U.S. Department of Labor

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

BRB No. 24-0018 BLA

ALLEN G. HILBERT Claimant-Respondent v. DOMINION COAL CORPORATION, c/o HEALTHSMART CASUALTY CLAIMS Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 12/03/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William P. Farley, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) William P. Farley's Decision and Order Awarding Benefits (2021-BLA-05718) 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 miner's subsequent claim[1] filed on October 21, 2019.[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) (2018); 20 C.F.R. §718.304. He found Claimant established 32.5 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked 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] and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed a prior claim, which the district director denied on January 27, 2016, because the evidence did not establish the existence of a totally disabling pulmonary or respiratory impairment. Director's Exhibit 1.

[2] The ALJ mistakenly relied on the date Claimant signed his claim form, October 11, 2019, for the date this claim was filed, rather than the date the office of the district director received it, October 21, 2019. *See* 20 C.F.R. §725.303(a)(1) ("A claim shall be considered filed on the day it is received by the office in which it is first filed."); Decision and Order at 2; Director's Exhibit 3.

[3] Section 411(c)(4) 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(b).

[4] When 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 "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); *see 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 the prior claim for failure to establish total disability, Claimant was required to submit new evidence establishing that element to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and that he invoked the Section 411(c)(4) presumption.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 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).

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

To invoke the Section 411(c)(4) presumption, a 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 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,[7] 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 established total disability

[5] We affirm, as unchallenged, the ALJ's finding that Claimant established 32.5 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

[6] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15, 22-23.

[7] 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).

based on the medical opinions and the evidence as a whole.[8] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 29-30.

Employer argues that the ALJ erred in finding Claimant established total disability based on the medical opinions. Employer's Brief at 4-12. We agree.

The ALJ considered the medical opinions of Drs. Nader and Fino.[9] Decision and Order at 18-20, 29-30; Director's Exhibits 22, 39. Dr. Nader conducted the Department of Labor's complete pulmonary evaluation of Claimant on February 13, 2020, and obtained qualifying blood gas study results and non-qualifying pulmonary function study results. Director's Exhibit 22. He opined Claimant would not be able to continue his last coal mine employment based on the blood gas study results, which "[met] the standard for total pulmonary disability[,]" and Dr. DePonte's x-ray reading, which was positive for complicated pneumoconiosis. *Id.* at 4. He further opined Claimant's chronic cough, wheezing, and shortness of breath also "contribute[d] to his total pulmonary disability." *Id.*

Dr. Fino examined Claimant on July 29, 2020, and reviewed Dr. Nader's report and objective testing results. Director's Exhibit 39. He obtained non-qualifying pulmonary function and resting blood gas study results and opined the results were normal. *Id.* at 6. Dr. Fino also conducted a pulse oximetry test and explained pulse oximetry "is noninvasive and can provide the same information as an arterial blood gas [study]." *Id.* at 8-9. He opined that Claimant is not totally disabled as he "did not find oxygen desaturation with exertion" based on the pulse oximetry results. *Id*. at 8.

The ALJ gave "lesser weight" to the portion of Dr. Nader's opinion that was based on Dr. DePonte's x-ray reading. Decision and Order at 29. Nevertheless, the ALJ found Dr. Nader's opinion well-reasoned and documented based on his reliance on the February 13, 2020 "qualifying [arterial blood gas study] results and Claimant's history of severe pulmonary symptoms." *Id*. He further found Dr. Fino's reliance on the pulse oximetry

[8] The ALJ found the two pulmonary function studies were non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 27-28. The ALJ accurately found Dr. Nader's February 13, 2020 resting blood gas study was qualifying, while Dr. Fino's July 29, 2020 resting blood gas study was not, and thus determined the blood gas study evidence to be in equipoise. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 17, 27-28.

[9] The ALJ determined the Claimant's usual coal mine employment as a section foreman required very heavy work. Decision and Order at 6-7, 29; Hearing Transcript at 14, 16-18; Director's Exhibit 5.

results was "less persuasive" than Dr. Nader's opinion because Dr. Nader "relied on testing and other factors that the regulations instruct as primary evidence of total disability." *Id.* at 29-30. Ultimately, he concluded Dr. Fino's opinion was less documented and reasoned than Dr. Nader's opinion because it was based "solely" on the pulse oximetry results and he failed to consider Claimant's symptoms and objective testing results, including the qualifying blood gas study results. *Id*. at 30. Thus, he found the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* Weighing the evidence as a whole, the ALJ found Claimant established a totally disabling respiratory or pulmonary impairment. *Id.*

We agree with Employer's argument that the ALJ's crediting of Dr. Nader's opinion is not sufficiently explained. While the ALJ found Dr. Nader's opinion reasoned and documented based on his reliance on the "qualifying [arterial blood gas study] results" and Claimant's symptoms, he did not reconcile this finding with his determination that the arterial blood gas study evidence as a whole was in equipoise. 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 27-30; *see* Employer's Brief at 8. Because the ALJ did not sufficiently explain his credibility findings as the Administrative Procedure Act (APA) requires,[10] we vacate his crediting of Dr. Nader's opinion to find Claimant totally disabled. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53, 255-56 (4th Cir. 2016) (ALJ must conduct an appropriate analysis of the evidence to support his 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); Decision and Order at 27-30.

We also agree with Employer's argument that the ALJ erred in discrediting Dr. Fino's opinion. Employer's Brief at 5-6, 9-12. Contrary to the ALJ's finding, Dr. Fino did review Dr. Nader's resting blood gas study results, which conflicted with his own results, and explained that he relied on the pulse oximetry results to find Claimant did not have oxygen desaturation *with exertion* and that pulse oximetry can "provide the same information as an arterial blood gas [study]." *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (if the ALJ misconstrues relevant evidence, the case must be remanded for reevaluation of the issue to which the evidence is relevant); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); Decision and Order at 29-30;

[10] The APA provides that 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).

Director's Exhibit 39 at 8. While the ALJ acknowledged that "reliance on pulse oximetry data is not forbidden by the regulations . . . and Dr. Fino has established that [pulse oximetry] is an acceptable method of measuring impairment," he found this aspect of Dr. Fino's opinion was "less persuasive" than Dr. Nader's opinion because Dr. Nader relied on the blood gas study results he obtained and "other factors." Decision and Order at 29-30. Because we have vacated the ALJ's crediting of Dr. Nader's opinion, we also vacate his determination that Dr. Fino's opinion is less persuasive, less reasoned, and less documented than Dr. Nader's opinion. *Id.* at 29-30. For these reasons, we vacate the ALJ's weighing of Dr. Fino's opinion. *See Addison*, 831 F.3d at 252-53; *Wojtowicz*, 12 BLR at 1-165.

Thus, we vacate the ALJ's finding Claimant established total disability based on the medical opinion evidence and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 30. Consequently, we vacate the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement and the award of benefits.[11] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c); Decision and Order at 4, 30.

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). In rendering his credibility findings, the ALJ must consider 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 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

The ALJ must then weigh all of the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability and thereby invokes the Section 411(c)(4) presumption, the ALJ may reinstate the award of benefits. If Claimant is unable to establish total disability, benefits are precluded. *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). In rendering all of his credibility determinations and findings on remand, the ALJ must comply with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

[11]We affirm, as unchallenged, the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711; Decision and Order at 30-31.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits and remand the case to the ALJ for further consideration consistent with this decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge