U.S. Department of Labor

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

BRB No. 22-0100 BLA

THOMAS A. CARPENTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GMS MINE & REPAIR MAINTENANCE INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 9/06/2023
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2021-BLA-05081) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on December 28, 2017.

The ALJ found Claimant established thirteen years of coal mine employment. Because Claimant established fewer than fifteen years, the ALJ found he 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).[1] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the existence of legal pneumoconiosis but failed to establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2). Thus, the ALJ denied benefits.

On appeal, Claimant asserts the ALJ erred in finding he failed to establish total disability.[2] Employer and its Carrier (Employer) respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a brief unless requested.

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] Under Section 411(c)(4) of the Act, a miner is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirteen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4. In addition, the ALJ found Claimant established legal pneumoconiosis based on Dr. Feicht's diagnosis of chronic obstructive pulmonary disease (COPD) related to Claimant's cigarette smoking and coal mine dust exposure. Decision and Order at 13; Director's Exhibit 15. We also affirm this finding as unchallenged. 20 C.F.R. §718.202(a)(4); *see Skrack*, 6 BLR at 1-711; Decision and Order at 13.

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, a 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). The primary question in this appeal is whether Claimant established 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. 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 the relevant evidence supporting a finding of total disability against the 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). 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 considered one pulmonary function study, one arterial blood gas study, and one medical opinion, and he concluded Claimant did not establish total disability by any method. 20 C.F.R. §718.204(b)(2)(i), (ii), (iv). Claimant argues the ALJ erred in finding the pulmonary function study and medical opinion evidence insufficient to establish total disability.[4]

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[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14.

[4] We affirm, as unchallenged, the ALJ's determination that Claimant failed to establish total disability based on the arterial blood gas study and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 16-17.

Pulmonary Function Study

The ALJ considered one pulmonary function study Claimant performed on February 6, 2018. Director's Exhibit 15 at 44. The ALJ found the study produced non-qualifying results before and after the administration of a bronchodilator. Decision and Order at 15-16. He therefore determined the pulmonary function study evidence does not support total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 15-16.

Claimant contends the ALJ erred in finding this study, the only one in the record, non-qualifying pre-bronchodilator. Claimant's Brief at 5-6. We agree.

A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i). A pulmonary function study constitutes evidence of total disability if it produces both a qualifying FEV_1 value and one of the following: a qualifying FVC or MVV value, or an FEV_1/FVC ratio equal to or less than fifty-five percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). The qualifying values in Appendix B are based on gender, height, and age. 20 C.F.R. Part 718, Appendix B.

Claimant was sixty-eight years old and measured at 65.5 inches tall at the time of the February 6, 2018 study, a height that falls between the heights of 65.4 inches and 65.7 inches listed in the table values of Appendix B. Director's Exhibit 15 at 44. The ALJ rounded down to the nearest lower table height of 65.4 inches in determining the study is non-qualifying. 20 C.F.R. Part 718, Appendix B; Decision and Order at 15-16.

Claimant argues this was error because an ALJ must use the nearest greater height to evaluate whether pulmonary function studies are qualifying. Claimant's Brief at 5-6. We agree.

The Department of Labor (DOL) has long asserted that when a miner's actual height falls between the heights listed in the table contained in Appendix B, the fact finder should use the closest greater table height to determine the qualifying values. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995) (noting the Director's argument that the Office of Workers' Compensation Programs Procedure Manual, which mandates use of the closest greater table height when a miner's actual height falls between those listed in the table, should be binding on ALJs); *see also Scott v. Mason Coal Co.*, 60 F.3d 1138, 1140 (4th Cir. 1995) (noting the Director's argument that the court apply DOL Bulletin No. 84-6, which dictates the next higher height should be used when a miner's height is between those listed in the table). Using the closest greater table height promotes ease of application, produces consistent results (all miners with unlisted heights will be

treated in the same manner), and comports with the remedial purpose of the Act.[5] *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019) (The Act "is remedial legislation that should be liberally construed so as to include the largest number of miners within its entitlement provisions.").

Moreover, several circuit courts and this Board have endorsed using the closest greater table height and its corresponding table values. *See Amax Coal Co. v. Anderson*, 771 F.2d 1011, 1015 (7th Cir. 1985) (rejecting an employer's argument that the miner's height should be rounded down because "[w]e will not require the Board to apply the regulations in a [stingy] manner when there is no compelling reason to do so, and we find none here"); *Scott*, 60 F.3d at 1140 (explaining the Director reasonably argues for using the next higher table height); *Browning v. Independence Coal Co.*, BRB No. 05-0621 BLA, slip op. at 8 n.7 (Mar. 31, 2006) (unpub.).[6] Thus, we agree with the DOL's position and hold the ALJ erred, as a matter of law, in rounding down to the lower table height.

Indeed, even Employer does not directly dispute that the ALJ incorrectly used the lower table height, but instead asserts any "error [was] harmless . . . ." Employer's Brief at 2-3. Contrary to Employer's contention, however, the ALJ's error was not harmless. By rounding down to the nearest lower table height, the ALJ found the February 6, 2018 pre-bronchodilator FEV_1 results are non-qualifying. Decision and Order at 15-16. Had the ALJ used the closest greater table height, he would have found the FEV_1 values are qualifying. 20 C.F.R. Part 718, Appendix B. Applying the table height of 65.7 inches, a

[5] Further, the broader effect of rounding down to the nearest lower height will automatically disadvantage miners. In the tables of values set forth in Appendix B to Part 718, as a miner's height decreases, the qualifying values for the FEV_1, FVC, and MVV also decrease. Thus, a miner's pulmonary function study values that are qualifying at a greater table height can be deemed non-qualifying simply because the ALJ chose to apply a lower table height. Holding taller miners to the height measurements of shorter individuals requires them to show a greater loss of lung function to establish total disability.

[6] The Board's consistent and longstanding interpretation of this issue is demonstrated in numerous unpublished decisions approving of ALJs' using the closest greater table height and its corresponding table values. *See, e.g., Reynolds v. Sea "B" Mining Co.*, BRB No. 21-0524 BLA, slip op. at 3 n.9 (Dec. 23, 2022) (unpub.); *Mullens v. Island Creek Ky. Mining*, BRB No. 21-0640 BLA, slip op. at 4 n.7 (Dec. 19, 2022) (unpub.); *Anderson v. Plowboy Coal Co.*., BRB No. 20-0109 BLA, slip op. at 4 n.4 (Dec. 22, 2020) (unpub.); *Gross v. Unicorn Mining, Inc.*, BRB No. 17-0019 BLA, slip op. at 4 n.7 (Oct. 12, 2017) (unpub.); *Sparks v. Wilgar Land Co.*, BRB No. 16-0692 BLA, slip op. at 4 n.9 (Sept. 28, 2017) (unpub.).

study performed on a male miner who is sixty-eight years old qualifies for total disability if it produces an FEV_1 value at or below 1.59 and either an FVC value at or below 2.05, an MVV value at or below sixty-three, or an FEV_1/FVC ratio of fifty-five percent or less. *Id.* Claimant's pre-bronchodilator study produced an FEV_1 value of 1.58, an FVC value of 2.88, and an FEV_1/FVC ratio of fifty-five percent.[7] Director's Exhibit 15 at 44. We therefore reverse the ALJ's finding and hold the February 6, 2018 pre-bronchodilator study is qualifying for total disability.

In light of the foregoing, we vacate the ALJ's finding that the pulmonary function studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 15-16. Further, we vacate his findings that the evidence overall does not establish total disability and that Claimant failed to establish entitlement to benefits. *Trent*, 11 BLR at 1-27; 20 C.F.R. §718.204(b)(2); Decision and Order at 18. Consequently, we remand the case for further consideration.

Medical Opinions

Claimant next argues the ALJ erred in weighing Dr. Feicht's medical opinion. Claimant's Brief at 6-11. We agree.

Dr. Feicht diagnosed Claimant with moderate obstructive lung disease. Director's Exhibit 15 at 4-6. With respect to Claimant's respiratory symptoms, Dr. Feicht noted Claimant has moderate exertional dyspnea, coughs every day, and occasionally experiences wheezing. *Id*. at 4. As a result, he opined Claimant can ascend only one flight of stairs, can walk about fifty yards on level ground, and would be "very limited on any incline." *Id*. He concluded Claimant is "definitely disabled" from his usual coal mine employment due to his "pulmonary insufficiency." *Id*. at 6

The ALJ discredited Dr. Feicht's opinion as contrary to the ALJ's conclusion that the pulmonary function studies are not qualifying for total disability. Decision and Order at 18. He also found Dr. Feicht's opinion not credible because he failed to discuss the exertional requirements of Claimant's usual coal mine employment. *Id.*

Because the ALJ's error in weighing the pulmonary function studies affected his consideration of the medical opinion evidence, we vacate his finding that Dr. Feicht's medical opinion does not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18. Moreover, it was also error for the ALJ to discredit Dr. Feicht's opinion as contrary to the ALJ's finding with respect to the pulmonary function studies, as a physician may conclude a miner is totally disabled even if the objective studies are non-

[7] Dr. Feicht did not report an MVV value. Director's Exhibit 15.

qualifying. *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); 20 C.F.R. §718.204(b)(2)(iv).

Further, the ALJ erred in discrediting Dr. Feicht's total disability diagnosis because the doctor did not set forth the exertional requirements of Claimant's usual coal mine employment.

A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably conclude a miner is unable to do his usual coal mine employment. *See Scott*, 60 F.3d at 1141; *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc). In determining whether a miner is totally disabled, the ALJ must compare the exertional requirements of the miner's usual coal mine work with a physician's description of the miner's pulmonary impairment and physical limitations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713 (6th Cir. 2002) (if a physician lists a miner's job title, ALJ may rationally conclude physician understands the exertional requirements of common mining jobs, even absent explicitly identifying them).

First, the ALJ failed to render the necessary factual findings regarding the exertional requirements of Claimant's usual coal mine employment which would allow him to properly consider Dr. Feicht's opinion. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016); *Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

Second, the ALJ failed to compare those exertional requirements with Dr. Feicht's assessment to determine whether his opinion supports a finding of total respiratory disability. *Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *Cornett*, 227 F.3d at 578; *McMath*, 12 BLR at 1-9; *Budash*, 9 BLR at 1-51-52. Dr. Feicht indicated Claimant has respiratory symptoms of exertional dyspnea, daily cough, and occasional wheezing. Director's Exhibit 15 at 4. In concluding Claimant cannot perform his previous coal mine job, he stated Claimant can ascend only one flight of stairs, can walk about fifty yards on level ground, and would be "very limited on any incline" as a result. *Id.* The ALJ failed to address this aspect of Dr. Feicht's opinion. *See* 30 U.S.C. §923(b) (the fact-finder must address all relevant evidence); *Addison*, 831 F.3d at 252-53; *see also McCune v. Cent. Appalachian Coal Co.* 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

For these reasons, we vacate the ALJ's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), Decision and Order at 18.

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), taking into consideration the February 6, 2018 qualifying pre-bronchodilator results and non-qualifying post-bronchodilator results. Director's Exhibit 15. In doing so, he must undertake a quantitative and qualitative analysis of the conflicting results and adequately explain his basis for resolving the conflict in the evidence as the Administrative Procedure Act (APA) requires.[8] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Addison*, 831 F.3d at 252-54; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The ALJ must then reconsider the medical opinion evidence, comparing the exertional requirements of Claimant's usual coal mine work with the physician's description of his pulmonary impairment and physical limitations. *See Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *Cornett*, 227 F.3d at 578; 20 C.F.R. §718.204(b)(2)(iv). In rendering his credibility findings, he must consider Dr. Feicht's credentials, the explanation for his conclusion, the documentation underlying his medical judgment, and the sophistication of and bases for his diagnosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). 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.

If Claimant establishes total disability on remand, the ALJ must address whether Claimant has proven that 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 of a miner's totally disabling impairment 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

[8] 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).

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). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Trent*, 11 BLR at 1-27.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part, reversed 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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge