U.S. Department of Labor

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

BRB No. 22-0006 BLA

JULIAN L. DAUGHERTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STONEY RIDGE COAL COMPANY	)	
	)	
and	)	
	)	
ARROWOOD INDEMNITY	)	DATE ISSUED: 5/03/2023
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Julian L. Daugherty, Oliver Springs, Tennessee.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Denying Benefits (2020-BLA-05491) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on November 28, 2016.

The ALJ found Employer is the properly designated responsible operator. He credited Claimant with sixteen years of qualifying coal mine employment. However, he found the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and failed to establish a required element of entitlement. He therefore denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are 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 (1965).

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[1] Heather M. Lane, a benefits counselor with Community Health of East Tennessee of LaFollette, Tennessee, requested the Benefits Review Board review the administrative law judge's (ALJ) decision on Claimant's behalf, but Ms. Lane is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co*., 19 BLR 1-88 (1995) (Order).

[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.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 3; Hearing Transcript at 10.

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Invocation of the Section 411(c)(4) Presumption: Length of Coal Mine Employment

The ALJ accurately noted the parties stipulated to Claimant's sixteen years of qualifying coal mine employment. Decision and Order at 3; Hearing Transcript at 7; Employer's Response Brief at 3. Stipulations of fact fairly entered into are binding on the parties. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996). As Employer is bound by its stipulation that Claimant worked for sixteen years in qualifying coal mine employment, we affirm this finding. *Id.*

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 or comparable gainful 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).

The ALJ found the pulmonary function studies, arterial blood gas studies, and medical opinions do not establish total disability.[4] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv);

[4] The treatment records from Dr. Montes at Parkway Cardiology Associates diagnose Claimant with chronic diastolic congestive heart failure. Employer's Exhibit E at 4. Dr. Banick opined Claimant "likely" has cor pulmonale that is "not related to coal

Decision and Order at 18-20. Therefore, he found Claimant did not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 20-21.

Arterial Blood Gas Studies

The ALJ considered the results of two arterial blood gas studies dated February 21, 2017 and October 20, 2020, and accurately found neither study produced qualifying values. Decision and Order at 7, 18; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Both studies produced non-qualifying values at rest and with exercise.[5] Director's Exhibit 14; Employer's Exhibit A. Thus we affirm his finding the blood gas study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 18.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated February 21, 2017, March 27, 2019, and October 20, 2020. Decision and Order at 6-7, 18; Director's Exhibits 14, 20; Employer's Exhibit A. The February 21, 2017 study produced qualifying results before and after administration of bronchodilators. Director's Exhibit 14. The March 27, 2019 study produced non-qualifying results before administration of bronchodilators while the October 20, 2020 study produced non-qualifying results before and after administration of bronchodilators. Director's Exhibit 20; Employer's Exhibit A.

The ALJ summarily found, apparently solely because the studies "showed improvement over time," the pulmonary function study evidence does not establish total

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workers' pneumoconiosis." Director's Exhibit 20 at 7, 18. The ALJ determined Dr. Banick's reference to "likely" cor pulmonale is "not firm." Decision and Order at 17. Further, he accurately found there is no evidence in the record containing a diagnosis specifically of cor pulmonale *with right-sided* congestive heart failure. *Id.* at 17-18. Thus, he permissibly concluded Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iii). *Id.; see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

[5] 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).

disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 18. We are unable to affirm the ALJ's finding.

The ALJ erred by crediting, based solely on recency, the non-qualifying studies over the qualifying study. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held it irrational to credit evidence solely based on recency when a miner's condition improves. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the court reasoned that a "later test or exam" is a "more reliable indicator of [a] miner's condition than an earlier one" where a "miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. As the test results do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's current condition." *Id.* But if "the later test or exams" show the miner's condition has improved, the reasoning "simply cannot apply": one must be incorrect — and "it is just as likely that the later evidence is faulty as the earlier." *Id.* The ALJ must therefore resolve conflicting tests when the miner's condition improves "without reference to their chronological relationship." *Id.*; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (ALJs must perform a qualitative and quantitative analysis of conflicting evidence and not mechanically credit tests when they indicate a miner's condition has improved); *Adkins*, 958 F.2d at 52 ("'[l]ater is better' is not a reasoned explanation"). Thus, the ALJ erred in crediting the more recent non-qualifying studies over the earlier qualifying study for no reason other than when Claimant performed them. Decision and Order at 18.

Based upon the foregoing error, we vacate the ALJ's determination that Claimant did not establish total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 18.

Medical Opinions

The ALJ considered the medical opinions of Drs. Forehand, Banick, and Tuteur. Decision and Order at 8-13; Director's Exhibits 14, 20; Employer's Exhibit A. Dr. Forehand opined Claimant suffers from a totally disabling respiratory or pulmonary impairment in the form of "mixed restrictive-obstructive lung disease" based on Claimant's symptoms, history of coal mine dust exposure, and the February 21, 2017 pulmonary function study results. Director's Exhibit 14 at 4. Dr. Banick diagnosed Claimant with a Class 3C impairment under the American Medical Association Guidelines to the Evaluation of Permanent Impairment. Director's Exhibit 20 at 6. He opined Claimant may have obstructive airways disease likely due to morbid obesity and sleep apnea but stated

"occupational chronic obstructive pulmonary disease (COPD) is not ruled out."[6] *Id.* at 5-7. Dr. Tuteur opined Claimant is "neither impaired, nor disabled" due to coal mine dust exposure and any pulmonary impairment is due to cardiac dysfunction, diabetes mellitus, and morbid obesity.[7] Employer's Exhibit A at 3-4.

In weighing the medical opinion evidence, the ALJ noted Dr. Forehand considered only the February 21, 2017 pulmonary function study. He found Dr. Forehand "had an appreciably more limited picture of Claimant's condition in comparison to Drs. Banick and Tuteur" and accorded his opinion significantly less weight.[8] Decision and Order at 20. Thus, he summarily found Claimant did not establish total disability. *Id.* The ALJ failed, however, to properly consider the medical opinion evidence.

In determining whether a miner is totally disabled, the ALJ must compare the exertional requirements of the miner's usual coal mine work with a physician's description of the miner's pulmonary impairment and physical limitations. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *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). Although

[6] Dr. Banick does not state whether Claimant is totally disabled due to a respiratory or pulmonary impairment under 20 C.F.R. §718.204(b). *See generally* Director's Exhibit 20.

[7] Dr. Tuteur's determination of whether Claimant can perform the exertional requirements of his previous coal mine employment is unclear. He stated Claimant is "totally and permanently disabled from returning to work in the coal mine industry or work requiring similar effort" upon weighing all the medical data. Employer's Exhibit A at 3-4. Nevertheless, in the same report, he noted Claimant "does have the pulmonary capacity to perform work of a coal miner." *Id.* at 4.

[8] To support this finding, the ALJ reasoned that a medical opinion may be given less weight where the physician does not have a complete picture of the miner's condition. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Sabett v. Director, OWCP*, 7 BLR 1-299, 1-301 n.1 (1984). We note, however, an ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner, objective test results, and exposure histories. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). To constitute a "reasoned" medical opinion, a physician need only base his diagnosis on "medically acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. §718.204(b)(2)(iv). This is so even when the objective testing does not qualify for total disability. *Id.*

the ALJ described Claimant's last job in the mines as a shuttle car operator, he failed to make a finding regarding Claimant's usual coal mine work[9] or the exertional requirements of such work and failed to compare those requirements with the physicians' assessments to determine whether the opinions support a finding of total respiratory disability. Decision and Order at 4; *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-19 (1988) (medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably conclude that a miner is unable to do his last coal mine job).

The ALJ also erred in his consideration of Drs. Banick's and Tuteur's opinions. While he summarized their opinions, he made no determination as to whether they are reasoned and documented. Decision and Order at 18-20. He neither weighed these opinions nor made any credibility determinations regarding them. *Id*. Thus he erred by failing to critically analyze Drs. Banick's and Tuteur's opinions, render any findings as to whether their opinions are reasoned and documented, or otherwise explain why he found their opinions credible as required by the Administrative Procedure Act (APA).[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

Based on the foregoing errors, we vacate the ALJ's finding Claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). Consequently, we vacate his determination Claimant did not establish total disability overall at 20 C.F.R. §718.204(b)(2).[11] We therefore also vacate the ALJ's

[9] The record indicates Claimant worked as a shuttle car operator but also ran a bolting machine and did other jobs in the mine. Decision and Order at 4; Hearing Transcript at 12; Director's Exhibit 4.

[10] 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).

[11] As the ALJ found Claimant did not establish the presence of total disability by any of the methods under 20 C.F.R. § 718.204(b)(2), he did not weigh the evidence as a whole. Decision and Order at 20. On remand, should the ALJ find the evidence establishes total disability by any of the methods listed in 20 C.F.R. §718.204(b)(2), he must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones*

finding that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on the pulmonary function studies and provide an adequate rationale for how he resolves the conflict in the evidence. 20 C.F.R. §718.204(b)(2)(i). The ALJ must also determine the exertional requirements of Claimant's usual coal mine work. Thereafter, he must weigh the medical opinions taking into consideration his findings regarding the pulmonary function studies, the exertional requirements of Claimant's usual coal mine work, and other objective evidence. *Cornett*, 227 F.3d at 578; *see Eagle*, 943 F.2d at 512-13 (physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment). In weighing the medical opinions, he must consider the physicians' qualifications, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Rowe*, 710 F.2d at 255.

In reaching his credibility determinations, the ALJ must set forth his findings in detail and explain his rationale in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165. If the ALJ determines total disability is demonstrated by the pulmonary function studies or medical opinions, or both, he must consider the evidence as a whole and reach a determination as to whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *see Shedlock*, 9 BLR at 1-198.

If Claimant fails to establish total disability, benefits are precluded and the ALJ may reinstate his denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. If the ALJ finds the evidence establishes total disability, Claimant will thereby invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4). The ALJ must then consider whether Employer can rebut the presumption by establishing Claimant has neither legal nor clinical pneumoconiosis, or by establishing "no part of the miner's 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015).

& 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).

Accordingly, the ALJ's Decision and Order 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.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge