U.S. Department of Labor

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

BRB No. 23-0212 BLA

DONALD R. BROWN Claimant-Petitioner v. CENTRE CROWN MINING, LLC and ARGONAUT GREAT CENTRAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/05/2024 DECISION and ORDER

Appeal of the Decision and Order on Remand of Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Julie A. Webb (Craig & Craig, LLC), Mount Vernon, Illinois, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Angela F. Donaldson's Decision and Order on Remand (2019-BLA-06011) rendered on a claim filed on August 24, 2017, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In her September 28, 2020 Decision and Order Denying Benefits, the ALJ credited Claimant with at least thirty years of coal mine employment based on the parties' stipulation, but found the evidence does not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C §921(c)(4) (2018), or establish an essential element of entitlement. Thus, she denied benefits.

On Claimant's appeal, the Board affirmed as unchallenged the ALJ's finding that the arterial blood gas studies do not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Brown v. Centre Crown Mining, LLC*, BRB No. 21-0010 BLA, slip op. at 3 n.3 (Feb. 16, 2022) (unpub.). However, the Board vacated her finding that Claimant failed to establish total disability based on the pulmonary function studies and medical opinions. *Id.* at 5, 8; *see* 20 C.F.R. §718.204(b)(2)(i), (iv). Thus, the Board vacated her findings that Claimant failed to invoke the Section 411(c)(4) presumption or establish a requisite element of entitlement, and it remanded the case for further consideration. *Brown*, BRB No. 21-0010 BLA, slip op. at 8-9.

On remand, the ALJ again found the evidence insufficient to establish total disability and thus Claimant could not invoke the Section 411(c)(4) presumption or establish total disability under 20 C.F.R. Part 718. Therefore, she denied benefits.

On appeal, Claimant argues the ALJ erred in finding he failed to establish a total disability. Employer and its Carrier (Employer) respond in support of the denial of benefits. Claimant filed a reply reiterating his arguments. The Director, Office of Workers' Compensation Programs, has not filed a response.

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) 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.

with applicable law.[2] 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).

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

A miner is totally disabled if his pulmonary or respiratory impairment, 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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).

The ALJ found Claimant did not establish total disability based on any category of evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). Claimant alleges the ALJ failed to adequately explain her weighing of the pulmonary function studies and medical opinion evidence. Claimant's Brief at 12-30 (unpaginated); Claimant's Reply Brief at 2-7 (unpaginated).

Pulmonary Function Studies

The ALJ considered seven pulmonary function studies performed on December 19, 2011, August 9, 2012, October 9, 2017, January 24, 2018, February 27, 2018, August 28, 2018, and an unknown date. 20 C.F.R. §718.204(b)(i); Decision and Order on Remand at 3-4; Director's Exhibit 14 at 37; Claimant's Exhibit 8 at 34-37; Employer's Exhibit 7 at 80. The parties designated the studies from December 19, 2011, August 9, 2012, and October 9, 2017 as affirmative evidence. Director's Exhibit 14 at 37; Claimant's Exhibit 14 at 63; Employer's Exhibit 7 at 80; Claimant's Evidence Summary Form; Employer's Evidence Summary Form. The remaining studies were contained within Claimant's treatment records. Claimant's Exhibit 8 at 34-37.

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

The ALJ accurately determined that the February 27, 2018 pre-bronchodilator study was the only qualifying study of record.[3] Decision and Order on Remand at 3; Claimant's Exhibit 8 at 36. Relying on the opinion of Dr. Chavda that this study is invalid,[4] the ALJ concluded it is unreliable, entitled to less weight than the non-qualifying studies, and insufficient to establish total disability. *Id.* at 4 (citing Claimant's Exhibit 13 at 32-33). Thus, she found the pulmonary function study evidence does not support a finding of total disability at 20 C.F.R §718.204(b)(2)(i).

We reject Claimant's argument that the ALJ erred by failing to address the discrepancy in Claimant's measured height.[5] Claimant's Brief at 26-29 (unpaginated). Claimant forfeited this argument by failing to raise it at any time before the ALJ or when the case was previously before the Board. *See Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 210-12 (4th Cir 2022); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 587 (6th Cir. 2021); *Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-323, 1-327 (2022) (en banc); 20 C.F.R. §§802.211(a), 802.301(a).

Regardless, Claimant's argument is patently incorrect. The ALJ did not ignore the issue; she specifically noted the height discrepancy in her initial decision and permissibly calculated an average height of 72.5 inches and used the closest greater table height of 72.8 inches at Appendix B of 20 C.F.R. Part 718 for determining the qualifying or non-qualifying results of the studies. In her decision on remand, she also noted the Board's affirmance of her finding—based on the 72.8-inch table height—that only one pulmonary function study is qualifying. *See Carpenter v. GMS Mine & Repair Maint. Inc*., 26 BLR 1-33, 1-38-39 (2023); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 19; Director's Exhibit 15 at 37; Claimant's Exhibits 8 at 34-37; 14 at 63; Employer's Exhibit 7 at 74.

We further reject Claimant's argument that the ALJ erred in finding the February 27, 2018 pulmonary function study unreliable. Claimant's Brief at 29 (unpaginated). The

[3] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[4] The ALJ also noted Dr. Rosenberg indicated he was unable to opine as to whether the February 27, 2018 study is valid based on the data provided. Decision and Order on Remand at 3 n.12 (citing Employer's Exhibit 5 at 13-14).

[5] Claimant contends if the ALJ found his height to be 73 inches, then the October 9, 2017 study would be qualifying. Claimant's Brief at 28-29 (unpaginated).

ALJ noted that while objective studies contained in Claimant's treatment records are not subject to the quality standards, the regulations nonetheless require that the ALJ determine whether a study is sufficiently reliable to support a finding of total disability. Decision and Order on Remand at 3; *see* 20 C.F.R. §718.101(b); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

The ALJ permissibly relied on Dr. Chavda's uncontradicted opinion to find the February 27, 2018 study is unreliable evidence of total disability. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order on Remand at 3-4. Because the ALJ permissibly determined the results of the February 27, 2018 pulmonary function study are unreliable and entitled to less weight than the non-qualifying studies, we see no error in her determination that the pulmonary function study evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *See Poole*, 897 F.2d at 895; *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327 (7th Cir. 1992); Decision and Order on Remand at 4.

Medical Opinion Evidence

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine employment as a shuttle car operator. Decision and Order on Remand at 4. After considering Claimant's testimony and Description of Coal Mine Work Form CM-913 (Form CM-913), the ALJ found Claimant's usual coal mine work required a medium level of exertion. Decision and Order on Remand at 4 (citing *Dictionary of Occupational Titles* (4th Ed., Rev. 1991)).

Claimant argues the ALJ erred in classifying his employment as medium duty because she did not address that his duties required him to hang cables heavy enough to cause his hernia. Claimant's Brief at 11-12, 23 (unpaginated); Claimant's Reply Brief at 1-2 (unpaginated). We disagree.

Claimant stated on his Form CM-913 that he spent half of his shift operating the continuous miner, and the other half moving and hanging curtains, cables, and water lines. He stated that these duties required him to lift and carry up to fifteen pounds at a time.[6]

[6] The ALJ noted the record is unclear regarding how often Claimant lifted and carried the fifteen-pound curtain rolls. Decision and Order on Remand at 4. Claimant's Form CM-913 indicates he lifted and carried the curtain rolls thirty-six times per day. Director's Exhibit 4 at 2. At the hearing, however, Claimant agreed with Employer's reading of the form that he lifted curtain rolls "three to six times a day." Hearing Transcript at 29-30. The ALJ resolved this conflict by finding it more likely than not that Claimant

Director's Exhibit 4 at 1. At the hearing, Claimant testified that holding up the miner cable and water line required two people, while the heaviest things he lifted were buckets of bits that weighed up to fifteen pounds and curtain rolls that weighed up to twenty pounds. Hearing Transcript at 17-18, 22-23. He further testified that he once suffered a hernia while holding a cable over his head. *Id.* at 24. On cross-examination, Employer confirmed that his usual coal mining job required lifting fifteen-pound curtain rolls three to six times per day, three-to-five-pound buckets of bits eight to ten times per day, and ten-pound water pipes eight to ten times per day. *Id.* at 29-30 (referencing Director's Exhibit 4 at 1).

It is the job of the ALJ to weigh the evidence, draw inferences and determine credibility. *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). Nothing in the record establishes that Claimant's job duties required lifting and carrying more than twenty pounds at a time, which is well within the lifting and carrying requirements of medium work.[7] Hearing Transcript at 17-18, 22-24, 29-30; Director's Exhibit 4 at 1-2. Claimant's argument that lifting cables required more than medium work is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Claimant's Brief at 11-12, 23 (unpaginated); Claimant's Reply Brief at 1-2 (unpaginated). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant's usual coal mine work required medium exertion. Decision and Order on Remand at 4.

The ALJ next considered the medical opinions of Drs. Paul, Istanbouly, and Chavda that Claimant is totally disabled, and the opinions of Drs. Selby and Rosenberg that he is not. Decision and Order on Remand at 5-7; Director's Exhibits 14 at 7; 16 at 1; Claimant's Exhibits 9 at 10-12; 10 at 4; 13 at 9-12; 14 at 18-19; Employer's Exhibits 1 at 5; 5 at 17-18; 6 at 2; 7 at 14, 24-25, 75. She found Drs. Istanbouly's and Rosenberg's opinions entitled to "full probative value," Dr. Chavda's opinion entitled to only "moderate probative value," and Drs. Paul's and Selby's opinions entitled to "minimal probative value." Decision and Order on Remand at 7. Although the ALJ noted Drs. Rosenberg and Istanbouly are both Board-certified pulmonologists, she found "Dr. Rosenberg is significantly more qualified than Dr. Istanbouly" and that he had a better understanding of the exertional requirements of Claimant's usual coal mine work than Dr. Chavda. *Id.* Thus,

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lifted the curtain rolls "three to six times a day." Decision and Order on Remand at 4; Hearing Transcript at 29-30; Director's Exhibit 4 at 11.

[7] As the ALJ observed, medium-duty work requires lifting and carrying up to fifty pounds occasionally, up to twenty-five pounds frequently, and up to ten pounds constantly. Decision and Order on Remand at 4 (citing *Dictionary of Occupational Titles* (4th Ed., Rev. 1991)).

stating she would "[a]t best . . . find the medical opinion [evidence] in equipoise," she found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends the ALJ erred in discrediting Dr. Chavda's opinion. Claimant's Brief at 23 (unpaginated). We disagree.

As the ALJ found, Dr. Chavda's opinion indicates he understood that Claimant's usual coal mining work required him to lift and carry curtain rolls thirty-six times per day, contrary to the ALJ's determination that Claimant lifted and carried curtain rolls only three-to-six times per day. Decision and Order on Remand at 4-5; Claimant's Exhibits 10 at 4; 13 at 10. Claimant does not contest the finding that he carried curtain rolls no more than six times per day, as opposed to thirty-six times per day. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 4. Therefore, contrary to Claimant's contention, the ALJ permissibly discredited Dr. Chavda's opinion and found it entitled to only moderate weight because he had an inaccurate understanding of the exertional requirements of Claimant's usual coal mining work. *See Killman v. Director, OWCP*, 415 F.3d 716, 722 (7th Cir. 2005); Decision and Order on Remand at 5.

We agree, however, with Claimant's contention that the ALJ erred in discrediting Dr. Paul's opinion. Claimant's Brief at 12-14 (unpaginated); Claimant's Reply Brief at 2-3 (unpaginated).

As the ALJ noted, Dr. Paul opined that Claimant is limited to performing only light work due to his asthma and chronic bronchitis, but that even performing light work might trigger bronchitis or an asthma attack that would debilitate him and prevent him from working. Decision and Order on Remand at 6; Claimant's Exhibit 14 at 19. He further opined Claimant could not have further exposure to a coal mining environment without endangering his health. *Id.* at 16. Thus, he opined Claimant is permanently precluded from working as a coal miner due to both his heath and the limitations imposed by his impairment. *Id.* at 19.

The ALJ discredited Dr. Paul's opinion because: 1) she was "unconvinced" that he understood the exertional requirements of Claimant's usual coal mine employment; 2) he did not sufficiently explain his opinion in light of the non-qualifying pulmonary function studies; and 3) she was "unsure" whether Dr. Paul concluded Claimant is disabled because he is unable to perform the exertional requirements of his last coal mining job or because he simply should avoid returning to mining for health reasons. Decision and Order on Remand at 6.

Notwithstanding Dr. Paul's understanding of Claimant's last coal mining job, his opinion is not inherently inconsistent with or undermined by the ALJ's finding that Claimant's usual coal mine job required medium exertional labor. A medical opinion may

support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his usual coal mine work. *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *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); *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 the miner's usual coal mine work). Here, Dr. Paul specifically opined Claimant is limited to performing only light work. If credited, that opinion would render Claimant disabled from performing the medium labor found by the ALJ. Decision and Order on Remand at 4, 6; Claimant's Exhibit 14 at 19.

Likewise, Dr. Paul's opinion that Claimant cannot return to the mines due to the health risks of continued dust exposure is separate from his opinion that Claimant can perform only light work. Claimant's Exhibit 14 at 19. The ALJ correctly observed that a medical opinion advising a miner against returning to coal mine employment due to the detrimental health effects of further coal dust exposure does not by itself constitute an opinion that a miner has a totally disabling respiratory impairment. Decision and Order on Remand at 6 n.24 (citing *Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296 (7th Cir. 1990)).

In *Migliorini*, the Seventh Circuit held that a medical opinion that "cautions a claimant against exposure to dust, but fails to find total impairment," is not "necessarily . . . a finding of total disability" unless "the opinion . . . also diagnose[s] total impairment." 898 F.2d at 1296. In the present claim, Dr. Paul's opinion includes a clear diagnosis of a totally disabling respiratory impairment irrespective of his cautioning Claimant against further dust exposure for general health reasons (i.e., based on testing, examination, and diagnoses, Claimant could perform only light work); an additional conclusion that Claimant can perform only light work from a respiratory standpoint and might even then suffer bronchitis or an asthma attack that prevents him from working; and, finally, a third instruction that, as a general health matter, Claimant should avoid further dust exposure. Claimant's Exhibit 14 at 16, 18-19. Thus, while the ALJ observed the correct law, she did not apply it properly when she found Dr. Paul's opinion does not satisfy the definition of total disability. *See McMath*, 12 BLR at 1-9; *Budash*, 9 BLR at 1-51-52; *Cornett*, 227 F.3d at 578.

In addition, the ALJ's statement that Dr. Paul did not "sufficiently explain[] his opinion in light of the nonqualifying [pulmonary function studies]," is itself unexplained, beyond her aforementioned credibility determinations we have vacated. To the extent the ALJ may have been discrediting Dr. Paul for relying on non-qualifying testing, the regulations specifically provide that despite non-qualifying objective testing, total

disability may be established if a physician, exercising reasoned medical judgment based on medically acceptable diagnostic techniques, concludes the miner's respiratory or pulmonary condition prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Thus, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *See Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 578. Consequently, the ALJ erred by not fully considering Dr. Paul's rationale supporting his opinion and the adequacy of his explanation for his opinion. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69 (7th Cir. 2001). Further evaluation of Dr. Paul's opinion is thus required.

We further agree with Claimant that the ALJ did not provide a permissible explanation for crediting Dr. Rosenberg's opinion over the opinion of Dr. Istanbouly. Claimant's Brief at 22-23 (unpaginated). The ALJ found Drs. Istanbouly's and Rosenberg's opinions both entitled to "full probative value." Decision and Order on Remand at 5-7. Nevertheless, she credited Dr. Rosenberg's opinion over Dr. Istanbouly's because "Dr. Rosenberg is significantly more qualified than Istanbouly." *Id.* at 7. As Claimant contends, the ALJ provided no explanation to support her conclusion that Dr. Rosenberg is better qualified. *See* Decision and Order on Remand at 7; Claimant's Brief at 22-23 (unpaginated). The ALJ's analysis thus fails to comply with the explanatory requirements of the Administrative Procedure Act (APA).[8] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Because the ALJ failed to conduct the proper analysis at 20 C.F.R. §718.204(b)(2)(iv) and explain her findings as the APA requires, we vacate her determination that Claimant did not establish total disability based on the medical opinion evidence. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order on Remand at 7. Thus, we vacate the ALJ's findings that Claimant is not totally disabled and is unable 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 a totally disabling respiratory or pulmonary impairment at 20 C.F.R.

[8] The Administrative Procedure Act 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).

§718.204(b)(2)(iv). She must resolve the conflict in the medical opinion evidence by addressing the physicians' comparative credentials, explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Stalcup*, 477 F.3d at 484; *McCandless*, 255 F.3d at 468-69; *Poole*, 897 F.2d at 894; *Burns*, 855 F.2d at 501; *Budash*, 9 BLR at 1-51-52. In so doing, she must set forth her findings in detail and explain her rationale in accordance with the requirements of the APA. *Wojtowicz*, 12 BLR at 1-165. If Claimant establishes total disability based on the medical opinion evidence, the ALJ must then determine whether he has established total disability based on consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232.

If Claimant establishes total disability on remand, 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 can rebut the presumption. *See* 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ 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).

Accordingly, the ALJ's Decision and Order on Remand 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

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge