U.S. Department of Labor

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

BRB No. 23-0079 BLA

ROGER D. GALLION	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW RIDGE MINING COMPANY	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 04/18/2024
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order on Remand Denying Benefits (2018-BLA-05638) rendered on a claim filed on February 21, 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 a second time.

In his initial Decision and Order Denying Benefits, the ALJ credited Claimant with 32.18 years of underground or substantially similar surface coal mine employment but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1). He therefore found Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2018),[1] or establish an essential element of entitlement, and denied benefits.

In consideration of Claimant's appeal, the Board affirmed, as unchallenged, the ALJ's finding that Claimant established 32.18 years of qualifying coal mine employment, but it vacated his determination that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2).[2] *Gallion v. New Ridge Mining Co.*, BRB No. 20-0336 BLA, slip op. at 2 n.3, 4, 8 (Oct. 8, 2021) (unpub.). Specifically, the Board held that while the ALJ correctly determined the two pulmonary function studies of record were non-qualifying, he failed to properly resolve whether the April 6, 2017 pulmonary function study conducted in conjunction with the Department of Labor (DOL)-sponsored exam is valid, which is relevant to the credibility of the medical opinion evidence and whether Claimant received a complete pulmonary evaluation in accordance with 20 C.F.R. §725.406. *Id.* at 3-4, 6-8. Additionally, the Board held the ALJ erred in failing to consider whether the physicians had an accurate understanding of the exertional requirements of Claimant's usual coal mine work. *Id*. at 6-8.

[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); *see* 20 C.F.R. §718.305.

[2] The ALJ did not consider whether Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); however, Claimant did not allege he suffers from complicated pneumoconiosis. *Gallion v. New Ridge Mining Co.*, BRB No. 20-0336 BLA, slip op. at 2 n.2 (Oct. 8, 2021) (unpub.).

Thus, the Board vacated the denial of benefits and remanded the case for further consideration. The Board instructed the ALJ to reconsider if Claimant is totally disabled and can invoke the Section 411(c)(4) presumption. *Id*. at 8-9. If Claimant established total disability on remand and thereby invoked the Section 41l(c)(4) presumption, the Board instructed the ALJ to then consider whether Employer rebutted it. *Id.* at 9. However, if Claimant did not establish total disability, the Board stated the ALJ could reinstate the denial of benefits. *Id*.

On remand, the ALJ found the April 6, 2017 and October 24, 2017 pulmonary function studies valid. After considering those test results, and weighing the medical opinion evidence,[3] he found Claimant failed to establish total disability and could not invoke the Section 411(c)(4) presumption. Because Claimant did not establish total disability, an essential element of entitlement, the ALJ again denied benefits.

On appeal, Claimant seeks reversal of the ALJ's finding that he did not establish total disability based on the medical opinion evidence. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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 with applicable law.[4] 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).

Total Disability

To invoke the Section 411(c)(4) presumption or establish entitlement to benefits under 20 C.F.R. Part 718, 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

[3] The Board previously affirmed, as unchallenged, the ALJ's findings that the blood gas study evidence does not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Gallion*, BRB No. 20-0336 BLA, slip op. at 3 n.5. Thus, Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Gallion*, BRB No. 20-0336 BLA, slip op. at 2 n.4.

pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. *See* 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,[5] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[6] 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).

The ALJ considered Dr. Gaziano's opinion that Claimant is totally disabled and the contrary opinions of Drs. Vuskovich and Tuteur. Decision and Order on Remand at 11-14. He accorded "less weight" to Dr. Gaziano's opinion, finding he failed to adequately explain why he first found the April 6, 2017 pulmonary function study qualifying and later changed his opinion to "extremely close to qualifying." *Id.* at 14. He also gave "little weight" to Dr. Vuskovich's opinion because he considered the April 6, 2017 pulmonary function study to be invalid, contrary to the ALJ's finding. *Id.* Finally, he accorded Dr. Tuteur's opinion the "most weight" based on his credentials and found it well-documented and well-reasoned. *Id.* Consequently, he found Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Claimant argues the ALJ erred in rejecting Dr. Gaziano's opinion for mistakenly referencing in his initial report that the April 6, 2017 pulmonary function study was qualifying. Claimant's Brief at 20; *see* Decision and Order on Remand at 14. Specifically, Claimant contends the ALJ failed to conduct the proper analysis and did not follow the Board's instruction to compare the exertional requirements of his usual coal mine employment with the physician's assessment of his respiratory impairment in determining whether he is totally disabled. Claimant's Brief at 10. Claimant argues Dr. Gaziano's opinion is sufficient to support a finding of total disability because after acknowledging the April 6, 2017 study was non-qualifying, he specifically explained why the study

[5] 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).

[6] We affirm, as unchallenged, the ALJ's finding that the April 6, 2017 and October 24, 2017 studies are valid and that the pulmonary function studies do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 9-11, 14.

nonetheless showed Claimant is totally disabled from performing the exertional requirements of his usual coal mine work. Claimant's arguments have merit.

If total disability cannot be established by qualifying pulmonary function or arterial blood tests, it "may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents" him from performing his usual coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett*, 227 F.3d at 577 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (explaining a claimant can establish total disability despite non-qualifying objective tests). The sole reason the ALJ provided for discrediting Dr. Gaziano's opinion is that he did not explain why he initially stated Claimant's pulmonary function study was qualifying but then, in a supplemental opinion, acknowledged it was non-qualifying (although "extremely close").

The ALJ has not explained why Dr. Gaziano's initial misstatement about the qualifying nature of the study warrants a rejection of the entirety of his opinion, particularly given that the physician's supplemental report accurately considered that the pulmonary function study was non-qualifying and provided an explanation about why it nevertheless showed Claimant is totally disabled from performing the exertional requirements of his usual coal mine work. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). Because the ALJ failed to properly address whether Dr. Gaziano's opinion is sufficient to establish that Claimant is totally disabled from performing his usual coal mine work regardless of whether the objective testing is qualifying, we vacate the ALJ's discounting of his opinion.[7] 20 C.F.R. §718.204(b)(2)(iv); *Cornett*, 227 F.3d at 577.

Claimant further argues the ALJ mistakenly found Drs. Tuteur and Vuskovich reviewed Dr. Gaziano's testimony describing Claimant's work as requiring him to lift between fifty to one hundred pounds. Claimant's Brief at 10-20, *see* Decision and Order on Remand at 13. Therefore, Claimant asserts the ALJ repeated his prior error by failing to consider that Employer's experts did not have an adequate understanding of the heavy

[7] Claimant asserts the ALJ erred in rendering new credibility findings on remand with regard to Dr. Gaziano's opinion. Claimant's Brief at 20-21. However, the Board's prior decision specifically vacated the ALJ's weighing of the medical opinions and remanded the claim for him to reconsider them. *Gallion*, BRB No. 20-0336 BLA, slip op. at 8; *see Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985). Thus, the ALJ was required to weigh the credibility of Dr. Gaziano's opinion on remand.

exertional requirements of Claimant's usual coal mine job when concluding Claimant is not totally disabled. Claimant's Brief at 18, 20. We agree.

The Board previously affirmed, as unchallenged, the ALJ's factual determination that Claimant's usual coal mine work as "a labor and heavy equipment operator" required him "to lift items ranging from fifty to one hundred pounds and the job required 'heavy labor.'" [8] *Gallion*, BRB No. 20-0336 BLA, slip op. at 6. Pursuant to the Board's remand instructions to consider whether the physicians adequately understood the exertional requirements of Claimant's usual coal mine work, the ALJ summarized Dr. Gaziano's deposition testimony that Claimant had to lift fifty to one hundred pounds, which the physician described as medium to heavy exertion,[9] and then concluded that because Drs. Tuteur and Vuskovich "considered Dr. Gaziano's medical report, including his description of Claimant's occupation," they too had an "adequate understanding" of the exertional requirements. Decision and Order 13.

Contrary to the ALJ's finding, Dr. Tuteur could not have reviewed Dr. Gaziano's testimony[10] as to Claimant's lifting requirements because Dr. Tuteur's October 24, 2017

[8] Given the Board's holding, the ALJ erred in stating on remand that Claimant's job required only "medium" exertion. Decision and Order on Remand at 14; *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984).

[9] When first summarizing Dr. Gaziano's opinion, the ALJ accurately noted the physician's assessment that Claimant's job required medium *to heavy* exertion, but then later misstated that Dr. Gaziano concluded only that such work required medium exertion. Decision and Order at 6, 13.

[10] Dr. Gaziano testified at his January 10, 2019 deposition that the exertional requirements of "a heavy equipment operator is at least [] medium." Claimant's Exhibit 1 at 10. He further testified, for the first time, that Claimant's "past work[, which] included lifting fifty to one hundred pounds on and off," would result in a "medium to heavy" exertional requirement. Claimant's Exhibit 1 at 10. In his initial April 6, 2017 report prepared in conjunction with the DOL-sponsored exam, Dr. Gaziano noted Claimant was a heavy equipment operator, running equipment and performing labor at the coal mine site as needed. Director's Exhibit 15. In his supplemental July 9, 2017 report, he indicated Claimant's respiratory impairment would render him "unable to do medium work required for most underground mine occupations." Director's Exhibits 17, 18. In his January 30, 2018 report, he indicated Claimant's respiratory impairment would "impair [Claimant]

and November 22, 2017 reports and December 18, 2018 deposition testimony predate Dr. Gaziano's January 10, 2019 deposition. Claimant's Brief at 10; Director's Exhibits 32, 34; Employer's Exhibit 1. Similarly, although Dr. Vuskovich's January 14, 2019 report was completed after Dr. Gaziano's January 10, 2019 deposition testimony, the evidence he reviewed does not include Dr. Gaziano's deposition testimony. Claimant's Brief at 19; Employer's Exhibit 2. Thus, the ALJ's finding that Drs. Tuteur[11] and Vuskovich[12] were aware, based on reviewing Dr. Gaziano's opinion, that Claimant had to lift fifty to one hundred pounds is unsupported by the evidence. Director's Exhibits 32, 34; Employer's Exhibits 1, 2.

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from doing the medium to heavy work required at his usual coal mine job." Director's Exhibit 35.

[11] Dr. Tuteur noted Claimant worked 26 years above ground as a general laborer, mainly operating heavy equipment, and for 17 years underground laying track, operating a "buggy," and roof bolting. Director's Exhibit 32 at 1. He stated Claimant was limited to walking 225 feet because of his knee pain and breathlessness and could barely climb four steps. *Id*. at 2. Further, he noted Claimant's oxygen assessment six-minute walk demonstrated he completed a 950-feet walk without desaturation. *Id.* He opined Claimant's pulmonary function study showed moderate obstructive defect and that he was totally disabled from returning to work in the coal mines or in employment requiring similar effort, predominantly due to his morbid obesity and related consequences. *Id*. at 3. In a subsequent report where he was asked "whether, from a strictly pulmonary standpoint," Claimant would be considered totally disabled, he opined Claimant's moderate obstructive ventilatory abnormality was not totally disabling and that he could return to coal mining as a "heavy equipment operator." Director's Exhibit 34 at 1. At his deposition, he testified Claimant worked 17 years underground where he laid track, operated a buggy, and roof bolted and 26 years above ground where he operated heavy equipment at the tipple. Employer's Exhibit 1 at 7. He testified Claimant's respiratory impairment is "not disabling and not preventing him from returning to work in the coal mine or engaged in activity requiring similar effort." *Id.* at 12. In addition, he opined there is no evidence Claimant's obesity is impairing his pulmonary function but that "the extra work" required to "move your body due to the obesity" is giving a "perceived exercise limitation." *Id.* at 19.

[12] Dr. Vuskovich indicated he reviewed only Dr. Gaziano's April 6, 2017 report which, Dr. Vuskovich stated, reported that Claimant worked as a surface coal miner operating equipment, and prior to that he worked underground operating a shuttle car and was a sand blaster. Employer's Exhibit 2 at 2; *see* Director's Exhibit 15.

Based on his mischaracterization of the evidence, the ALJ erred in finding Drs. Tuteur and Vuskovich demonstrated "an adequate understanding of [the] exertional requirements" of Claimant's usual coal mine work.[13] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); *see also Gallion*, BRB No. 20-0336 BLA, slip op. at 6; Decision and Order on Remand at 13; Decision and Order at 5.

We therefore vacate the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) and the denial of benefits. Decision and Order on Remand at 14.

Remand Instructions

On remand, the ALJ must consider whether the physicians adequately addressed whether Claimant can perform the "heavy labor" of his usual coal mine work. *Gallion*, BRB No. 20-0336 BLA, slip op. at 6. In weighing their opinions, the ALJ must consider that a physician may offer a reasoned medical opinion diagnosing total disability even if the objective studies are non-qualifying. *See Cornett*, 227 F.3d at 578; *Killman*, 415 F.3d at 721-22. He must also consider the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for their opinions; the ALJ must provide an explanation as to his determinations, including how he resolves conflicts among the evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-54 (6th Cir. 1983) (ALJs have a duty to consider all relevant evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for their decisions); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune*, 6 BLR at 1-998.

If the ALJ finds the medical opinion evidence supports a finding that Claimant is totally disabled, the ALJ must weigh all the evidence together to determine whether Claimant has established total disability and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If Claimant invokes the Section 411(c)(4) presumption, the ALJ must then consider whether Employer rebutted it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R.

[13] Claimant also contends the ALJ should have given Dr. Vuskovich's opinion no weight, instead of little weight, because he found the April 16, 2017 pulmonary function study was invalid, contrary to the ALJ's finding. Claimant's Brief at 19. This argument amounts to 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).

§718.305(d)(1)(i), (ii). If Employer fails to rebut the presumption, Claimant is entitled to benefits. However, if the ALJ finds Claimant did not establish total disability, an essential element of entitlement, he may reinstate the denial of benefits.[14] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[14] A finding of no total disability precludes invocation of the Section 411(c)(4) presumption. 20 C.F.R. §718.305.

Accordingly, the ALJ's Decision and Order on Remand Denying Benefits 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

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge