U.S. Department of Labor

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

BRB No. 23-0494 BLA

ALEX GIBSON Claimant-Petitioner v. ENTERPRISE MINING COMPANY, LLC and AIG CASUALTY COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 10/11/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in a Subsequent Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Denying Benefits in a Subsequent Claim (2021-BLA-05420) 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 subsequent claim filed on January 17, 2020.[1]

The ALJ accepted the parties' stipulation that Claimant worked for twenty-two years in underground coal mine employment but found he did not have a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718.[3] Thus, he denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability.[4] Neither Employer and its Carrier nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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[1] Claimant filed his first claim on August 10, 2009, but withdrew it on October 13, 2009. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. Claimant filed a second claim on September 1, 2010, which the district director denied on September 10, 2011, because Claimant failed to establish any element of entitlement. Director's Exhibit 2 at 2, 102. He filed a third claim on November 15, 2012, but withdrew it on June 11, 2013. Director's Exhibit 3. He filed his current claim on January 17, 2020. Director's Exhibit 4.

[2] 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.

[3] 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 "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)(1); *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, Claimant had to submit evidence establishing any element to obtain review of the merits in his current claim. *Id.*

[4] As they are unchallenged, we affirm the ALJ's findings that Claimant worked in underground coal mine employment for twenty-two years, the pulmonary function and

The Benefits Review 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 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award 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 (1986) (en banc).

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 and comparable gainful work. 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).

In this case, the ALJ found the pulmonary function studies, arterial blood gas studies, and medical opinions do not support total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iv);

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arterial blood gas studies do not establish total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 4, 7-8.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 11.

Decision and Order at 6-10. Claimant argues the ALJ erred in finding the medical opinions do not establish total disability. Claimant's Brief at 10-13. We agree.

The ALJ considered Dr. Alam's opinion that Claimant is totally disabled and the opinions of Drs. Dahhan and Jarboe that he is not. Decision and Order at 9-10; Director's Exhibits 13, 21, 22, 29; Employer's Exhibit 1. He found Dr. Dahhan's opinion is not reasoned while the opinions of Drs. Alam and Jarboe are reasoned and documented. Decision and Order at 9-10. He then stated that "[w]hen reviewing these reports all together, I find Claimant has not met his burden of proof based on the preponderance of the evidence." *Id*. at 10.

As Claimant argues, the ALJ erred by failing to resolve the conflict in the medical opinion evidence and explain his findings as the Administrative Procedure Act (APA) requires.[6] Claimant Brief at 12-13. While we see no error in his finding that Dr. Dahhan's opinion is not reasoned,[7] the ALJ did not adequately explain his findings with respect to Drs. Alam's and Jarboe's opinions.

Turning to Dr. Alam's opinion, the ALJ found the physician's initial opinion inconsistent because Dr. Alam did not adequately explain why he believed Claimant is not totally disabled considering the arterial blood gas study he administered produced

[6] 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).

[7] The ALJ found Dr. Dahhan did not explain why he opined Claimant is not disabled, given that the pulmonary function study he administered produced qualifying values. Director's Exhibits 22, 23. In his supplemental report, Dr. Dahhan opined a pulmonary function study "is fickle to perform" and "[d]irect measurement always underestimates the true ability of the patient." Director's Exhibit 23 at 2. The ALJ found that, contrary to Dr. Dahhan's opinion, "there is no indication that Claimant failed to perform at maximum effort," the test report indicates Claimant's cooperation was good, and Dr. Jarboe opined Claimant "gave a valid effort" on all the pulmonary function studies. Decision and Order at 10; Director's Exhibit 22 at 7; Employer's Exhibit 1 at 8. Thus, the ALJ permissibly discredited Dr. Dahhan's opinion as not reasoned. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

qualifying results.[8] Decision and Order at 9; Director's Exhibit 13. In addressing Dr. Alam's supplemental opinion, wherein he opined Claimant is totally disabled, the ALJ found the physician's failure to specifically address the basis for changing his opinion was troubling, even though the change was supported by the qualifying objective test results. Decision and Order at 9; Director's Exhibits 21, 29. He ultimately found Dr. Alam's disability assessment reasoned and documented. *Id.* at 10.

Lastly, the ALJ observed Dr. Jarboe examined Claimant, administered objective tests that produced non-qualifying results, diagnosed bronchial asthma and a mild to moderate impairment, and found no disability. Employer's Exhibit 1. The ALJ found Dr. Jarboe's opinion is "well-reasoned on the issue of total disability." Decision and Order at 10.

When finding the opinions of Drs. Alam and Jarboe each reasoned and documented, the ALJ did not explain the basis for his findings as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Moreover, the mere presence of conflicting medical opinions is not a valid basis to conclude Claimant failed to meet his burden to establish total disability. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); Decision and Order at 9-10. The ALJ has a duty to resolve any conflicts in the evidence and explain his basis for doing so. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must still conduct an appropriate analysis of the evidence to support his or her conclusion and render necessary credibility findings); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 9-10.

Next, while the ALJ discussed Dr. Alam's opinions from his March 16, 2020 and April 30, 2020 reports, we are unable to discern whether the ALJ considered Dr. Alam's December 1, 2020 report. Director's Exhibits 13, 21, 29. Because the ALJ did not adequately address all the relevant evidence, his findings do not satisfy the APA. *See Wojtowicz*, 12 BLR at 1-165; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

[8] 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).

We also agree with Claimant's argument that the ALJ failed to render the necessary factual findings regarding the exertional requirements of Claimant's usual coal mine employment, which would have allowed him to properly consider the medical opinions. Claimant's Brief at 11-12.

A physician may conclude a miner is totally disabled based on non-qualifying objective studies if the studies nonetheless demonstrate sufficient impairment to preclude the miner's usual coal mine work. *See 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); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests). In addition, a medical opinion need not be phrased explicitly in terms of "total disability" to support a finding that a miner is, in fact, disabled. Rather, the ALJ must consider all relevant evidence concerning a miner's respiratory capacity and may rationally conclude he is totally disabled based on a physician's report as to the miner's exertional limitations. *See Cornett*, 227 F.3d at 578. Thus, ALJs must determine the exertional requirements of a miner's usual coal mine work and then consider them in conjunction with the medical opinions assessing the extent of his impairment. *See id.*; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-10 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to his work capabilities).

Dr. Jarboe indicated Claimant has shortness of breath, wheezing, and daily mucus production in the morning, and he diagnosed bronchial asthma. Employer's Exhibit 1. He opined Claimant has a non-disabling pulmonary impairment "in the form of mild-to-moderate airflow obstruction," but is not totally disabled based on the pulmonary function and arterial blood gas studies he administered. Employer's Exhibit 1 at 4-5, 7. As discussed above, the ALJ did not explain his finding that Dr. Jarboe's opinion is "well-reasoned." Decision and Order 10. In addition, because the ALJ did not render a finding on the exertional requirements of Claimant's usual coal mine work,[9] he erred by failing to render the necessary factual findings which would have allowed him to determine whether Dr. Jarboe's opinion is credible. *See Cornett*, 227 F.3d at 578; *see also Killman*, 415 F.3d at 721-22. Because the ALJ did not adequately render findings that comport with the APA,

[9] A miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982).

we must vacate his determination that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10.

We thus vacate the ALJ's finding that the evidence as a whole does not establish total disability and that Claimant did not invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2). Consequently, we vacate the ALJ's finding that Claimant is not entitled to benefits and remand the case for further consideration of the evidence.

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). He must first identify the exertional requirements of Claimant's usual coal mine employment. Next, he must explain the weight afforded the medical opinions of Drs. Alam and Jarboe based on the physicians' comparative credentials, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Milburn Colliery 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 and has invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §§718.204(b)(2), 718.305.

If the ALJ finds Claimant has invoked the Section 411(c)(4) presumption, he must determine whether Employer rebutted it by establishing either that Claimant does not have clinical or legal pneumoconiosis, or that "no part of [Claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015). If Claimant fails to 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). The ALJ must explain the bases for his findings in accordance 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, the ALJ's Decision and Order Denying Benefits in a Subsequent Claim is affirmed in part and vacated in part, and the case is remanded to the ALJ 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