U.S. Department of Labor

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

BRB No. 23-0404 BLA

GREGORY W. HAGY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WAHTAHSHI LAND & COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 06/14/2024
	)	
Employer/Carrier-Respondents	)	
	)	
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 William P. Farley, Administrative Law Judge, United States Department of Labor.

Gregory W. Hagy, Vansant, Virginia.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) William P. Farley's Decision and Order Denying Benefits (2020-BLA-06017) rendered on a miner's subsequent claim filed on May 3, 2019,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with greater than fifteen years of qualifying coal mine employment but found he did not establish total disability. Thus, the ALJ found Claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] or establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). As Claimant did not establish total disability, a required element of entitlement, the ALJ denied benefits.

[1] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed a prior claim on September 8, 2015, and the district director denied it on May 19, 2017, for failure to establish total disability. Decision and Order at 2. 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 that "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 Claimant failed to establish total disability in his prior claim, he had to submit evidence establishing that element to obtain review of the merits of the current claim. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

[3] 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.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a response brief.[4]

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 findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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 or establish entitlement under 20 C.F.R. Part 718, Claimant must prove he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on qualifying pulmonary function studies, arterial blood gas studies,[6] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[7] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ

[4] We affirm the ALJ's finding that Claimant had greater than fifteen years of qualifying coal mine employment as Employer does not challenge it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

[5] 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 West Virginia. *Shupe v. Director,* OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5 & n.25; Hearing Transcript at 12.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The ALJ correctly found that the two arterial blood gas studies, dated July 29, 2019, and March 23, 2021, are non-qualifying for total disability and that that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 8-9, 15. Thus, we affirm the ALJ's determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

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 did not establish total disability by any method. Decision and Order at 13-20.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated April 18, 2019, July 29, 2019, and March 23, 2021.[8] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 7-8, 14-15; Director's Exhibit 14; Claimant's Exhibit 5; Employer's Exhibit 1. The April 18, 2019 pulmonary function study was conducted before the administration of a bronchodilator. Claimant's Exhibit 5. The July 29, 2019 and March 23, 2021 pulmonary function studies were conducted before and after the administration of a bronchodilator. Director's Exhibit 14; Employer's Exhibit 1. All of the pulmonary function studies except the July 29, 2019 pre-bronchodilator study yielded non-qualifying results. Because the preponderance of the studies is non-qualifying, the ALJ determined the pulmonary function testing does not support a finding of total disability.[9] Decision and Order at 14-15. We affirm this finding

[8] Because the pulmonary function studies reported varying heights for Claimant of 70, 72, and 73 inches, the ALJ calculated an average height for Claimant of 71.6 inches. Decision and Order at 7. He then properly used the closest greater table height at Appendix B of 20 C.F.R. Part 718 to determine whether the results were qualifying. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114, 116 n.6 (4th Cir. 1995); *Carpenter v. GMS Mine & Repair Maintenance Inc.*, BLR , BRB No. 22-0100 BLA (Sept. 6, 2023); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 7-8.

[9] The ALJ further credited "the more recent pulmonary function study." Decision and Order at 15. To the extent the ALJ purported to credit the March 23, 2021 pulmonary function study based on its recency, he erred, as it is irrational to credit evidence solely on the basis of recency when it suggests the miner's condition has improved. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Kincaid v. Island Creek Coal Co.*, BLR , BRB No. 22-0024 BLA and BRB No. 22-0024 BLA-A, slip op. at 7-11 (Nov. 17, 2023); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14 (June 23, 2023). However, any error is harmless given his permissible finding that the preponderance of the pulmonary function study evidence does not support a finding of total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

as it is supported by substantial evidence.[10] 20 C.F.R. §718.204(b)(2)(i); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012).

Medical Opinions and Evidence as a Whole

The ALJ considered three medical opinions.[11] Decision and Order at 16-17. For the reasons that follow, we affirm the ALJ's rejection of Dr. Forehand's opinion but vacate his conclusion that Claimant failed to establish total disability based on Drs. Sargent's and Fino's medical opinions.

Dr. Forehand

Dr. Forehand examined Claimant on July 29, 2019, as part of the Department of Labor (DOL)-sponsored complete pulmonary evaluation. Director's Exhibit 14. He initially opined that Claimant has an obstructive impairment and is totally disabled. *Id*. at 4. While noting Claimant's pulmonary function study results were "very slightly above" DOL disability standards, he explained that the FEV1 value of 55 percent would leave Claimant "with insufficient 'wind'" to perform the physical demands of his last coal mine job. *Id*. In a subsequent letter, however, Dr. Forehand indicated he reconsidered the results of Claimant's pulmonary function and arterial blood gas studies and stated Claimant "retains the respiratory capacity to return to his last coal mining job" and "is not totally disabled." Employer's Exhibit 4.

The ALJ acted within his discretion in giving diminished weight to Dr. Forehand's opinion because he did not fully explain the basis for his change in opinion. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (ALJ acted within her discretion in giving less weight to medical opinions by doctors who failed to adequately explain their conclusions); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)

[10] Employer designated two pulmonary function studies, dated July 7, 2014 and February 9, 2021, that were contained in Claimant's hospitalization and treatment notes. Employer's Evidence Summary Form dated June 23, 2021 at 9-10. Any error in the ALJ's failure to weigh these treatment pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i) is harmless as both studies are non-qualifying, consistent with the ALJ's finding that a preponderance of the studies do not support total disability. *See Larioni*, 6 BLR at 1-1278; Employer's Exhibits 5, 7.

[11] Prior to weighing the medical opinions, the ALJ determined the exertional requirements of Claimant's usual coal mine employment as a continuous miner operator required very heavy work because he had to lift 200 to 250 pounds. Decision and Order at 6-7; Hearing Transcript at 12-13.

(en banc) (same); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12, 1-14 (1984) (ALJ rationally rejected a physician's change in opinion as it was unexplained); Decision and Order at 16; Director's Exhibit 14; Employer's Exhibit 4.

Dr. Sargent

Dr. Sargent initially reviewed records and provided a report dated April 9, 2020. Employer's Exhibit 1. He opined Claimant is not totally disabled from a respiratory standpoint. *Id*. at 2. Subsequently, he examined Claimant on March 23, 2021, and prepared a report dated May 3, 2021. Employer's Exhibit 1 at 5-7; Claimant's Exhibit 6. He noted Claimant described shortness of breath walking 100 yards or climbing a flight of stairs. Employer's Exhibit 1 at 8. In addition, he noted Claimant was primarily employed as a continuous miner operator, where he worked in 46-inch coal and had to do a lot of crawling and heavy lifting in addition to operating controls. *Id*. While noting Claimant's pulmonary function and blood gas studies do not meet DOL disability standards, he found they were "close to those standards." Employer's Exhibit 1 at 6; Claimant's Exhibit 6 at 2. Dr. Sargent diagnosed a moderate obstructive respiratory impairment based on Claimant's pulmonary function study results, and "suspect[ed]" Claimant "would have a significant difficulty doing his last job as a continuous miner operator . . . ." *Id*. Further, he stated that Claimant "would have difficulty doing heavy manual labor." *Id*.

The ALJ found Dr. Sargent's opinion does not support a finding of total disability, citing cases for the propositions that a physician's statement that a miner should "avoid" further exposure to coal dust is not equivalent to a finding of total disability and an equivocal or vague opinion can be given less weight. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391 (4th Cir. 1999); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Justice v. island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 17 & n.103; Claimant's Exhibit 6; Employer's Exhibit 1.

We are unable to affirm the ALJ's rejection of Dr. Sargent's opinion. Dr. Sargent did not simply advise Claimant against further coal mine dust exposure; he stated Claimant's obstructive impairment would make it difficult for him perform his previous coal mine work or any heavy manual labor. *See* Employer's Exhibit 1 at 6, 8; Claimant's Exhibit 6 at 2. Moreover, the ALJ did not identify what aspects of Dr. Sargent's opinion he felt were equivocal. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (physician's "refusal to express a diagnosis in categorical terms is candor, not equivocation"). Thus, because the ALJ did not adequately explain his credibility findings with respect to Dr. Sargent's opinion, we vacate them.

Dr. Fino

Dr. Fino evaluated Claimant on February 19, 2020. Claimant's Exhibit 7. He diagnosed a totally disabling moderate respiratory impairment based upon a pulmonary function study that he conducted that day, which was not admitted into the record, and the July 29, 2019 pulmonary function testing that Dr. Forehand conducted, which was admitted into the record. *Id.* at 9. In addition, he observed that Claimant's FEV1 on the 2019 and 2020 pulmonary function tests is about five percent lower now than it was when Dr. Fino previously examined and tested Claimant on February 22, 2017, in conjunction with Claimant's prior claim. *Id.* While noting Claimant has no oxygen transfer impairment, Dr. Fino opined that Claimant's FEV1 values from the 2019 and 2020 studies would prevent him from being able to perform his last coal mine job involving heavy and very heavy manual labor seventy-five percent of the time. *Id.*

The ALJ found Dr. Fino's opinion "is almost entirely based on his own [testing] of Claimant in 2017 and 2020" but that both of those studies "are not in the current record and thus inadmissible." Decision and Order at 16-17. The ALJ pointed out that "[t]he only admissible evidence Dr. Fino stated he based his opinion on was Claimant's 2019 [pulmonary function study conducted] by Dr. Forehand." *Id.* Finding it was "unclear how great or little reliance Dr. Fino placed on [the] inadmissible evidence," the ALJ gave his opinion "lesser weight." *Id.* at 17.

We are unable to affirm the ALJ's rejection of Dr. Fino's opinion. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While the parties did not designate Dr. Fino's 2020 pulmonary function study as evidence in this claim, Dr. Fino's 2017 pulmonary function study is part of the record in Claimant's prior claim and thus is part of the record in this subsequent claim. 20 C.F.R. §725.309(c)(2); Prior Claim Director's Exhibit 11 at 17; Decision and Order at 3. Moreover, Dr. Fino specifically explained that Claimant's reductions in his FEV1 values in both 2019 and 2020 showed a moderate obstructive respiratory impairment that would be ultimately disabling. Claimant's Exhibit 7 at 9. Claimant's FEV1 in 2019 was fifty-five percent of predicted and in 2020 was slightly higher at fifty-seven percent of predicted. *Id.* at 7-8. So even if the 2020 study is not designated evidence of record, the ALJ did not explain how that fact undermines Dr. Fino's diagnosis of a disabling obstructive impairment based on the 2019 study that was admitted into the record. *See, e.g., Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983) (Board affirms ALJ's crediting or discrediting of a medical opinion if he or she provides a valid reason).

Moreover, the second reason the ALJ provided for rejecting Dr. Fino's opinion also fails. The ALJ stated:

> In addition, Dr. Fino's opinion is too vague to support a finding of total disability, as he does not directly comment on whether Claimant is totally disabled and instead provides two comments which are in opposition, by stating, "[t]here is no oxygen transfer impairment . . ." and ". . . I do not believe that [Claimant] would be able to perform his last job since now he tells me that 75% of the time he had to perform heavy and very heavy manual labor." [footnote omitted].

Decision and Order at 17 (quoting Claimant's Exhibit 7 at 9).

Contrary to the ALJ's statement, Dr. Fino specifically stated that Claimant has a "moderate respiratory impairment . . . that is disabling" based on Claimant's description of his job duties. Claimant's Exhibit 7 at 9. Moreover, pulmonary function and blood gas studies measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Thus, the ALJ failed to explain why Dr. Fino's opinion that Claimant has normal oxygen transfer on blood gas testing contradicts his subsequent statement that Claimant's pulmonary function testing indicates he has a disabling moderate respiratory impairment. *See Tussey*, 982 F.2d at 1040-41; *Sheranko*, 6 BLR at 1-798; Decision and Order at 16-18; Claimant's Exhibit 7 at 9. We therefore vacate the ALJ's rejection of Dr. Fino's opinion.

Because we vacate the ALJ's credibility findings with respect to Drs. Sargent's and Fino's opinions, we vacate his conclusion that Claimant did not establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 15-18. We therefore vacate the ALJ's findings that Claimant did not invoke the Section 411(c)(4) presumption, establish a change in the applicable condition of entitlement, or establish entitlement under 20 C.F.R. Part 718. *See* Decision and Order at 18.

Remand Instructions

On remand, the ALJ first must reconsider the credibility of Drs. Sargent's and Fino's medical opinions at 20 C.F.R. §718.204(b)(2)(iv) and then determine whether the evidence as a whole establishes that Claimant has a totally disabling respiratory or pulmonary impairment. *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and establish a change in the applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309. The ALJ must then consider whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(1). However, if the ALJ finds Claimant did not establish total

disability, an essential element of entitlement, he may reinstate the denial of benefits. *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 credibility determinations on remand, the ALJ must explain the bases for his findings as the Administrative Procedure Act requires.[12]

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case to him 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

[12] 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).