U.S. Department of Labor

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

BRB No. 21-0104 BLA

ROBERT E. LEE Claimant-Petitioner v. AMERICAN ENERGY, LLC and ROCKWOOD CASUALTY INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/22/2022 DECISION and ORDER

Appeal of Order Granting Motion for Reconsideration and Denying Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Robert E. Lee, St. Paul, Virginia.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges

PER CURIAM:

Claimant, without representation,[1] appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson's Order Granting Motion for Reconsideration and Denying Benefits (2015-BLA-05663), 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 claim filed on November 15, 2013, and is before the Benefits Review Board for a second time.

ALJ Alan L. Bergstrom initially denied Claimant benefits in an October 30, 2017 Decision and Order – Denying Benefits. Pursuant to Claimant's appeal, the Board affirmed ALJ Bergstrom's finding that Claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. *Lee v. American Energy, LLC*, BRB No. 18-0087 BLA, slip op. at 4 (Nov. 16, 2018). The Board, however, vacated his finding that Claimant failed to establish total disability and thus failed to invoke the Section 411(c)(4) presumption.[2] *Id*. at 9-11. Furthermore, the Board determined ALJ Bergstrom failed to address whether Claimant's twenty-nine years of coal mine employment qualified to invoke the Section 411(c)(4) presumption. *Id.* at 10-11 n. 13. Thus, in the event total disability was established on remand, the Board directed him to determine if Claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. *Id.* at 10. If Claimant invoked the Section 411(c)(4) presumption, he was then to consider whether Employer and its Carrier (Employer) could rebut it. *Id*. at 11; 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

On remand, this case was assigned to ALJ Johnson because ALJ Bergstrom retired. Order Reassigning Case. ALJ Johnson (the ALJ) issued a Decision and Order on Remand Awarding Benefits on May 21, 2020. He found Claimant established total disability under 20 C.F.R. §718.204(b)(2)(iv) and at least fifteen years of qualifying coal mine employment, thus invoking the Section 411(c)(4) presumption. Decision and Order on Remand at 6-7. He further found Employer failed to rebut it and awarded benefits. *Id.* at 10-15.

[1] Robin Napier, a benefits counselor with Stone Mountain Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. *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.

Employer requested reconsideration, asserting the ALJ erred in finding total disability based on the medical opinion evidence.[3] In his Order Granting Motion for Reconsideration and Denying Benefits (Order Granting Reconsideration), the subject of the current appeal, the ALJ reevaluated the evidence and determined it was insufficient to establish total disability. He therefore denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

Because Claimant is unrepresented, the Board addresses whether substantial evidence supports the Decision and Order below. *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).

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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function

[3] Employer filed its Motion for Reconsideration on August 20, 2020. In its motion, it stated that it did not receive or have actual notice of the issuance of the Decision and Order on Remand until August 11, 2020, when its counsel discovered it on the Office of Administrative Law Judges website and then found the electronic notice of filing in his email "junk" folder. Motion for Reconsideration at 1-2. The ALJ accepted Employer's representation that it did not actually receive the Decision and Order until August 11, 2020, thus making its motion timely. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009); 20 C.F.R. §725.479(b) (a party may request a reconsideration within thirty days of the filing of the ALJ's decision); 20 C.F.R. §725.479(d) ("[r]egardless of any defect in service, actual receipt of the decision is sufficient to commence the 30-day period"); *see also Dominion Coal Corp. v. Honaker*, 33 F.3d 401, 404 (4th Cir. 1994) (actual notice informing counsel of the ALJ's decision was sufficient to begin the thirty-day period for appealing to the Board when the parties were not served by certified mail); *Jewell Smokeless Coal Corp. v. Looney*, 892 F.2d 366, 369 (4th Cir. 1989).

[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); Employer's Exhibit 3 at l.

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 consider all relevant evidence and weigh the evidence supporting total disability against the 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). As the Board previously affirmed the findings that Claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(ii), (iii), the remaining avenues to establish total disability are via pulmonary function study or medical opinion evidence. *Lee*, BRB No. 18-0087 BLA, slip op. at 6 n. 5; 20 C.F.R. §718.204(b)(2)(i), (iv).

Pulmonary Function Studies

On remand, the ALJ considered six pulmonary function studies conducted on October 30, 2013, March 26, 2014, August 1, 2014, August 15, 2014, July 2, 2015, and May 24, 2016. Decision and Order on Remand at 3-4. The October 30, 2013 pulmonary function study was qualifying[5] before the administration of bronchodilators. Claimant's Exhibit 3. The March 26, 2014 study was non-qualifying before and after the administration of bronchodilators. Director's Exhibit 10. The August 1, 2014 study was qualifying before the administration of bronchodilators. Claimant's Exhibit 45. The August 15, 2015 pulmonary function study was non-qualifying before and after the administration of bronchodilators. Director's Exhibit 11. The July 2, 2015 pulmonary function study was qualifying before the administration of bronchodilators and non-qualifying after the administration of bronchodilators. Employer's Exhibit 1. The May 24, 2016 pulmonary function study was non-qualifying before the administration of bronchodilators. Employer's Exhibit 4. The ALJ found the results of the pulmonary function study evidence are in equipoise and therefore do not establish total disability.[6] Decision and Order on Remand at 4.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[6] The ALJ permissibly resolved the conflict in Claimant's recorded heights by averaging them together to find 67.1 inches. Decision and Order on Remand at 4; *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Because Claimant's height falls between the table heights of 66.9 and 67.3 inches listed in 20 C.F.R. Part 718, Appendix B, the ALJ permissibly evaluated the studies using the table values for the closest greater height of 67.3 inches. Decision and Order on Remand at 4; *see Toler v. E.*

Addressing the Board's remand instructions, the ALJ found the August 15, 2014 and July 2, 2015 studies valid[7] for determining total disability.[8] *Id*. at 3. He noted Dr. Sargent "signed off" on the August 15, 2014 study, which Dr. Sargent believed represented a "true and accurate reflection of the patient's current clinical condition." *Id.* at 3, *citing* Director's Exhibit 11. The ALJ also found the July 2, 2015 test valid given that the technician who performed it indicated the data was "acceptable and reproducible" and Dr. McSharry "signed off" on it. Decision and Order on Remand at 3. Because it is supported by substantial evidence, we affirm the ALJ's findings that the August 15, 2014 and July 2, 2015 pulmonary function studies are reliable. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc); *Orek v. Director, OWCP*, 10 BLR 1-511, 1-54-5 (1987); Decision and Order on Remand at 3.

On remand the ALJ also reconsidered whether ALJ Bergstrom had properly admitted the May 24, 2016 pulmonary function study into evidence.[9] *Lee*, BRB No. 18-0087 BLA, slip op. at 9. He rationally determined the study was admitted into the record, as Employer submitted it at the hearing and it is clearly a part of Claimant's treatment records. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009); Decision and Order on Remand at 2-3; Hearing Transcript at 11; Employer's Evidence Summary Form; Employer's Exhibit 4. Employer is correct that the ALJ did not, as the Board instructed, first determine if the study was sufficiently reliable to establish total disability.[10]

Associated Coal Corp., 43 F.3d 109, 116 n.6 (4th Cir. 1995); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008).

[7] ALJ Bergstrom noted the August 15, 2014 and July 2, 2015 studies did not include statements regarding Claimant's effort, understanding, or cooperation. Decision and Order at 17. However, he failed to determine if this rendered the studies invalid. *Lee*, BRB No. 18-0087 BLA, slip op. at 6.

[8] A study need not precisely conform to the quality standards at 20 C.F.R. §718.103(c), but rather must be in "substantial compliance." 20 C.F.R. §718.101(b); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc).

[9] ALJ Bergstrom found the May 24, 2016 pulmonary function study was not admitted into evidence. Decision and Order at 13. The Board noted this finding conflicted with the admission of the study into the record as part of Claimant's treatment records at Employer's Exhibit 4. *Lee*, BRB No. 18-0087 BLA, slip op. at 6.

[10] The quality standards do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); *Lee*, BRB No. 18-0087 BLA, slip op. at 9 n. 8; Decision and Order on Remand at 3; Employer's Response at 6. But there is no indication that the study is invalid or unreliable, and Dr. McSharry opined the test is reproducible. *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984) (the party challenging the validity of a study has the burden to establish the results are suspect or unreliable); Employer's Exhibits 3, 4. As such, any error in not determining the reliability of the test was harmless.[11] *Larioni v. Director,* 6 BLR 1-1276, 1-1278 (1984).

The ALJ noted the results of the pulmonary function studies are mixed, with the first test being qualifying and the final test producing non-qualifying values before and after bronchodilators. Decisions and Order on Remand at 4. He further noted the studies alternated between qualifying and non-qualifying values, separated by five months, six months, two weeks, one year, and one year. *Id*. Because the ALJ did a qualitative and quantitative review of the tests, his findings are supported by substantial evidence and therefore we affirm his determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).[12] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); Decision and Order on Remand at 4.

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standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment). But an ALJ must still determine if the results are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[11] Nor is there any reason to suspect the ALJ would not also determine the May 24, 2016 study is reliable, in light of his determination that the August 15, 2014 and July 2, 2015 studies are reliable because physicians "signed off" on them. Decision and Order on Remand at 3. Dr. McSharry relied on the May 24, 2016 study and opined the test is reproducible, while the technician who performed the test noted Claimant's good effort. Employer's Exhibits 3, 4.

[12] Both ALJ Bergstrom and ALJ Johnson failed to consider the June 27, 2007 pulmonary function study, that Employer also submitted as one of Claimant's treatment records and admitted at the hearing. Director's Exhibit 12; Employer's Evidence Summary Form; Hearing Transcript at 8-9. However, as the study was non-qualifying, any error in the ALJ's failure to consider it is harmless. *See Larioni v. Director,* 6 BLR 1-1276, 1-1278 (1984).

Medical Opinions

Notwithstanding non-qualifying objective testing, total disability may be established by a reasoned medical opinion that the miner is unable to perform his usual coal mining work. 20 C.F.R. §718.204(b)(2)(iv); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000). A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982).

The ALJ considered the medical opinions of Drs. Ajjarapu, Sargent, and McSharry. Dr. Ajjarapu opined Claimant has a severe, totally disabling pulmonary impairment that renders him unable to perform his previous coal mine employment. Director's Exhibits 10, 15. Dr. McSharry opined Claimant has a non-disabling pulmonary impairment. Employer's Exhibits 1, 3, 5. Dr. Sargent opined Claimant has a moderate, non-disabling pulmonary impairment. Director's Exhibit 11; Employer's Exhibit 2.

On remand, the ALJ credited Dr. Ajjarapu's opinion that Claimant is totally disabled as well-reasoned and documented. Decision and Order on Remand at 5. Conversely, he found Dr. McSharry's opinion entitled to little weight because his opinion that Claimant was not disabled addressed only whether the objective testing was qualifying, and did not address whether Claimant would be able to perform his usual coal mine employment. *Id.* at 5. The ALJ further discredited Dr. Sargent's opinion because he was not provided Dr. McSharry's reports and therefore did not consider the totality of the evidence. *Id.* He thus found the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 6.

On reconsideration, however, the ALJ found Dr. Ajjarapu's opinion undermined, as he relied on an "erroneous premise" that Claimant's usual coal mine employment involved working as a "scoop, miner, or shuttle car operator." Order Granting Reconsideration at 4. He further found Dr. Sargent's opinion worthy of "determinative" weight as well-reasoned, supported, and based on "the correct premise" that Claimant's usual coal mine job was working as a repairman which involved "only occasional heavy labor." *Id.* at 3-4. Finally, he found Dr. McSharry's opinion undermined for failing to address whether Claimant could perform his usual coal mining work notwithstanding the non-qualifying pulmonary function studies. *Id.* at 3. Therefore, he determined Clamant did not establish total disability based on the medical opinion evidence. *Id.* at 4.

Because the ALJ failed to consider all the relevant evidence in determining the exertional requirements of Claimant's usual coal mine employment, his weighing of the medical opinions is not supported by substantial evidence. Claimant testified his job at his

last employer was working as a repairman[13] and stated the physical requirements of his job comprised of "*a lot of heavy lifting* and maintenance on equipment." Hearing Transcript at 13 (emphasis added). In addition, the ALJ did not consider Claimant's description of the exertional requirements provided in his application for benefits, which included, among others, lifting and carrying fifty pounds ten to fifteen times per day. Director's Exhibit 4. Consequently, in finding Claimant's usual coal mine work required "only occasional heavy labor," and crediting Dr. Dahhan on that basis, the ALJ failed to consider all relevant evidence regarding its exertional requirements and he did not explain the rationale underlying his determination. We thus vacate his finding as it does not satisfy the Administrative Procedure Act (APA).[14] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Moreover, the ALJ did not explain how Dr. Ajjarapu's reliance on the incorrect job title for Claimant's usual coal mine employment rendered her opinion, that his severe pulmonary impairment would prevent him from lifting and carrying heavy objects, unreasoned.[15] *See Wojtowicz*, 12 BLR at 1-165; *see also McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (ALJ must identify the miner's usual coal mine work and then

[13] While the ALJ indicated Claimant worked as a repairman on the surface for four years in his Order Granting Reconsideration, Claimant testified only that "some" of his work was outside and his work as a repairman was performed at "the face." Hearing Transcript at 13. Further, the ALJ indicated in his Decision and Order on Remand that Claimant told Dr. McSharry he worked three or four years at a strip mine and the remainder of his employment was working as a repairman underground. Decision and Order on Remand at 6-7 (citing Employer's Exhibit 1). Any error in the ALJ's recitation of the time Claimant spent as a repairman is harmless, however, because in either event, substantial evidence supports the ALJ's conclusion that Claimant's most recent job for a substantial period of time was working as a repairman. *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982); *Larioni*, 6 BLR at 1-1278; Hearing Transcript at 13; Director's Exhibits 4, 11; Employer's Exhibit 1.

[14] The Administrative Procedure Act 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).

[15] While Dr. Ajjarapu stated Claimant's job duties included work as a "scoop, miner, and shuttle car operator" in her March 24, 2015 supplemental report, Director's Exhibit 15, she noted in her initial report that Claimant's job duties included work as a "scoop, shuttle car, miner operator, and *maintenance man*." Director's Exhibit 10 (emphasis added).

compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to the miner's work capabilities); Director's Exhibit 15 at 6. We therefore vacate his credibility determinations regarding Drs. Ajjarapu's and Sargent's opinions and his finding that Claimant failed to establish total disability at 20 C.F.R. §718.304(b)(2)(iv). Order on Reconsideration at 4.

Based on the foregoing, we vacate the ALJ's finding that Claimant failed to establish total disability and invoke the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b), 718.305. We therefore vacate the denial of benefits.

Remand Instructions

On remand, the ALJ must first consider all relevant evidence to determine the exertional requirements of Claimant's usual coal mine work and then consider them in conjunction with Drs. Ajjarapu's and Dahhan's medical opinions assessing total disability. *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *Cornett*, 227 F.3d at 578. In evaluating the medical opinions, the ALJ should address 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 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). The ALJ must set forth his findings on remand in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

The ALJ must then weigh the categories of evidence together to determine if Claimant has established total disability by a preponderance of the evidence. *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If the ALJ finds total disability established, he may reinstate his prior finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order on Remand at 7; 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Moreover, because Employer did not ask the ALJ to reconsider his findings that Claimant worked for at least fifteen years in qualifying coal mine employment and Employer failed to rebut the Section 411(c)(4) presumption, the ALJ must reinstate the award if he finds Claimant established total disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 14-15. But if the ALJ finds Claimant cannot establish total disability, he must deny benefits, as Claimant will have failed to establish an essential element of entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Accordingly, the ALJ's Order Granting Motion for Reconsideration is affirmed in part, 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

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge