U.S. Department of Labor

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

BRB No. 21-0221 BLA

DONALD M. KUNSELMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROSEBUD MINING COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 02/16/2022
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

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

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2019-BLA-06290) 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 claim filed on November 5, 2018.

The ALJ credited Claimant with forty-one years of coal mine employment, with more than fifteen of those years in underground mining, but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718.[2] He therefore denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer responds in support of the denial.[3] The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefit 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.[4] 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).

[1] 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); *see* 20 C.F.R. §718.305.

[2] The ALJ also found Claimant established the existence of both legal and clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b); Decision and Order at 11, 14-15.

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment and the existence of legal and clinical pneumoconiosis arising out of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 11, 14-15.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania.

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

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. *See* 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 all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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).

In this case, the ALJ found the pulmonary function studies, arterial blood gas studies, and medical opinions do not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 17-18, 21. He therefore found the evidence as a whole does not establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 21.

Claimant contends the ALJ erred in weighing the conflicting medical opinions.[5] Claimant's Brief at 5-6. We agree.

The ALJ considered the medical opinions of Drs. Basheda, Fino, and Zlupko. Decision and Order at 19-21; Director's Exhibit. Dr. Basheda listed Claimant's last coal mine job as performing aboveground supply work that required lifting and carrying; he opined Claimant is not disabled and "would be able to perform his coal mining work or work of similar effort." Employer's Exhibit 1 at 9. At his deposition, Dr. Basheda identified Claimant's last coal mine job as an underground face boss, which he acknowledged sometimes required heavy labor; he again opined Claimant is not disabled on a pulmonary basis and could perform this job. Employer's Exhibit 3 at 7, 16-17. Dr. Fino listed Claimant's last coal mine job as an outside section foreman and opined he has a mild respiratory impairment but is not disabled from a pulmonary standpoint and would

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See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] We affirm, as unchallenged, the ALJ's findings that the pulmonary function and arterial blood gas studies do not establish total disability and that 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.

be able to "perform his last mining job."[6] Employer's Exhibit 2 at 8. Dr. Zlupko noted Claimant's employment history on his Form CM-911a[7] and opined he has a severe respiratory impairment "as evidenced by a substantial drop in his PO_2 with exertion" on his blood gas testing.[8] Director's Exhibits 3, 12. He further stated "[he] would not return [Claimant] to his previous coal mine work" or "expect him to be able to perform his job duties." *Id.*

The ALJ found the opinions of Drs. Basheda and Fino well-reasoned because they reflected the results of objective diagnostic testing and addressed the exertional requirements of Claimant's usual coal mine job. Decision and Order at 21. Conversely, he found Dr. Zlupko's opinion not well-reasoned because he failed to identify Claimant's last coal mine job or discuss its exertional requirements. *Id.* at 20. Thus, he found Claimant failed to establish total disability based on the medical opinions. *Id.* at 21.

Claimant specifically argues the ALJ erred in failing to consider Dr. Zlupko's assessment of his respiratory impairment with the exertional requirements of his usual coal mine job. Claimant's Brief at 5-6. Claimant's argument has merit.

A medical opinion need not be phrased explicitly in terms of "total disability" to support a finding that a claimant is, in fact, disabled. An ALJ must determine the exertional requirements of a miner's usual coal mine work and then consider them in conjunction with the medical opinions assessing the extent of his impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild pulmonary impairment may be totally disabling, depending on the exertional requirements of a miner's usual coal mine employment); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985). Claimant's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v.*

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[6] Dr. Fino stated the exertional demands of Claimant's job as an outside section foreman "entailed 15% very heavy labor, 20% heavy labor, 50% moderate labor, and 15% light labor." Employer's Exhibits 2 at 2, 4 at 8.

[7] On this form, Claimant indicated his most recent employment included working as a clerk, outside laborer, and front-end loader. Director's Exhibit 3.

[8] Dr. Zlupko observed that Claimant's "[s]hortness of breath" affects his "daily activities," he "cannot walk very far before becoming 'winded,'" and his current treatment includes "oxygen at night." Director's Exhibit 12.

Florence Mining Co., 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

Although the ALJ identified Claimant's usual coal mine work was working as a purchasing agent,[9] he failed to render a finding concerning the physical exertional demands associated with it for comparison with the medical opinions assessing his capability to perform that work.[10] *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("To infer disability, the ALJ must first determine the nature of the claimant's usual coal mine work and then compare evidence of the exertional requirements of the work with medical opinions as to the claimant's work capability."); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9-10 (1988); Decision and Order at 5; Hearing Tr. at 13. This error is not harmless as a finding regarding the exertional requirements of Claimant's usual coal mine job is central to the ALJ's rationale for resolving the conflict in the medical opinions. As the ALJ's omission affected his credibility findings regarding the opinions of Drs. Basheda, Fino, and Zlupko, we vacate his finding that the medical opinions did not establish total disability and remand the case for further consideration. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20-21. We therefore also vacate his finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) and invocation of the Section 411(c)(4) presumption.

[9] We affirm, as unchallenged, the ALJ's determination that Claimant's usual coal mine work was working as a purchasing agent. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5.

[10] At the hearing, Claimant testified he was a "purchasing agent/laborer," which required him to run the front-end loader to load coal into trucks. Hearing Tr. at 13. He started this position in 2006. *Id.* He would purchase parts and supplies for the mines, in addition to his front-end loader duties, help with maintenance on the belts when they broke down, and work in the mechanic shop. *Id.* at 14. He testified his duty to run the front-end loader required him to climb ladders and varied from every day to every few days. *Id.* at 15. He further testified he would perform belt maintenance only a few times a week. *Id.* at 16. He explained some of the parts varied in weight from very light to nearly 700 pounds, which he had to drag on the floor to move. *Id.* at 16-17. On cross examination, Claimant testified that after his heart attack in 2011, his co-workers took on the more strenuous work that he did previously, such as front-end loading. *Id.* at 23-24. He also testified the most difficult part of his job "was climbing in and out of the front-end loader." *Id.*

Remand Instructions

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must first determine the exertional requirements of Claimant's usual coal mine work and then must consider the medical opinions in light of those requirements. *See Cornett*, 227 F.3d at 578; *Eagle*, 943 F.2d at 512-13 (physician who asserts a claimant is capable of performing assigned duties should state his or her knowledge of the physical efforts required and relate them to the miner's impairment); *Walker*, 927 F.2d at 184-85. He must then consider the credibility of the opinions of Drs. Basheda, Fino, and Zlupko in light of their understanding of the exertional requirements of Claimant's usual coal mine work, focusing his analysis on the presence or absence of a totally disabling respiratory or pulmonary impairment without regard to causation. Moreover, even if the ALJ determines a physician did not properly identify Claimant's usual coal mine work, he must consider whether the doctor adequately described Claimant's physical limitations. If the ALJ credits a physician's statement of Claimant's physical limitations, he can consider the limitations together with the exertional requirements of Claimant's usual coal mine work to determine if the opinion supports Claimant's burden to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See McMath*, 12 BLR at 1-9-10. In rendering his credibility findings, he must consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. See *Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). The ALJ must also reweigh the evidence as a whole, and determine whether Claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the ALJ must then consider whether Employer has rebutted it. In order to rebut the presumption, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 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. *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 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 that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material

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.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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).