mines or surface coal mines in conditions substantially similar to those in an underground coal mine. Thus she again determined Claimant could not invoke the Section 411(c)(4) presumption. She also found Claimant had a smoking history of two packs a day for thirty-four years. Considering entitlement under 20 C.F.R. Part 718, she found Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). She therefore awarded benefits.

On appeal, Employer asserts that the ALJ erred in finding Claimant established legal pneumoconiosis and disability causation.[5] Claimant responds in support of the award of

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 24.75 years of coal mine employment and a cigarette smoking history of two packs a day for at least thirty-four years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless requested to do so.

The 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 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).

Entitlement - 20 C.F.R. Part 718

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. Failure to establish any element precludes an award 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); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish he suffers from a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

The ALJ considered the medical opinions of Drs. Klayton, Fino, Sargent, Gallai, and Nader. Decision and Order at 7-8. Drs. Klatyon, Gallai, and Nader diagnosed Claimant with legal pneumoconiosis in the form of an obstructive lung disease arising out of coal mine employment, whereas Drs. Fino and Sargent opined Claimant has an obstructive lung disease due to cigarette smoking and unrelated to coal mine dust exposure. Director's Exhibits 18, 21, 61; Claimant's Exhibits 3, 4; Employer's Exhibits 4, 10, 11. The ALJ found each of the medical opinions entitled to "some weight" and "overall . . . they do support a finding of a chronic lung disease or impairment and its sequelae arising out of coal mine employment." Decision and Order at 9. She thus concluded Claimant established the existence of legal pneumoconiosis. *Id.*

[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); Director's Exhibit 11; Hearing Transcript at 4.

Employer argues the ALJ erred by failing to explain her findings. Employer's Brief at 5-7. We agree.

The ALJ made no determination as to whether the medical opinions are reasoned and documented. Decision and Order at 7-9. Although she assigned the medical opinions "some weight," she did not explain the basis for this finding. *Id.* at 9. 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)[7] 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. Klayton, Gallai, and Nader outweigh the opinions of Drs. Fino and Sargent on the issue of legal pneumoconiosis. *Addison*, 831 F.3d at 252-53; *Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 9. The ALJ's unexplained finding that all the medical opinions are entitled to "some weight" and her apparent reliance on a head count of positive diagnoses is an insufficient basis to find Claimant satisfied his burden. Decision and Order at 9; *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.

In view of the foregoing errors, we vacate the ALJ's finding that Claimant established legal pneumoconiosis and remand the case for further consideration of the medical opinion evidence. 20 C.F.R. §718.202(a)(4); Decision and Order at 9.

[7] 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).

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

The ALJ discussed the opinions of Drs. Klayton, Nader, and Gallai that Claimant is totally disabled due to pneumoconiosis and Drs. Fino and Sargent that he is not. Decision and Order at 9-10. She credited all of the opinions as entitled to "some weight" and determined "overall they support a finding that [] Claimant's disability is due to pneumoconiosis." Decision and Order at 10. Thus, she concluded Claimant's total disability is due to pneumoconiosis. *Id.*

Because the ALJ's errors in assessing legal pneumoconiosis affected her credibility findings on disability causation, we vacate her finding that Claimant established total disability due to legal pneumoconiosis. 20 C.F.R. §718.204(c)(1); Decision and Order at 10. Moreover, the ALJ committed the same errors as discussed above. She failed 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 APA requires. *Addison*, 831 F.3d at 252-53; *Wojtowicz*, 12 BLR at 1-165. Specifically, she did not explain why she found the opinions of Drs. Klayton, Gallai, and Nader outweigh the opinions of Drs. Fino and Sargent on the issue of total disability causation and appears to have again engaged in an improper head count of the medical opinions. *Ondecko*, 512 U.S. at 281; *Addison*, 831 F.3d at 256-57; *Lockhart*, 137 F.3d at 803; *Wojtowicz*, 12 BLR at 1-165.

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence establishes legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.202(a). She must then consider whether the medical opinion evidence establishes Claimant's total respiratory or pulmonary disability is due to pneumoconiosis.[8] 20 C.F.R. §718.204(c). In reconsidering the medical opinion evidence on the issues of legal pneumoconiosis and total

[8] The ALJ should also render a finding on whether Claimant has established total disability due to clinical pneumoconiosis. 20 C.F.R. §718.204(c).

disability causation, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 528; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Further, she must consider all the relevant evidence in reaching her determinations. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *Addison*, 831 F.3d at 252-53; *McCune*, 6 BLR at 1-998. The ALJ must set forth her findings in detail, including the underlying rationale for her decision as the APA requires. *See Wojtowicz*, 12 BLR at 1-165. If the ALJ finds Claimant establishes the existence of pneumoconiosis and disability causation, she may reinstate the award of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the ALJ's Decision and Order on Remand Granting 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

JONATHAN ROLFE
Administrative Appeals Judge