U.S. Department of Labor

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

BRB No. 24-0130 BLA

TRUMAN L. NEEPER Claimant-Petitioner v. SWANSON TRUCKING INDUSTRY and ROCKWOOD CASUALTY INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 10/31/2024 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.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits[1] (2023-BLA-05158) rendered on a claim filed on October 22, 2021, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 22.25 years of coal mine employment, including more than fifteen years of underground or substantially similar coal mine employment. However, he found Claimant did not establish a totally disabling respiratory or pulmonary impairment and therefore 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); *see* 20 C.F.R. §§718.305, 718.204(b)(2). He further found Claimant did not establish clinical or legal pneumoconiosis and therefore did not reach the issue of total disability causation. 20 C.F.R. §§718.202(a)(4), 718.204(c). Because Claimant failed to establish an essential element of entitlement, he denied benefits.

On appeal, Claimant challenges the ALJ's finding that the medical opinion evidence does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), and thus that he failed to invoke the Section 411(c)(4) presumption. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, did not file a response.

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

[1] The ALJ subsequently issued a March 7, 2024 Errata Order Regarding Employer's Exhibits, clarifying that, contrary to what is stated in his December 21, 2023 Decision and Order Denying Benefits, he admitted Employer's Exhibits 1, 2, 4, and 5 at the hearing. Although the ALJ indicated at the hearing that Employer's Exhibit 3 would be admitted once received, Employer never submitted it. Therefore, any reference to Employer's Exhibit 3 as being Dr. Fino's curriculum vitae (CV) is incorrect as it was properly designated as Employer's Exhibit 5.

[2] 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.

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 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

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. *See* 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 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Claimant does not challenge, and we therefore affirm, the ALJ's findings that the pulmonary function studies and blood gas studies are all non-qualifying,[4] there is no evidence of cor pulmonale with right-sided congestive heart failure, and thus Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21-22. Rather, Claimant asserts the ALJ erred in finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Relevant to his weighing of the medical opinions, the ALJ found Claimant's usual coal mine work as a truck driver required medium labor, which we affirm as unchallenged. *See Skrack*, 6 BLR at 1-711; Decision and Order at 23. Dr. Zlupko conducted the Department of Labor's (DOL's) complete pulmonary evaluation of Claimant and opined he is not totally disabled because the objective studies were non-qualifying and do not meet DOL's disability standards. *Id*. at 23-26. Conversely, Dr. Fino, who examined Claimant

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] 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).

on Employer's behalf, opined that despite the non-qualifying objective tests, Claimant has a disabling oxygen impairment. Employer's Exhibit 4 at 10; *see also* Claimant's Exhibit 1 at 10. The ALJ found Dr. Fino's opinion was incomplete and conclusory and therefore entitled to "no weight," and credited Dr. Zlupko's opinion as better supported by the non-qualifying objective studies. Thus, the ALJ found that Claimant did not satisfy his burden to establish he is totally disabled at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 23-26.

Claimant contends the ALJ erred in discrediting Dr. Fino's opinion. Claimant's Brief at 5-6. We agree. Dr. Fino examined Claimant on January 30, 2023, and reviewed additional medical records including Dr. Zlupko's opinion and objective testing. Claimant's Exhibit 1; Employer's Exhibit 4. He reported Claimant worked thirty years as a coal miner and his work as a truck driver required "very heavy labor – 10%; heavy labor – 25%; and light labor – 65%." Claimant's Exhibit 1 at 2. Further, he observed Claimant has had shortness of breath for the last fifteen years that is getting worse and that he "becomes dyspneic when walking at his own pace on the level ground or ascending one flight of steps. Dyspnea occurs when walking up hills or grades, lifting and carrying, performing manual labor, and walking briskly on the level ground." *Id*. Although Dr. Fino reported normal spirometry and blood gas study values, he observed Claimant's diffusing capacity is abnormal and the six-minute walk test showed the oxygen saturation at rest dropped from ninety-three percent to eighty-six percent after two minutes of walking 250 feet. *Id.* at 7-9. He opined the significant decrease in oxygen saturation with exertion is disabling. *Id.* at 10.

The ALJ found Dr. Fino's opinion "incomplete" because he concluded Claimant is "disabled" without opining whether Claimant is totally disabled from performing his last coal mine employment or work of similar effort. Decision and Order at 25. In addition, the ALJ determined Dr. Fino's opinion is conclusory because, although he based his diagnosis of "oxygen desaturation with exertion" on Claimant's abnormal diffusing capacity, the ALJ found "it is unclear upon what basis he arrived at the conclusion that Claimant is disabled." *Id.*

As Claimant contends, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a miner is unable to do his usual coal mine employment. *See Gonzales v. Director, OWCP*, 869 F.2d 776, 780 (3d Cir. 1989) (physician's description of miner's functional limitations is "probative of a finding [the miner] is totally disabled")*; Kowalchick v. Director, OWCP*, 893 F.2d 615, 623 (3d Cir. 1990) ("An ALJ may disregard an assessment of a patient's limitations only if the ALJ can 'identify a basis for a finding that listed limitations are the patient's rather than the doctor's conclusions.'"), *quoting Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460-61 (11th Cir. 1989); *see also Scott v. Mason Coal Co.*, 60 F.3d 1138,

1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion*.") (emphasis added); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability); Claimant's Brief at 5-6.

We are unable to affirm the ALJ's finding that Dr. Fino's opinion is "incomplete" and "conclusory." Decision and Order at 25. As Claimant alleges, Dr. Fino specifically set forth the exertional requirements of his usual coal mine work as a truck driver and observed his six-minute walk test was ended after only two minutes of walking 250 feet because his oxygen saturation dropped from ninety-three percent at rest to eighty-six percent. Claimant's Brief at 5; *see* Claimant's Exhibit 1 at 2, 7-8; Employer's Exhibit 4 at 2, 7-8. As indicated above, Dr. Fino further discussed Claimant's symptoms of worsening shortness of breath and dyspnea when walking, climbing a flight of stairs, and performing manual labor. Claimant's Exhibit 1 at 2; Employer's Exhibit 4 at 2. Dr. Fino then stated that there was a "significant decrease in oxygen saturations with exertion" that is disabling. Claimant's Exhibit 1 at 10.

As the ALJ failed to fully consider Dr. Fino's opinion, we must vacate his discrediting of it and remand the case for him to determine whether Dr. Fino credibly diagnosed total disability based on Claimant's oxygen desaturation with exertion indicated on objective testing in conjunction with his respiratory limitations due to shortness of breath and dyspnea. 30 U.S.C. §923(b) (ALJ must address all relevant evidence); *Budash*, 9 BLR at 1-51-52; *see also McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 25; Claimant's Exhibit 1; Employer's Exhibit 4. In addition to specifically stating that Claimant is totally disabled from performing his last coal mine employment, Dr. Fino provided information regarding Claimant's respiratory limitations that could, if credited, also support a finding that Claimant is totally disabled. *Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894.

There is also merit to Claimant's arguments concerning the ALJ's basis for crediting Dr. Zlupko's opinion. Claimant's Brief at 6. Dr. Zlupko performed the DOL-sponsored complete pulmonary evaluation of Claimant on November 22, 2021. Director's Exhibit 12. He based his opinion on diagnostic testing including chest x-ray, pulmonary function studies, and blood gas studies, as well as symptoms, a ninety-eight pack-year smoking history and thirty-five years of coal mine employment as a truck driver. *Id.* He noted Claimant's complaints that he "cannot do daily activities like he used to due to his shortness

of breath. Unable to mow his lawn or do any moderate/heavy exertion due to breathing trouble. Has to take breaks often to catch his breath." *Id.* at 3. Dr. Zlupko diagnosed arterial hypoxemia with exertion based on the blood gas study data but opined "it is not at the level to meet disability standards set forth by the [DOL]." *Id.* at 4.

The ALJ's sole basis for crediting Dr. Zlupko's opinion is that it is better supported by the non-qualifying objective medical data. Decision and Order at 25. However, as Claimant accurately states, a physician's opinion may support total disability even if the objective studies are non-qualifying. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002)*; see also 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* 20 C.F.R. §718.204(b)(2)(iv). The ALJ did not consider if Dr. Zlupko addressed whether the impairment he diagnosed would prevent Claimant from performing the labor required of his usual coal mine employment, even if the objective testing was non-qualifying. 20 C.F.R. §718.204(b)(2)(iv). Nor did the ALJ consider if Dr. Zlupko was aware of those exertional requirements, which the ALJ found required medium exertion. 20 C.F.R. §718.204(b)(1)(i).

Given the foregoing errors, we vacate the ALJ's finding that the medical opinion evidence does not support a finding of total disability, 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune*, 6 BLR at 1-998; Decision and Order at 25-26. Further, we vacate his findings that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) and therefore failed to invoke the Section 411(c)(4) presumption. Decision and Order on Remand at 26. Thus, we vacate his finding that Claimant is not entitled to benefits.

Remand Instructions

On remand, the ALJ must consider whether Claimant has established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). When weighing the medical opinions, the ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Balsavage*, 295 F.3d at 396-97; *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). In addition, the ALJ must compare the findings regarding the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. *See Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9 BLR

at 1-51-52. The ALJ must set forth in detail how he resolves conflicts in the evidence, as the Administrative Procedure Act requires. [5] *Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability based on the medical opinion evidence, the ALJ should then weigh all the relevant evidence together to determine whether he has established total disability. *See* 20 C.F.R. §718.204(b)(2); *see also Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, and thereby invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305. The burden would then shift to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[6] or "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). If the ALJ again finds Claimant is not totally disabled, he may reinstate the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[5] 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).

[6] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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