U.S. Department of Labor

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

BRB Nos. 23-0365 BLA
and 23-0365 BLA-A

WADE L. HINKLE Claimant-Petitioner Cross-Respondent v. INDUSTRIAL ENERGY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 10/30/2024 DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Advanced Administrative Litigation Clinic, Washington & Lee University School of Law), Lexington, Virginia, for Claimant.

Chris M. Green and Wesley A. Shumway (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Denying Benefits (2021-BLA-05356) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 30.86 years of qualifying coal mine employment but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). As a result, the ALJ found Claimant 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),[1] and did not establish an essential element of entitlement. Thus, the ALJ denied benefits.

On appeal, Claimant contends the ALJ erred in finding he is not totally disabled. Employer filed a response in support of the denial of benefits, to which Claimant replied. On cross-appeal, Employer argues the ALJ erred in assessing its medical experts' qualifications and opinions.[2] Claimant responds, urging the Benefits Review Board to reject Employer's arguments. The Director, Office of Workers' Compensation Programs, has not filed a response in either appeal.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

[2] We affirm the ALJ's finding that Claimant has 30.86 years of qualifying coal mine employment as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

with applicable law.[3] 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)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work.[4] 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function 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 weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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.[5] 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 22-26.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated August 30, 2018, September 26, 2019, and March 11, 2020. Director's Exhibits 15, 25, 26. The August 30, 2018 study produced qualifying[6] results before the administration of bronchodilators and

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 28.

[4] The ALJ found Claimant's usual coal mine employment as a foreman required heavy exertion. Decision and Order at 6. We affirm his finding as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii),(iii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 23.

[6] A "qualifying" pulmonary function study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

non-qualifying results after the administration of bronchodilators. Decision and Order at 22; Director's Exhibit 15. The September 26, 2019 and March 11, 2020 studies produced non-qualifying results. Director's Exhibits 25, 26. Noting that two of the three studies are non-qualifying, including the most recent study, ALJ found the pulmonary function studies do not establish total disability on their own. Decision and Order at 23; 20 C.F.R. §718.204(b)(2)(i).

Claimant argues the ALJ erred in according greater weight to the March 11, 2020 study based solely on recency, erroneously applying the "later is better" rule in contravention of Fourth Circuit precedent. Claimant's Brief at 16-18 (citing *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992)). However, we need not address Claimant's argument, as the ALJ permissibly relied on the majority of non-qualifying studies to find that a preponderance of the pulmonary function study evidence overall does not support a finding of total disability regardless of recency.[7] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 23.

Medical Opinions

The ALJ considered the medical opinions of Drs. Gaziano, Go, Sood, Zaldivar, and Basheda. Decision and Order at 9-19, 23-26; 20 C.F.R. §718.204(b)(2)(iv). Drs. Gaziano, Sood, and Go opined that Claimant is totally disabled from performing his usual coal mine employment, while Drs. Zaldivar and Basheda opined he is not totally disabled.

Dr. Gaziano identified a mild to moderate obstruction and concluded Claimant is totally disabled from performing any coal mine work based on his disabling FEV1 values and moderate diffusion impairment. Director's Exhibits 22, 23. Dr. Sood also identified a mild obstruction on Claimant's pulmonary function studies and opined Claimant is totally disabled from performing his last coal mine job requiring heavy labor. Claimant's Exhibit 2 at 5-6, 11. In support of his opinion, Dr. Sood pointed to Claimant's pre-bronchodilator FEV1 values meeting Department of Labor (DOL) disability standards and his diffusion capacity meeting the criteria for a Class III impairment under the American Medical

[7] Claimant also argues the ALJ erred in not considering that the March 11, 2020 study was only 0.85 percent away from a qualifying value; thus, he asserts the ALJ erred in not weighing this fact along with the ALJ's finding that Claimant's usual coal mine employment required heavy exertion. Claimant's Brief at 13-15. Contrary to Claimant's assertion, the inquiry under 20 C.F.R. §718.204(b)(2)(i) is whether the pulmonary function studies are qualifying pursuant the regulations. An ALJ may not interpret the objective testing, which is a matter for medical experts. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22-24 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Association (AMA) guidelines. *Id.* Dr. Go agreed that Claimant has a Class III impairment under AMA guidelines based on his abnormal diffusion capacity and explained that such an impairment[8] is "incompatible [with] any coal mine employment." Claimant's Exhibit 1 at 9; Claimant's Exhibit 5 at 15. Dr. Go further opined Claimant's pulmonary function studies demonstrate he has a moderate to moderately severe obstructive impairment and air trapping. Claimant's Exhibit 5 at 11, 36-37.

The ALJ found Drs. Gaziano's, Sood's, and Go's opinions[9] not well-reasoned because they did not explain the diffusion capacity measurement, its importance, or its impact on Claimant from a respiratory or pulmonary standpoint. Decision and Order at 26. He further found the physicians did not explain why Claimant's diffusion impairment rating as a Class III impairment under AMA guidelines means he is totally disabled given the non-qualifying objective studies. *Id.*

We agree with Claimant's contention that the ALJ failed to properly consider that Claimant may establish total disability through a reasoned medical opinion notwithstanding non-qualifying objective tests. 20 C.F.R. §718.204(b)(2)(iv); *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) (even a non-qualifying pulmonary function study reflecting a mild impairment may be totally disabling); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); Claimant's Brief at 15-16, 18-20. All the physicians, including Employer's experts, agreed that Claimant has at least mild obstruction, as well as varying degrees of diffusion capacity impairment. Decision and Order at 9-19; Director's Exhibits 22, 23, 26; Claimant's Exhibits 1, 2; Employer's Exhibit 2. Drs. Gaziano, Sood, and Go further noted Claimant's FEV1 values met the DOL standards for disability, that he has air trapping, and dyspnea at rest, and they diagnosed Claimant with a mild to moderate obstructive impairment, which they opined renders him incapable of performing his usual coal mine work. Director's Exhibits 22, 23; Claimant's Exhibits 1, 2, 5.

[8] Dr. Go initially opined Claimant is totally disabled based on "spirometry values meeting DOL criteria for total disability" but later withdrew that statement. Claimant's Exhibit 1 at 9; Claimant's Exhibit 5 at 8. As the ALJ found, the pre-bronchodilator August 30, 2018 study is qualifying pursuant the regulations but the remaining studies are not. Decision and Order at 22-23.

[9] The ALJ found all the medical opinions to be "poorly reasoned." Decision and Order at 25-26. We will address the ALJ's consideration of Drs. Basheda's and Zaldivar's opinions below.

The ALJ failed to address whether their opinions are well-reasoned to support a finding that Claimant's impairment would preclude him from performing the heavy labor required by his usual coal mine work, even if the objective testing was non-qualifying. Rather than addressing the entirety of their opinions, he focused solely on whether they adequately explained whether Claimant's diffusion capacity was disabling and could be relied upon. Because the ALJ did not perform the correct inquiry or address the entirety of Drs. Gaziano's, Sood's, and Go's opinions, remand is required. *See* 30 U.S.C. §923(b); *Killman*, 415 F.3d at 722; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

We also agree with Claimant's argument that substantial evidence does not support the ALJ's determination that Drs. Gaziano, Sood, and Go did not explain their opinions with respect to the diffusion capacity measurement. Claimant's Brief at 9-11. As Claimant argues, each physician explained the extent of Claimant's diffusion capacity and that his results indicate loss of lung function and the inability to perform his coal mine work. Director's Exhibits 22, 23; Claimant's Exhibits 1 at 9, 2 at 11, 5 at 15. Thus, the ALJ has not adequately explained the basis for his finding that they did not explain their reliance on Claimant's diffusion capacity. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 26. Moreover, the Fourth Circuit, within whose jurisdiction this case arises, has held that the fact that the regulation does not specifically list diffusion capacity as a basis for diagnosing total disability does not by itself preclude its use. *See Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); 20 C.F.R. §718.204(b)(2)(iv) (physician can diagnose total disability "based on medically acceptable clinical and laboratory diagnostic techniques" even if the objective testing listed in the regulation is non-qualifying or medically contraindicated).

For these reasons, we vacate the ALJ's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and thus failed to establish total disability based on the evidence as a whole. Decision and Order at 26. We therefore also vacate the denial of benefits.

Employer's Cross-Appeal

Employer raises arguments on cross-appeal that it asks us to consider should we remand the case to the ALJ based on Claimant's appeal. It argues the ALJ erred in discrediting Drs. Zaldivar's and Basheda's opinions that Claimant is not totally disabled. Employer's Response and Cross-Appeal at 28-31. It also contends the ALJ erred in finding Dr. Go to be the most qualified expert. *Id.* at 25-28.

Dr. Zaldivar opined that Claimant can perform heavy labor based on his FEV1 values from the March 11, 2020 pulmonary study. Employer's Exhibit 4 at 27. He

indicated Claimant's testing demonstrated moderate obstruction with a positive response to bronchodilators, which he indicated demonstrates that Claimant is capable of performing "all work for which he has been trained" if he received "proper treatment." Director's Exhibit 26 at 5. Dr. Zaldivar also acknowledged mild air trapping and a moderate diffusion abnormality. *Id.*; Employer's Exhibit 4 at 26, 34, 40-41. However, he indicated the diffusion capacity is not considered by the DOL in evaluating disability and it "shouldn't be" relied upon because a miner's arterial blood gases at rest and exercise should be considered instead. Employer's Exhibit 4 at 33.

Dr. Basheda opined Claimant's pulmonary function studies initially showed a "moderately severe" obstructive impairment that improved to a mild impairment post-bronchodilator in the most recent study. Employer's Exhibit 2 at 10, 14. He found no "significant" impairment based on the most recent study, and opined Claimant can perform his last coal mine job.[10] *Id.* at 17. He acknowledged that Claimant has an "abnormal diffusion measurement" but declined to diagnose Claimant with a disabling diffusion impairment because he could not exercise Claimant to see whether the results are due to a "cardiopulmonary abnormality" or "some abnormality of gas exchange." Employer's Exhibit 3 at 20-21.

The ALJ accorded Dr. Zaldivar's opinion little weight as not well-reasoned because the doctor did not address whether Claimant is totally disabled based on the abnormal diffusion capacity testing other than indicating the test is redundant, given the arterial blood gas studies. Decision and Order at 25. He found this particularly so given that Dr. Zaldivar did not "reconcile [his] opinion with the fact that Claimant did not perform an exercising arterial blood gas study." *Id.* The ALJ found Dr. Basheda's opinion not well-reasoned because he focused on the cause of the reduced diffusion capacity instead of addressing whether the diffusion abnormality is a totally disabling impairment. *Id.*

Employer argues the ALJ erred in finding Drs. Zaldivar's and Basheda's opinions not well-reasoned, as both "explained in detail" why they did not rely on Claimant's abnormal diffusion capacity and why Claimant is not totally disabled. Employer's Response and Cross-Appeal at 29-31.

We hold that the ALJ did not adequately address Drs. Zaldivar's and Basheda's opinions. As with the opinions of Drs. Gaziano, Sood, and Go, the ALJ focuses on the

[10] Dr. Basheda indicated that an individual with an FEV1 of fifty-seven percent of predicted would be unable to perform "exertional work." Employer's Exhibit 3 at 63. As the ALJ noted, this value was present on the September 26, 2019 pre-bronchodilator study. Decision and Order at 25 n.14; Director's Exhibit 25.

diffusion capacity to the exclusion of the remainder of their opinions. Moreover, as Employer argues, Drs. Zaldivar and Basheda explained why they did not rely on the abnormal diffusion studies to diagnose disability; however, the ALJ did not adequately attempt to resolve the conflict between their opinions regarding diffusion capacity and those of Drs. Gaziano, Sood, and Go. *See Hicks*, 138 F.3d at 533; *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ has duty to resolve conflicts in the evidence and adequately explain his conclusions). Thus, we remand for the ALJ to reconsider the entirety of their opinions regarding total disability.

Next, Employer argues the ALJ erred in his consideration of the experts' qualifications, finding Dr. Go more qualified than Drs. Zaldivar and Basheda. Employer's Response and Cross-Appeal at 25-28. Employer's argument has merit.

Experts' respective qualifications are important indicators of the reliability of their opinions. *Adkins*, 958 F.2d at 52-53. As the trier of fact, the ALJ has discretion to compare the physicians' qualifications, including board certifications, professorships, institutional affiliation, and publications. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951 (4th Cir. 1997); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 n.2 (4th Cir. 1997); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc). However, the ALJ must explain his determinations and examine all relevant evidence. *McCune*, 6 BLR at 1-998.

The ALJ summarized the experts' credentials, noting each expert's relevant board certifications, professorships, hospital affiliations, and related positions. Decision and Order at 10, 13, 16. He further noted that Dr. Go is published. *Id.* at 16. Based on his consideration of these credentials, the ALJ found Dr. Go the most qualified expert given his board certifications, publications "related to black lung and/or with miners," professorships, and affiliations with a "sizeable/teaching hospital." *Id.* at 24.

As the ALJ noted, all three physicians are board-certified in internal medicine with a subspecialty in pulmonary diseases, and Drs. Go and Zaldivar have positions as professors. Decision and Order at 10, 13, 16. However, the ALJ did not explain what constitutes a "sizeable/teaching hospital" or how an affiliation with such a hospital factored into crediting Dr. Go as more highly qualified, particularly given Dr. Zaldivar is affiliated with Charleston Area Medical Center. Decision and Order at 10, 16, 24. In addition, while he noted that Dr. Go is published and gave him more weight based on publications related to "black lung and/or miners," Drs. Zaldivar and Basheda also note publications on their curricula vitae. Director's Exhibit 26; Employer's Exhibit 2. Although Claimant argues that Dr. Go's research and publications are more significant and relevant, Claimant's Consolidated Reply and Response at 14-15, the ALJ did not make that finding. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (it is not for the

Board to make factual findings in the first instance); Decision and Order at 24. Moreover, while length of experience is not a determinative factor in assessing credibility, as Employer contends it is unclear whether the ALJ considered the experts' experience in evaluating and treating miners when making his credibility determinations. Employer's Brief at 27.

Because the ALJ did not adequately explain his determinations and it is unclear whether he considered all the relevant evidence regarding the experts' qualifications, we vacate his finding that Dr. Go is the most qualified expert.

Remand Instructions

On remand, the ALJ must reconsider the medical opinions to determine whether they are reasoned and documented to support a finding of total disability, taking into consideration 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 Hicks*, 138 F.3d at 533. In doing so, the ALJ must consider whether the physicians have identified an impairment or physical limitations that would preclude Claimant from performing his usual coal mine work, notwithstanding non-qualifying objective testing. 20 C.F.R. §718.204(b)(2)(iv); *Killman*, 415 F.3d at 722; *Cornett*, 227 F.3d at 577. If the ALJ determines the medical opinion evidence demonstrates total disability, he must then determine whether Claimant is totally disabled based on the evidence considered as a whole. 20 C.F.R. §718.204(b)(2); *see Defore*, 12 BLR at 1-28-29; *Rafferty*, 9 BLR at 1-232. If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the ALJ must then consider if Employer has rebutted it. 20 C.F.R. §718.305(d)(1).

However, if the ALJ finds Claimant has not established total disability, he may reinstate the denial of 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). In rendering his findings on remand, the ALJ must comply with the Administrative Procedure Act.[11] 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).

[11] The Administrative Procedure Act 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).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge