U.S. Department of Labor

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

BRB No. 23-0463 BLA

ROY LEE BREEDLOVE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANADA COAL CORPORATION	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE GROUP	)	DATE ISSUED: 06/13/2024
	)	
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 on Remand Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Robert P. Normann (Law Office of Cheryl Esposito Kaufman), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Denying Benefits (2020-BLA-05040) 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 subsequent claim[1] filed on July 17, 2018, and is before the Benefits Review Board for the second time.[2]

In her initial Decision and Order Denying Benefits, the ALJ accepted the parties' stipulation that Claimant had twenty-one years of qualifying coal mine employment. However, she found Claimant failed to establish a totally disabling respiratory or pulmonary impairment and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018);

[1] Claimant filed two previous claims. On December 4, 2012, the district director denied his more recent claim because he failed to establish any element of entitlement. Director's Exhibit 1. 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 she finds "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); *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 the district director denied Claimant's prior claim for failure to establish any element of entitlement, he had to submit new evidence establishing at least one element in order to have the claim reviewed on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 1.

[2] We incorporate the procedural history of the case and the Board's prior holdings, as set forth in *Breedlove v. Canada Coal Corp.*, BRB No. 21-0335 BLA (June 23, 2022) (unpub.).

[3] Section 411(c)(4) 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.

20 C.F.R. §718.204(b)(2). She also found Claimant failed to establish pneumoconiosis at 20 C.F.R. §718.202 and denied benefits.

In consideration of Claimant's appeal, the Board affirmed the ALJ's finding that Claimant established twenty-one years of qualifying coal mine employment and that the evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Breedlove v. Canada Coal Corp.*, BRB No. 21-0335 BLA, slip op. at 3 n.3, 4 n.8 (June 23, 2022) (unpub.). However, the Board vacated the ALJ's determination that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv) because she did not determine the exertional requirements of Claimant's usual coal mine employment and did not adequately explain her weighing of the medical opinions. *Id.* at 4-8. Thus, the Board vacated her finding that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits, and it remanded the case for further consideration. *Id.* at 7-8.

On remand, the ALJ again found the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Consequently, she found Claimant failed to establish total disability based on the evidence as a whole and again denied benefits.

On appeal, Claimant contends the ALJ erred in finding that he failed to establish total disability. Employer and its Carrier (Employer) respond 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.[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).

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

[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 10; Director's Exhibit 4.

pulmonary function studies or arterial blood gas studies,[5] 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).

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Shah and Rosenberg. Decision and Order on Remand at 4-5 (unpaginated); Director's Exhibit 14; Claimant's Exhibit 1; Employer's Exhibit 1. Dr. Shah opined Claimant's objective testing results showed an "obstructive and restrictive ventilatory defect, mechanical ventilatory limitation to exercise, gas exchange abnormality[,] and diffusion abnormality with abnormal oxygen transfer." Director's Exhibit 14 at 6. Based on these results, she determined Claimant does not have the pulmonary capacity to continue the heavy and very heavy manual labor required by his last coal mine employment. *Id.* Dr. Rosenberg opined Claimant is not totally disabled from performing his previous coal mine work and that any exercise limitations are unrelated to a pulmonary disorder. Employer's Exhibit 1 at 3-4.

Considering the conflicting opinions on remand, the ALJ again noted both physicians were Board-certified, and then summarily stated:

> Finding both physicians equally qualified I accept their opinions. Drs[.] Shah and Rosenberg issue opposite opinions on total disability. Evaluating each opinion, I find them both well documented and well-reasoned, thus equally balanced. Affording both opinions some weight, I find them in equipoise. Therefore, I find that total disability has not been established by reasoned medical opinions.

Decision and Order on Remand at 5 (unpaginated).

Claimant contends that the ALJ failed to properly consider whether he is totally disabled in accordance with the Board's remand instructions. Claimant's Brief at 11-18. We agree.

[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).

The Board instructed the ALJ to determine the exertional requirements of Claimant's usual coal mine work and consider the medical opinions given those requirements. *Breedlove*, BRB No. 21-0335 BLA, slip op. at 8. While the ALJ acknowledged Dr. Shah's statement that Claimant's last job as a mechanic involved performing "very heavy work[,]" the ALJ did not make a finding regarding the exertional requirements of Claimant's usual coal mine work. *See* Decision and Order on Remand at 4 (unpaginated).

The Board also instructed the ALJ to "consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments." *Breedlove*, BRB No. 21-0335 BLA, slip op. at 8. Although the ALJ found Drs. Shah and Rosenberg equally qualified, and that their opinions were reasoned and documented and entitled to "some weight," she did not critically analyze the physicians' explanations for their conclusions or the underlying documentation, or otherwise explain the bases for her findings as the Administrative Procedure Act (APA) requires.[6] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53, 255-56 (4th Cir. 2016) (ALJ must conduct an appropriate analysis of the evidence to support her conclusion and render necessary credibility findings); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); 20 C.F.R. §718.204(b)(2)(iv); *Breedlove*, BRB No. 21-0335 BLA, slip op. at 7-8; Decision and Order on Remand at 5 (unpaginated).

In summarily finding the opinions of Drs. Shah and Rosenberg entitled to "some weight" and in equipoise, the ALJ failed to resolve the conflicts in the medical opinions or explain why she found them in equipoise. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order on Remand at 5 (unpaginated). While a claimant fails to meet his burden of proof when the evidence is equally balanced, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 279-81 (1994), the ALJ must nevertheless explain her rationale for reaching that conclusion. The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *Addison*, 831 F.3d at 256-57; *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010) (If the ALJ cannot "identify the more probable of the disputed expert opinions . . . [she] has a duty to explain, on scientific grounds, why a conclusion cannot be reached. Merely stating that the evidence is 'evenly

[6] The APA 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).

balanced, and should receive equal weight,' without further explanation, is not sufficient.") (citations omitted); *Wojtowicz*, 12 BLR at 1-165.

When the Board remands a case, the ALJ must comply with its instructions and "'implement both the letter and spirit' of the mandate." *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 210 (4th Cir. 2022) (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 267 (4th Cir. 2002). Based on the foregoing errors, we vacate the ALJ's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. Consequently, we vacate her conclusion that Claimant failed to invoke the Section 411(c)(4) presumption and the denial of benefits.

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). In doing so, she must first determine the exertional requirements of Claimant's usual coal mine work and consider the medical opinions given those requirements. *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). She must also determine whether the opinions of Drs. Shah and Rosenberg are well-reasoned and documented, explaining the weight she accords each medical opinion based on her consideration of the physicians' comparative credentials, their understanding of the exertional requirements of Claimant's usual coal mine work, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *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 then weigh all relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *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 the ALJ must then consider whether Employer has rebutted it. 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).

On remand, the ALJ must explain the bases for her findings and credibility determinations as the APA requires. 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 in accordance with this opinion and the Board's prior opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge