U.S. Department of Labor

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

BRB No. 23-0440 BLA

PAMELA MENEAR (o/b/o JAMES MENEAR, JR., deceased) Claimant-Petitioner v. CONSOL MINING COMPANY, LLC, c/o CONSOL ENERGY INCORPORATED and CONSOL ENERGY INCORPORATED, c/o SMART CASUALTY CLAIMS Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/30/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Deanna Lyn Istik (Gilliland Vanasdale Sinatra Istik Law Office, LLC), Cranberry Township, Pennsylvania, for Claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

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

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2022-BLA-05769) rendered on a claim filed on October 28, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with twenty-three years of underground or substantially similar surface coal mine employment but found Claimant did not establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b).[2] Thus, he found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), and denied benefits.

On appeal, Claimant argues the ALJ erred in finding she failed to establish total disability and thus did not invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits.[4] The Director, Office of Workers' Compensation Programs, has not filed 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

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[1] Claimant is the widow of the Miner, who died on January 5, 2021, while his claim was pending before the district director. Director's Exhibits 47, 48. She is pursuing the miner's claim on behalf of her husband's estate. Director's Exhibit 49.

[2] The ALJ found Claimant did not establish the existence of clinical pneumoconiosis, but did establish the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 13-22.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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(b).

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had twenty-three years of underground or substantially similar surface coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function and arterial blood gas studies,[6] 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 did not establish total disability based on the pulmonary function studies, arterial blood gas studies, medical opinions, and evidence as a whole.[7] Decision and Order at 23-34.

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).

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[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 33.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values 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 values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] 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 27.

Medical Opinions

Claimant argues the ALJ did not adequately explain his findings regarding the Miner's last coal mine work and its exertional requirements. Claimant's Brief at 2-3.

Before weighing the medical opinions, the ALJ addressed the exertional requirements of the Miner's usual coal mine employment. 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.*, 7 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

The ALJ cited the Miner's CM-911a Employment History form, on which the Miner listed his work as being: "laborer, miner operator, shuttle car operator, roof bolter." Director's Exhibit 33. The ALJ also cited the portion of the hearing transcript wherein Claimant testified that the Miner worked "as a roof bolter, a miner operator helper, and then for several years, his last job was the miner operator." Hearing Tr. at 12. He summarily concluded the Miner "last worked in the mining industry in 1998 as a miner operator" and took official notice of the *Dictionary of Occupational Titles* (DOT) to find the Miner's usual coal mine work required "medium labor." Decision and Order at 6-7 n.8.

We agree with Claimant that the ALJ failed to adequately explain his findings regarding the Miner's last coal mine work and its exertional requirements as the Administrative Procedure Act (APA) requires.[8] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the ALJ's findings that the Miner's last coal mine job was as a miner operator and the exertional requirements of his usual coal mine work required medium labor, and remand the case for further consideration. *See Pifer*, 7 BLR at 1-155; *Daft*, 7 BLR at 1-127; *Shortridge*, 4 BLR at 1-539; *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 6, 7 n.8.

On remand, the ALJ must consider all the conflicting evidence concerning the Miner's usual coal mine work and its exertional requirements. In addition to the Miner's CM-911a Employment History form and Claimant's testimony, the record consists of Employer's employment verification letter and employment stubs, and the coal mine

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[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).

employment histories recorded by Drs. Celko, Spagnolo, Rosenberg, Sood, and Go.[9] While Employer's employment verification letter noted the Miner was employed as a laborer and miner bolt operator from 1975 to 1981, as a miner operator helper from 1981 to 1982, and as a miner operator from 1982 to 1997, Director's Exhibit 35, the physicians largely describe his last job as being that of a roof bolter. Dr. Celko noted he "last" worked as a roof bolter. Director's Exhibit 53 at 2. Similarly, Dr. Rosenberg noted the Miner "worked as a laborer, miner operator, shuttle car operator and roof bolter," and that "his last known position was that of a roof bolter" requiring "heavy exertional work." Employer's Exhibits 8 at 1; 10 at 9, 22, 23. Further, Dr. Sood noted the Miner's "last coal mine job as a roof bolter" required "heavy physical labor, including lifting [fifty to seventy-five-pound] weights." Director's Exhibit 57 at 1-2; Claimant's Exhibit 5 at 2. In addition, Drs. Go and Spagnolo noted Dr. Celko's coal mine employment history reporting the Miner's "last" job as a roof bolter required him to lift and carry objects "weighing up to [seventy-five] pounds." Claimant's Exhibits 1 at 1; 1a at 7; Employer's Exhibits 7 at 10; 9 at 45.

The ALJ next considered the medical opinions of Drs. Celko, Spagnolo, Rosenberg, Sood, and Go. Decision and Order at 27-33. Drs. Sood and Go opined the Miner was totally disabled from a pulmonary or respiratory impairment,[10] Director's Exhibit 57; Claimant's Exhibits 1, 1a, 5, while Drs. Celko, Spagnolo, and Rosenberg opined he was not. Director's Exhibit 53; Employer's Exhibits 7-10. The ALJ found Drs. Spagnolo's and Rosenberg's opinions well-reasoned and documented because they are supported by the Miner's objective medical testing results and consistent with his finding that the pulmonary function and arterial blood gas studies do not establish total disability. Decision and Order at 33. In contrast, he found Dr. Celko's opinion conclusory and thus not reasoned. *Id.* at 32. Further, he found Drs. Sood's and Go's opinions not reasoned because they are based on an inaccurate understanding of the Miner's usual coal mine work. *Id.* at

[9] The ALJ may consider the source and credibility of the information each doctor relied upon to identify the Miner's last coal mine work.

[10] Dr. Sood opined the Miner had a totally disabling chronic obstructive pulmonary disease based on his pulmonary function study results. Director's Exhibit 57 at 6-7; Claimant's Exhibit 5 at 8. He concluded the Miner was unable to perform his last coal mining job because he could not perform "heavy labor, including lifting [fifty to seventy-five] pounds of weight." Director's Exhibit 57 at 7; Claimant's Exhibit 5 at 8. Dr. Go opined the Miner had a Class III pulmonary impairment under the American Medical Association criteria and was totally disabled "for any coal mine employment, including his last coal mine employment as a roof bolter, in which he carried loads weighing up to [seventy-five] pounds." Claimant's Exhibits 1 at 5; 1a at 7.

31-32. He thus concluded the medical opinion evidence does not support a finding of total disability.

As the ALJ's error in failing to adequately explain his findings regarding the Miner's last coal mine job and its exertional requirements affected his weighing of the medical opinions, we also vacate his finding that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). As a consequence, we vacate the ALJ's findings that Claimant did not establish total disability based on the evidence as a whole, 20 C.F.R. §718.204(b)(2), and thus did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305(b). We therefore vacate the denial of benefits.

Remand Instructions

On remand, the ALJ must first consider all relevant evidence to determine the Miner's last coal mine job and the exertional requirements of his usual coal mine employment, and then consider the medical opinions in light of those requirements. 20 C.F.R. §718.204(b)(1)(i), (b)(2)(iv); *see Gonzales v. Director, OWCP*, 869 F.2d 776, 779 (3d Cir. 1989); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *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 resolve any conflicts presented. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). 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 she established the Miner was totally disabled from a 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, she 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. *See* 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 the

Miner had 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. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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