

U.S. Department of Labor

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



BRB No. 23-0446 BLA

MICHAEL J. ADEN)
)
 Claimant-Petitioner)
)
 v.)
)
 MONTEREY COAL COMPANY)
)
 Self-Insured) DATE ISSUED: 07/17/2024
 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 on Remand Denying Benefits of Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer.

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

PER CURIAM:

Claimant appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order on Remand Denying Benefits (2019-BLA-06208) rendered on a claim filed on January 31, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.¹

In her initial Decision and Order Denying Benefits, the ALJ credited Claimant with seventeen years of qualifying coal mine employment but found he failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, she found Claimant failed to 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 or establish entitlement pursuant to 20 C.F.R. Part 718. 20 C.F.R. §§718.204(b)(2), 718.305. She therefore denied benefits.

On appeal, the Board affirmed as unchallenged the ALJ's findings that Claimant established seventeen years of qualifying coal mine employment and that he did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) or complicated pneumoconiosis. *See Aden v. Monterey Coal Co.*, BRB No. 21-0362 BLA, slip op. at 2 n.3, 4 n.6 (July 29, 2022) (unpub.). The Board vacated, however, the finding that Claimant failed to establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv) because the ALJ did not consider all of the relevant evidence. *Id.* at 4-5. Specifically, the Board held the ALJ mischaracterized Dr. Istanbuly's supplemental report, and it reversed her evidentiary ruling excluding it from the record. *Id.* at 5. Thus, the Board vacated her finding that Claimant failed to invoke the Section 411(c)(4) presumption and the denial of benefits. It instructed the ALJ on remand to determine the exertional requirements of Claimant's usual coal mine employment and to reconsider the medical opinions. *Id.* at 5-6.

On remand, the ALJ again found Claimant did not establish total disability based on the medical opinion evidence. Consequently, she found Claimant failed to establish total disability based on the evidence as a whole and denied benefits.

¹ We incorporate the procedural history of the case and the Board's prior holdings, as set forth in *Aden v. Monterey Coal Co.*, BRB No. 21-0362 BLA (July 29, 2022) (unpub.).

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); *see* 20 C.F.R. §718.305.

On appeal, Claimant contends the ALJ erred in finding he did not establish total disability and thus did not invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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, 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. 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,⁴ 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).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 9, 24; Director's Exhibit 7.

We note that the Board's prior decision stated this case arose within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *Aden*, BRB No. 21-0362 BLA, slip op. at 3 n.4. This reference was a scrivener's error that did not materially affect the outcome of that decision.

⁴ 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).

Claimant challenges the ALJ's finding that he failed to establish total disability based on the medical opinions and in consideration of the evidence as a whole. Claimant's Brief at 2-10.

20 C.F.R. §718.204(b)(2)(iv) – Medical Opinions

In accordance with the Board's prior instructions, the ALJ determined the exertional requirements of Claimant's usual coal mine employment as a surface foreman and found it required light exertion. Decision and Order on Remand at 3; Hearing Transcript at 11-13, 24-25; Director's Exhibit 8. She then incorporated her summaries of Drs. Istanbuly's, Tuteur's, and Bruce's opinions from her prior decision.⁵ Decision and Order on Remand at 3-4; Decision and Order at 7-10. The ALJ adopted her prior finding that Dr. Bruce did not address total disability and proceeded to reevaluate Drs. Istanbuly's and Tuteur's opinions.

Dr. Istanbuly conducted the Department of Labor complete pulmonary evaluation of Claimant and obtained qualifying pulmonary function study and exercise blood gas study results. Director's Exhibit 11. He diagnosed Claimant with severe chronic obstructive pulmonary disease (COPD) and hypoxemia based on his objective testing results. *Id.* at 17-19. Further, he noted Claimant's history of sputum production, cough, wheezing, and shortness of breath and reported Claimant described being able to walk only one mile because of his shortness of breath. *Id.* at 17. He opined that Claimant is totally disabled due to his COPD and hypoxemia. *Id.* at 18-19.

In his supplemental report, after reviewing Dr. Bruce's medical opinion and the non-qualifying pulmonary function and blood gas studies Dr. Bruce conducted, Dr. Istanbuly maintained his opinion that Claimant is totally disabled. Claimant's Exhibit 2 at 1-3. He opined the pulmonary function study results Dr. Bruce obtained were "still abnormal and . . . reveal[ed] a moderate obstructive defect . . . [and a] moderate reduction of DLCO," and he noted that Dr. Bruce diagnosed moderate COPD. *Id.* at 2.

Dr. Tuteur prepared a report based on his review of Claimant's medical records. Employer's Exhibit 8. He diagnosed a mild obstruction based on the most recent pulmonary function study results but found no evidence of a "clinical COPD phenotype[.]" and noted Claimant's most recent blood gas study results show a mildly elevated PCO₂.

⁵ Dr. Bruce examined Claimant and obtained non-qualifying objective testing results. Employer's Exhibit 1. He opined Claimant has "moderate" chronic obstructive pulmonary disease and mild elevation of PCO₂ on blood gas testing. *Id.* at 2. Dr. Bruce also noted Claimant has shortness of breath with exertion and that he can walk a mile slowly on level ground. *Id.* at 3.

Id. at 3, 5. In addition, he noted that Claimant reported having breathlessness, which was not confirmed by the objective testing and that he did not have a persistent cough, expectoration, or wheezing. *Id.* at 5. Dr. Tuteur opined Claimant is totally disabled due solely to musculoskeletal issues that are complicated by morbid obesity. *Id.* at 4.

The ALJ found Dr. Istanbuly's opinion "poorly reasoned" because he "relie[d] on his own testing as the basis for his opinion in April 2020 without meaningfully explaining why the later non-qualifying results obtained by Dr. Bruce d[id] not undermine his opinion." Decision and Order on Remand at 4. In contrast, the ALJ found Dr. Tuteur's opinion well-reasoned and documented because it was supported by her previous findings regarding the objective medical evidence, and it better addressed the conflicting evidence in the record. *Id.* Consequently, the ALJ found the medical opinions did not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), and that Claimant did not establish a totally disabling respiratory or pulmonary impairment when considering the evidence as a whole. *Id.* at 4-5.

Claimant contends the ALJ erred by focusing on whether the physicians' opinions were supported by qualifying or non-qualifying objective tests, rather than comparing the physicians' assessments of Claimant's respiratory impairment or physical limitations with the exertional requirements of his prior coal mine employment to determine if he is totally disabled. Claimant's Brief at 2-10. We agree.

Total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing, as non-qualifying testing may still render a miner incapable of performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *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); Decision and Order on Remand at 3-5; Claimant's Brief at 2-10.

Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a miner is unable to do his usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability);⁶ *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990)

⁶ In *Scott*, the United States Court of Appeals for the Fourth Circuit determined an ALJ erred by rejecting physical limitations identified in a physician's report as being "not the doctor's opinion" but simply a recitation of the miner's complaints. The court held, "[U]nless there is explicit evidence contained in the physician's report that the report is not the physician's opinion, but merely lists without adopting the patient's description of the

(“[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion.*”) (emphasis added); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may infer total disability by comparing the severity of impairment or related physical limitations that a physician diagnoses with the exertional requirements of the miner’s usual coal mine work).

As Claimant points out, the ALJ’s analysis on remand focused on whether the physicians’ opinions were supported by qualifying or non-qualifying objective tests and did not focus on whether they nevertheless credibly diagnosed an impairment, or identified respiratory limitations, that would preclude the performance of his usual coal mine work. Claimant’s Brief at 5, 10; *see* Decision and Order on Remand at 4-5.

Although the ALJ found Claimant’s work required light exertion, we agree with Claimant’s argument that she erred in not considering whether he has an impairment that would preclude his specific job duties by comparing the physical demands of his usual coal mine work with the physicians’ assessments of his respiratory condition and physical limitations.⁷ 20 C.F.R. §718.204(b)(2)(iv); *see Poole*, 897 F.2d at 895; *Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983) (“When the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case . . . rather than attempting to fill the gaps in the ALJ’s opinion.”); *see also Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably conclude that a miner is unable to do his last coal mine job); *Budash*, 9 BLR at 1-51-52; Decision and Order on Remand at 3-6; Claimant’s Brief at 2-3, 5, 10.

physical limitations, the limitations must be taken as the physician’s opinion.” *Scott*, 60 F.3d at 1141 (noting the court’s agreement with the United States Courts of Appeals for the Third and Eleventh Circuits).

⁷ While Claimant does not challenge the ALJ’s characterization of the exertional requirements of his usual coal mine employment as light, Claimant contends the ALJ failed to adequately explain whether he can actually perform the physical requirements as described in the record and summarized by the ALJ, which included walking up and down six stories and 300-foot silos at a 45-degree angle multiple times in a day, and carrying twelve to fifteen pounds of tools and equipment all day. Claimant’s Brief at 2; Decision and Order on Remand at 3; Hearing Transcript at 11-12, 24-25.

Additionally, the ALJ did not adequately address whether Claimant's treatment records support a finding of total disability.⁸ Claimant's Brief at 2 (citing Claimant's Exhibit 5 at 1-2, 5); *see* 30 U.S.C. §923(b) (ALJ must address all relevant evidence); *see McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Finally, we agree with Claimant's argument that the ALJ did not adequately explain why Dr. Istanbuly's opinion was undermined by subsequent non-qualifying pulmonary function and blood gas studies. Claimant's Brief at 2-5, 10; Decision and Order on Remand at 4. In reviewing Dr. Istanbuly's supplemental report, the ALJ largely focused on the fact that Dr. Bruce's objective testing results were non-qualifying rather than Drs. Istanbuly's and Bruce's findings based on those results. Decision and Order on Remand at 4. Both physicians observed a moderate obstruction based on Dr. Bruce's pulmonary function study results, and Dr. Istanbuly explained why he believed those results were "abnormal" by comparing Claimant's actual results to the predicted values. Claimant's Exhibit 2 at 1-2; Employer's Exhibit 1 at 2.

Further, the ALJ determined that Dr. Istanbuly failed to provide "any explanation" for opining the blood gas study he conducted was "superior" to Dr. Bruce's study. Decision and Order on Remand at 4. However, Dr. Istanbuly explained that Claimant "was very close to reaching his target heart rate" during the exercise portion of the study Dr. Istanbuly administered, which was conducted on a stationary bike. Claimant's Exhibit 2 at 1. While Dr. Istanbuly acknowledged that Dr. Bruce's exercise study "did not reveal significant abnormality," he noted: "however, . . . the patient was not able to exercise on the stationary bike" but instead walked for six-minutes. *Id.* at 2; Claimant's Brief at 3. Thus, after considering the more recent non-qualifying objective testing results, Dr. Istanbuly reiterated his opinion that Claimant is totally disabled based on the "abnormal" pulmonary function tests and Dr. Istanbuly's "superior" exercise study. Claimant's Exhibit 2 at 3; Director's Exhibit 11 at 15-19.

As the ALJ did not consider these explanations and failed to adequately explain why Dr. Istanbuly's opinion was undermined by subsequent non-qualifying pulmonary function and blood gas studies, her decision does not comply with the Administrative

⁸ Dr. Moja diagnosed Claimant with a severe obstruction and COPD. Claimant's Exhibit 5. While the ALJ noted Dr. Istanbuly stated that Dr. Moja diagnosed COPD, the ALJ did not summarize or consider Drs. Moja's or Siddique's treatment records relevant to whether Claimant is totally disabled. Decision and Order on Remand at 4; Claimant's Exhibits 4, 5; Claimant's Brief at 2; Claimant's Brief on Remand at 5, 7-8.

Procedure Act (APA).⁹ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); see also *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023); *Smith v. Kelly's Creek Res.*, 26 BLR 1-15, 1-27-28 (2023); Decision and Order on Remand at 4; Claimant's Brief at 2-3, 5, 10.

As the ALJ did not conduct the proper analysis at 20 C.F.R. §718.204(b)(2)(iv) and failed to adequately consider all of the evidence, we vacate her conclusion that Claimant did not establish total disability based on the medical opinion evidence and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order on Remand at 3-5. Thus, we vacate the ALJ's conclusion that Claimant failed to invoke the Section 411(c)(4) presumption and the denial of benefits.¹⁰

Remand Instructions

On remand, the ALJ must reweigh the medical opinions and Claimant's treatment records, including Dr. Bruce's opinion and Drs. Moja's and Siddique's treatment records, and determine whether the physicians have identified an impairment or physical limitations that would preclude Claimant from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); see *Poole*, 897 F.2d at 895; *Budash*, 9 BLR at 1-51-52. In weighing the medical opinions, the ALJ must consider 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. See *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Rowe*, 710 F.2d at 255.

If Claimant establishes total disability based on the medical opinion evidence, the ALJ must weigh the evidence as a whole to determine whether Claimant is totally disabled by a respiratory or pulmonary impairment. See 20 C.F.R. §718.204(b)(2); see also *Shedlock*, 9 BLR at 1-198. If Claimant fails to establish total disability, 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).

⁹ 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).

¹⁰ We decline to address, as premature, Claimant's arguments regarding whether Employer can rebut the Section 411(c)(4) presumption. Claimant's Brief at 11-12.

If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption, and the ALJ must determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1). In rendering all of her 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.

Accordingly, we vacate the ALJ's Decision and Order on Remand Denying Benefits and remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge