U.S. Department of Labor

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

BRB No. 24-0092 BLA

JAMES E. BOWMAN Claimant-Petitioner v. CONSOL PENNSYLVANIA COAL COMPANY and CONSOL ENERGY INCORPORATED Employer/Carrier-Respondents 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 of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2023-BLA-05604) rendered on a claim filed on March 2, 2022, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has twenty-six years of underground or substantially similar surface coal mine employment. However, he found Claimant did not 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).[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Because Claimant failed to establish total disability, an essential element of entitlement, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability and therefore erred in finding he did not invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits.[2] The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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.[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, 361-62 (1965).

[1] 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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-six years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 29.

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. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[4] 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 the pulmonary function and blood gas studies are non-qualifying and the medical opinion evidence does not support a finding of total disability.[5] 20 C.F.R. §718.204(b)(2); Decision and Order at 20-29. As the ALJ's findings that Claimant did not establish total disability based on the pulmonary function study and arterial blood gas study evidence are unchallenged, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23.

Claimant argues the ALJ erred in determining the exertional requirements of his usual coal mine work and in weighing the medical opinion evidence. Claimant's Brief at 9-13 (unpaginated).

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine work as a pumper. Decision and Order at 6-7. A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

[4] 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).

[5] The ALJ found there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 24.

Claimant stated he lifted twenty-five pounds six to eight times per day on his Description of Coal Mine Work form. Director's Exhibit 5. At the hearing, he provided additional information, testifying his usual coal mine job was working as a pumper in six feet of coal at least five days a week. Hearing Tr. at 13-15. He testified he manually lifted or dragged pumps and their hoses, some weighing in excess of 100 pounds, between 20 and 100 feet on his own. *Id.* at 15-17, 27-28.

The ALJ found, based on Claimant's hearing testimony and Description of Coal Mine Work form, that Claimant's usual coal mine job was working as a pumper and that he was "required to lift [twenty-five] pounds six to eight times per day." Decision and Order at 6-7, *citing* Director's Exhibits 4; 5; Hearing Tr. at 14. He took official notice of the *Dictionary of Occupational Titles* and found it defines "the job of pumper as requiring medium labor" "[e]xerting [twenty] to [fifty] pounds of force occasionally, and/or [ten] to [twenty-five] pounds of force frequently, and/or greater than negligible up to [ten] pounds of force constantly to move objects." *Id.* at 7 n.7; Hearing Tr. at 7. Thus, he concluded Claimant's usual coal mine employment required medium labor. Decision and Order at 6-7, n.7, 24

We agree with Claimant's argument that the ALJ failed to consider all relevant evidence in determining the exertional requirements of his usual coal mine employment. Claimant's Brief at 11-12 (unpaginated). The ALJ has not explained how he determined Claimant's exertional requirements beyond stating he relied on the *Dictionary of Occupational Titles* definitions of "pumper" and "medium work." Importantly, the ALJ failed to consider relevant evidence that Claimant's work as a pumper routinely required him to lift and drag equipment well above the weight defined as medium work. *See McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand); *see, e.g., Dictionary of Occupational Titles* (4th Ed., Rev. 1991) (defining heavy work as "[e]xerting [fifty] to 100 pounds of force occasionally, and/or [twenty-five] to [fifty] pounds of force frequently, and/or [ten] to [twenty] pounds of force constantly to move objects"); Hearing Tr. at 15-17, 27-28. Because the ALJ's analysis does not discuss all relevant evidence and is not adequately explained, we must vacate his finding Claimant's usual coal mine employment required medium labor. Decision and Order at 6-7, 24.

The ALJ next considered the medical opinions of Drs. Werntz, Fino, and Kilkenny. *Id.* at 25-28. Dr. Werntz opined Claimant is totally disabled based on his impaired gas exchange and the exertional requirements of his coal mine employment. Director's Exhibits 16 at 6; 19 at 4. Dr. Fino opined Claimant has a moderate respiratory impairment but is not totally disabled because he could perform light and moderate labor while his job only required "[ten percent] heavy labor." Director's Exhibit 23 at 11. Dr. Kilkenny opined Claimant has a moderate obstructive impairment and would not be able to perform

his usual coal mine employment, which required "[ten percent] very heavy work, [fifty-five percent] heavy work and [thirty percent] moderate work." Employer's Exhibit 1 at 9. However, he also opined that if Dr. Fino's understanding of Claimant's exertional requirements is correct, he is not totally disabled. *Id.*

The ALJ discredited Dr. Werntz's opinion as "equivocal or vague" and Dr. Kilkenny's opinion as "internally inconsistent" based on their discussions of Claimant's exertional requirements. Decision and Order at 28-29. He found Dr. Fino's opinion reasoned and documented because it was consistent with the ALJ's finding that the pulmonary function and blood gas studies do not support total disability. *Id.* at 28. Thus the ALJ found the medical opinions do not support a finding of total disability. *Id.* at 29.

Because the ALJ's error with respect to Claimant's exertional requirements affected his weighing of the medical opinions, we vacate his credibility findings regarding Drs. Werntz, Fino, and Kilkenny. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 25-29.

Additionally, we agree with Claimant's argument that the ALJ erred in weighing Dr. Werntz's medical opinion. Claimant's Brief at 12-13 (unpaginated).

A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably conclude a miner is unable to do his usual coal mine employment. *See Balsavage* v. *Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc). In determining whether a miner is totally disabled, the ALJ must compare the exertional requirements of the miner's usual coal mine work with the physician's description of the miner's pulmonary impairment and physical limitations. *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).

The ALJ summarized Dr. Werntz's opinion that Claimant could "perhaps perform some moderate work" but, considering "the heavy components" of Claimant's job, would not be able to perform his usual coal mine employment. The ALJ found his opinion is "equivocal or vague." Decision and Order at 28. We are unable to affirm this finding, as the ALJ has not explained how Dr. Werntz's opinion is equivocal or vague.

Dr. Werntz opined Claimant has a gas exchange impairment because when he exercised to 5.2 METS on his blood gas test his pO2 fell, "suggesting that his maximum sustainable aerobic capacity is less than the demonstrated 5.2 METS, most likely [four to] 4.5 METS," and that this is corroborated by his low diffusion capacity. Director's Exhibit 16 at 6. He described Claimant's usual coal mine employment as a pumper, stating that Claimant had to lift and carry pumps weighing up to forty pounds, and opined his job is "in the upper end of the moderate aerobic demand category." *Id.* at 5. Further, he opined

Claimant does not have adequate aerobic capacity to perform these duties. *Id.* a 5-6. In his supplemental report, he agreed with Dr. Fino that Claimant could do light work "and perhaps some moderate work," but maintained his opinion that Claimant could not perform his usual coal mine employment, which required the "upper end" of moderate labor and that he would be unable to perform any heavy labor. Director's Exhibit 19 at 4.

While Dr. Werntz partially agreed with Dr. Fino's opinion that Claimant could perform light labor and some moderate labor, he consistently opined Claimant's job required the "upper end" of moderate labor, which Claimant could not perform. Director's Exhibits 16 at 5-6; 19 at 4. Dr. Werntz further noted Dr. Fino's opinion that Claimant is not totally disabled because his job only required ten percent heavy labor; however, he disagreed with Dr. Fino's opinion and instead asserted Claimant could not perform any heavy labor required by his job and, therefore, is totally disabled. Director's Exhibits 19 at 4; 23 at 11; *see Eagle*, 943 F.2d at 512 n.4 (if a claimant cannot perform the hardest parts of his usual coal mine work, he cannot perform his usual coal mine work). As Dr. Werntz did not change his opinion, but rather clarified and maintained his total disability diagnosis after reviewing additional evidence, the ALJ's characterization of his opinion as "equivocal or vague" is not supported by substantial evidence. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997).

Therefore, we vacate the ALJ's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and that the evidence overall does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 29. Thus, we vacate his finding that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits. *Id.* at 29-30.

Remand Instructions

On remand, the ALJ must first consider all relevant evidence to determine the exertional requirements of Claimant's usual coal mine employment and then must consider the medical opinions given those requirements. 20 C.F.R. §718.204(b)(1)(i), (b)(2)(iv); *see Gonzales v. Director, OWCP*, 869 F.2d 776, 779-80 (3d Cir. 1989); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996); *Eagle*, 943 F.2d at 512-13; *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985).

In weighing the medical opinions, the ALJ must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, the sophistication of and bases for their diagnoses, and any conflicts presented. *See Balsavage*, 295 F.3d at 396; *Kertesz v. Director, OWCP*,

788 F.2d 158, 163 (3d Cir. 1986). He must compare the exertional requirements of Claimant's usual coal mine employment to the physicians' descriptions of his pulmonary impairment and physical limitations. *Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; 20 C.F.R. §718.204(b)(2)(iv). In reaching his credibility determinations, the ALJ must set forth his findings in detail and explain his rationale as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability based on the medical opinion evidence, the ALJ must weigh the evidence as a whole to determine whether he has established he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); *Defore*, 12 BLR at 1-28-29; *see Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will have invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305. The ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). In that event, the ALJ must reconsider the evidence with the burden shifting to Employer to affirmatively establish Claimant has neither legal nor clinical pneumoconiosis or that "no part of [his] respiratory or pulmonary 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 Minich*, 25 BLR at 1-155.

If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded 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