U.S. Department of Labor

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

BRB No. 22-0154 BLA

HENRY S. STEVENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 02/22/2023
Employer-Respondent	)	
	)	
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 Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Henry S. Stevens, Meadowview, Virginia.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2019-BLA-05923) rendered on a claim filed on March 13, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act).

The ALJ found Claimant established 15.96 years of underground coal mine employment but did not establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found he did 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) (2018).[2] The ALJ further found Claimant failed to establish he has pneumoconiosis. 20 C.F.R. §718.202(a). Accordingly, the ALJ denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial.[3] The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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).

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[1] Bradley Johnson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but he does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

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

[3] We affirm, as unchallenged on appeal, the ALJ's finding of at least 15.96 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[4] 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 17.

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 and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on qualifying[5] pulmonary function studies or 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 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 failed to establish total disability by any method.[6] 20 C.F.R. §718.204(b)(2); Decision and Order at 9.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated April 16, 2018, October 23, 2018, April 19, 2019, and March 11, 2021.[7] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6. The April 16, 2018 and October 23, 2018 pulmonary function studies were non-qualifying both before and after the administration of a bronchodilator. Director's Exhibits 11, 15. The April 19, 2019 study was qualifying pre-bronchodilator, and no post-bronchodilator test was administered. Claimant's Exhibit 3. Finally, the March 11, 2021

[5] 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).

[6] The ALJ did not make a finding regarding whether the irrebuttable presumption at 20 C.F.R. §718.304 applies. *See* 20 C.F.R. §718.204(b)(1). Because the record contains no evidence of complicated pneumoconiosis, Claimant cannot invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[7] Because the pulmonary function studies reported varying heights for Claimant ranging from 68 to 69 inches, the ALJ calculated an average height for Claimant of 68.3 inches. She then permissibly used the closest greater table height at Appendix B of 20 C.F.R. Part 718 for determining the qualifying or non-qualifying results of the studies. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114, 116 n.6 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 6 n.6.

study was qualifying pre-bronchodilator and non-qualifying post-bronchodilator. Employer's Exhibit 4.

The ALJ noted that all the post-bronchodilator results were non-qualifying. She found the studies' pre-bronchodilator results entitled to "some weight due to the nature of coal mining work" and further noted that the most recent pre-bronchodilator result qualifies for total disability. Decision and Order at 6. However, because "five of the seven results do not qualify," the ALJ found the pulmonary function studies do not support total disability.

We are unable to determine whether substantial evidence supports the ALJ's determination because she has not adequately explained her rationale. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252–53 (4th Cir. 2016). As noted, the ALJ accorded "some weight" to the pre-bronchodilator studies because of the nature of coal mine work. We infer the ALJ here was alluding to the Department of Labor's caution against reliance on post-bronchodilator results to determine total disability. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis").[8] The ALJ then noted, accurately, that the more recent pre-bronchodilator values are qualifying. If an ALJ determines that more recent evidence shows a miner's condition has progressed or worsened, she may rationally credit that evidence based on its recency. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51–52 (4th Cir. 1992) (case involving x-rays); *see Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993) (applying the holding in *Adkins* to medical opinions). Then, apparently relying on a numerical count or preponderance of the results obtained over approximately three years, the ALJ found disability not established because "five of the seven results" were non-qualifying. Decision and Order at 6.

Taking all the ALJ's findings together, we cannot discern her reasoning for the weight she accorded to the pulmonary function studies. The ALJ did not adequately explain her conclusion given her reference to qualitative factors, to apparently assign weight to the pre-bronchodilator studies of record and to the most recent qualifying test, while at the same time also relying on the numerical superiority of the non-qualifying results. *See Addison*, 831 F.3d at 256. To the extent the ALJ relied solely on numerical superiority, without taking into account other relevant considerations, that was error. *Id.* Therefore, we vacate her findings that Claimant failed to establish total disability and thus did not invoke the Section 411(c)(4) presumption, and remand the case for further

[8] The ALJ made no observation concerning the weight post-bronchodilator testing should be accorded.

consideration of the pulmonary function studies. *See Addison*, 831 F.3d at 253; 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6.

Arterial Blood Gas Studies

The ALJ considered three arterial blood gas studies conducted on April 16, 2018, October 23, 2018, and March 11, 2019. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 7. The April 16, 2018 arterial blood gas study was non-qualifying at rest and qualifying with exercise, while both the October 23, 2018 and March 11, 2019 studies were non-qualifying both at rest and with exercise. Director's Exhibits 11, 15; Employer's Exhibit 4. Because all the resting studies and only one of the three exercise studies are non-qualifying, the ALJ found the blood gas study evidence does not establish total disability. As this finding is supported by substantial evidence, it is affirmed. 20 C.F.R. §718.204(b)(2)(ii).

Cor Pulmonale

The ALJ accurately found there is no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure, and therefore Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 7.

Medical Opinions

The ALJ considered the medical opinions of Drs. Ajjarapu, Sargent, and McSharry. Decision and Order at 8–9. Dr. Ajjarapu initially opined Claimant is totally disabled, Director's Exhibit 11, but after a review of Dr. Sargent's non-qualifying testing obtained seven months after her examination, she opined Claimant is not totally disabled. Director's Exhibit 16. Drs. Sargent and McSharry also opined that Claimant is not totally disabled. Director's Exhibit 15, Employer's Exhibits 4, 6–7. The ALJ found Dr. Ajjarapu's opinion was in "equipoise," as she initially concluded Claimant was totally disabled before revising her conclusion in a supplemental report. Decision and Order at 9. Affording "each opinion some weight," the ALJ found the medical opinions do not support total disability. Decision and Order at 9.

Because the ALJ's analysis of the pulmonary function studies discussed above could affect the weight she accords the medical opinions regarding total disability, we also vacate her finding that the medical opinions do not support total disability. On remand, she must reconsider the medical opinions after she has addressed the pulmonary function studies. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316–17 (4th Cir. 2012) (it is the duty of the ALJ to make findings of fact and to resolve conflicts in the evidence); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ must adequately explain her reasons for crediting a physician).

Remand Instructions

On remand, the ALJ must reconsider whether Claimant has established total disability. In weighing the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), the ALJ must first address the evidence regarding the validity of the pulmonary function studies.[9] She should then determine, with sufficient explanation, whether the pulmonary function studies support total disability. Similarly, she should determine, with sufficient explanation, whether the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) supports a finding of total disability. Thus, she must also make credibility determinations regarding the contrary medical opinion evidence, considering 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. *Looney*, 678 F.3d at 316–17; *Hicks*, 138 F.3d 524, 533. She should also consider the medical opinions in light of Claimant's usual coal mine work.[10] *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). If the ALJ finds the pulmonary function studies or the medical opinions supportive of a finding of total disability, she must then weigh all the relevant evidence together, taking into account any contrary probative evidence to determine whether Claimant is totally disabled. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability on remand, he will invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. The ALJ must then determine whether Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015). If the ALJ finds Claimant is not totally disabled, he will have failed to establish an essential element of entitlement and the ALJ may reinstate the denial of benefits. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). In rendering all her findings on remand, the ALJ must explain

[9] As Employer contends, the ALJ did not address Drs. Sargent's and McSharry's opinions that the April 19, 2019 and March 11, 2021 pulmonary function studies are invalid. Employer's Exhibit 7 at 19–20, 21; Employer's Exhibit 8 at 12–13, 14–15. The record also contains Dr. Forehand's statement that the April 19, 2019 study is acceptable. Claimant's Exhibit 3.

[10] The ALJ noted Claimant most recently worked for approximately seven or eight years as a section foreman and she summarized portions of his testimony regarding his job duties, but she made no findings on the issue. Decision and Order at 3, 5.

her findings and conclusions in accordance with the Administrative Procedure Act.[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded 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

[11] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).