U.S. Department of Labor

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

BRB No. 22-0212 BLA

ARTHUR P. BLEVINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 5/08/2023
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 Denying Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Arthur P. Blevins, Abingdon, Virginia.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,[1] the Decision and Order Denying Benefits (2019-BLA-05171) of Administrative Law Judge (ALJ) Carrie Bland rendered on a

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the Administrative Law

miner's subsequent claim filed on January 20, 2017,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 14.45 years of underground coal mine employment and therefore could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Further finding Claimant did not establish total disability, the ALJ denied benefits.[4] 20 C.F.R. §718.204(b)(2).

On appeal, Claimant generally challenges the ALJ's denial of benefits and also specifically challenges the ALJ's length of coal mine employment finding and weighing of the pulmonary function study evidence. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), submitted a letter indicating he would not file a substantive response but included a footnote expressing disagreement with the ALJ's length of coal mine employment finding.[5]

Judge's (ALJ) decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant file three prior claims, each of which were denied. Director's Exhibit 1. The district director denied Claimant's most recent, previous claim for failure to establish total disability. *Id*.

[3] 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.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's most recent, previous claim for failure to establish total disability, Claimant had to submit new evidence establishing total disability to obtain a review of his current claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[5] Claimant asserts his Social Security Earnings Record and Union pension record establish 15.25 years of coal mine employment. Claimant's Brief at 1-2 (unpaginated).

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with law.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 – Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered Claimant's hearing testimony, his CM-911a Employment History form, and Employer's personnel records. Decision and Order at 9-10; Hearing Transcript at 16, 20-22; Director's Exhibits 4, 7. Based on Claimant's credible testimony, she found he performed all of his coal mine employment at underground mines.[7] Decision and Order at 11; Hearing Transcript at 14. She further determined the beginning and ending dates of Claimant's employment with Employer were ascertainable from its personnel records and calculated Claimant had a total of 15.08 years of coal mine employment.

The Director contends the ALJ erred in relying on Employer's counsel's representations at the hearing as to the length of the strike and in noting "there is no [record] evidence that Claimant missed any workdays due to the strike." Director's Response at 1 n.1. The Director, however, stated he was not "tak[ing] a position in this appeal" because the ALJ's error "would not affect the outcome" due to her finding that Claimant is not totally disabled, which the Director does not address. *Id.*

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 14.

[7] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant performed all of his coal mine employment at underground mines. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11; Hearing Transcript at 14.

Decision and Order at 9. However, relying solely on Employer's counsel's representation at the hearing that Claimant did not work during a strike that allegedly occurred during 1989 and 1990, the ALJ subtracted 165 working days from her 15.08-year calculation to conclude he established 14.45 years in coal mine employment. Decision and Order at 10; Hearing Transcript at 22. Thus, the ALJ found Claimant could not invoke the Section 411(c)(4) presumption.

We hold the ALJ's length of coal mine employment finding is not supported by substantial evidence. At the hearing, in response to questioning concerning a 1989 foot and toe injury he suffered, Claimant testified "I was off up until the strike. From March until the strike started in '89. But I don't remember the date they came out on strike." Hearing Transcript at 22. Employer's counsel then offered, "My recollection and notes indicate the strike began April 5, 1989 and lasted until February 21, 1990." *Id.* Although counsel asked Claimant to confirm if the dates "sound about right," Claimant responded only, "I was off about three months because I didn't get to go back. The doctor didn't release me to go back until after the strike had done being on for a while." *Id.* Based on this testimony, the ALJ found Claimant was off work for about three months due to an injury around the time of the strike, but there was not "a clear picture of when the physician released Claimant for work." Decision and Order at 10 (referencing Hearing Transcript at 22). The ALJ reasoned:

> [T]he best scenario for Claimant would be if he injured himself on April 4, the day before the strike began, and I credited Claimant with three months of medical leave, *i.e.*, April 4, 1989 – July 4, 1989, or 66 working days, of the strike time, as medical leave, which would be counted as coal mine employment. That would mean that 165 days (231 total strike days – 66 days when the strike was occurring that Claimant was on medical leave = 165 days of time that Claimant missed due to the strike) of the 15.08 years previously calculated was time when Claimant was on strike.

Id.

Contrary to the ALJ's analysis, Claimant's testimony does not corroborate Employer's counsel's statements as to the dates or length of the strike. Hearing Transcript at 22. Claimant also never stated he did not work due to the strike. Rather, Claimant stated only that he was off due to a work injury "up until the strike" and returned sometime after the strike started but was unsure of the dates. Hearing Transcript at 22. As there is no documentary evidence or sworn witness testimony to support when the strike occurred or for how long it extended, the ALJ's subtraction of 165 working days from Claimant's length of employment was in error. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997). Thus, we reverse the ALJ's subtraction and hold Claimant established fifteen years of qualifying coal mine employment based on the ALJ's initial calculation

and specific factual findings as they are supported by substantial evidence. *See generally Scott v. Mason Coal Co.*, 289 F.3d 263, 270 (4th Cir. 2002) (reversing denial of benefits where "only one factual conclusion is possible").

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 and comparable gainful work. 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,[8] 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).

Pulmonary Function Studies

The ALJ considered four pulmonary function studies. Decision and Order at 14, 20. The March 9, 2017 study produced non-qualifying values pre- and post-bronchodilator. Director's Exhibit 16. The December 13, 2017 study produced qualifying values pre-bronchodilator but non-qualifying values post-bronchodilator. Director's Exhibit 22. The June 20, 2019 study produced qualifying pre-bronchodilator values and did not include post-bronchodilator results, while the March 29, 2021 study produced non-qualifying pre-bronchodilator results and did not include post-bronchodilator results. Claimant's Exhibits 4, 5.

The ALJ noted the pre-bronchodilator pulmonary function studies are "evenly split." Decision and Order at 20. Therefore, she found Claimant did not demonstrate total disability by a preponderance of the pulmonary function study evidence. *Id*.

Claimant asserts the March 29, 2021 non-qualifying pre-bronchodilator study is invalid because he used an inhaler prior to his examination. Claimant's Brief at 3 (unpaginated); *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (use of a bronchodilator does not provide an adequate assessment of a miner's disability). We note, however, that Claimant alleges the invalid study was performed at Johnston Memorial Hospital, while

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

the record reflects that his March 29, 2021 study was performed at Vansant Respiratory Center.[9] Claimant's Brief at 3 (unpaginated); Claimant's Exhibit 5. Moreover, Dr. Forehand makes no mention that the study he conducted at Vansant Respiratory Center was performed while Claimant was using an inhaler, and specifically noted the study is "acceptable." Claimant's Exhibit 5. As the record contains no evidence suggesting the March 29, 2021 study is invalid, the ALJ permissibly relied on it. *See Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable).

Because substantial evidence supports the ALJ's finding that the pulmonary function study results are in equipoise and therefore do not establish total disability, we affirm it.[10] 20 C.F.R. §718.204(b)(2)(i); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

Medical Opinion Evidence[11]

In considering whether Claimant established total disability based on the medical opinions, the ALJ first found Claimant's last usual coal mine employment was working on belt maintenance which required heavy physical exertion.[12] Decision and Order at 11;

[9] As none of the designated pulmonary function studies were conducted at Johnston Memorial Hospital, it appears Claimant is referring to evidence outside the record.

[10] Because the ALJ permissibly found the pulmonary function studies in equipoise, any error in also stating the March 29, 2021 non-qualifying test is entitled to "great weight" based on its recency is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992) (it is irrational to credit evidence solely on the basis of recency where the miner's condition has improved); Decision and Order at 20.

[11] The ALJ correctly found the two arterial blood gas studies, dated March 9, 2017, and December 13, 2017, are non-qualifying for total disability, and that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 20; Director's Exhibits 16 at 18, 22 at 9. Thus, we affirm the ALJ's determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

[12] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's usual work required heavy physical exertion. *See Skrack*, 6 BLR at 1-711; Decision and Order at 11.

Hearing Transcript at 14-16. She then considered the medical opinions of Drs. Forehand and Fino, both of whom opined Claimant is totally disabled.

Dr. Forehand conducted the Department of Labor's complete pulmonary evaluation of Claimant on March 9, 2017. Director's Exhibit 16. He diagnosed Claimant with a "significant" obstructive impairment that precludes the physical demands of his last coal mining job and his ability to tolerate additional coal mine dust exposure. *Id.* at 6. Citing Claimant's FEV1 of fifty-three percent on pulmonary function testing, Dr. Forehand explained Claimant would not have:

> the "wind" (the ability to increase ventilation in response to an increase in physical activity) to return to [his jobs as a roof bolter, continuous miner operator, tailhead shearer operator, shuttle car operator, rock miner operator, and fire boss/mine examiner, and his work installing belt drives; pulling and dragging belts; lifting and carrying belt structures, rollers, and tool bags; and welding and cutting.]

Id.

Dr. Fino examined Claimant on December 13, 2017. Director's Exhibit 22. Based on the pulmonary function study he obtained, Dr. Fino diagnosed a moderate and variable respiratory impairment, and stated that from a respiratory standpoint, Claimant is disabled from returning to his last coal mine employment which involved varying degrees of heavy and very heavy manual labor. *Id.* at 4, 11. In his subsequent deposition on May 27, 2021, having reviewed all of the record pulmonary function study evidence, Dr. Fino reiterated that Claimant is totally disabled. Employer's Exhibit 5 at 26. He explained Claimant's pre-bronchodilator results on pulmonary function testing are disabling and, while Claimant can achieve non-disabling values after administration of bronchodilators, "he's never going to stay bronchodilated all the time, so he's going to have lower lung function which would prevent him from returning to the mines." *Id.* at 26-27.

The ALJ found the opinions of Drs. Forehand and Fino sufficiently documented to the extent they adequately understood Claimant's job, with Dr. Fino providing a more detailed explanation of the exertional requirements. Decision and Order at 21. The ALJ initially found Dr. Forehand's opinion, indicating Claimant should not work because he should not be further exposed to coal mine dust, was insufficient to support a finding of total disability. *Id*. She further found "Dr. Forehand's reliance on the results of the non-qualifying pulmonary function study he administered to explain his opinion renders his opinion regarding disability inadequately reasoned to support a finding of total disability at Section 718.204(b)(2)(iv)." *Id*. Similarly, the ALJ found Dr. Fino's reliance on a qualifying pulmonary function study not well-reasoned because it is contrary to her finding that the overall results of the studies are in equipoise. *Id.* at 22. Therefore, she

found the medical opinion evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22.

We vacate the ALJ's rejection of the opinions of Drs. Forehand and Fino as her findings are not adequately explained. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42 (4th Cir. 1997). The regulation at 20 C.F.R §718.204(b)(2)(iv) provides that even if a claimant is unable to establish total disability based on the objective testing at 20 C.F.R. §718.204(b)(2)(i) or (ii), total disability may be established based on a physician's reasoned opinion that he could not perform his usual coal mine employment from a respiratory or pulmonary standpoint. 20 C.F.R. §718.204(b)(2)(iv); *see Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (even a mild impairment may be disabling). Here the ALJ focused her analysis entirely on whether Drs. Forehand and Fino relied on qualifying or non-qualifying pulmonary function studies, or whether they reached conclusions consistent with her own findings that the pulmonary function studies are in equipoise. Because she did not adequately consider whether each physician provided a reasoned opinion that Claimant has an impairment that precludes the performance of his usual coal mine employment, we vacate her determination that Claimant did not establish total disability at 20 C.F.R §718.204(b)(2)(iv). Decision and Order at 22. Thus, we vacate her finding that Claimant is unable to invoke the Section 411(c)(4) presumption. *Id.* at 10.

Remand Instructions

On remand, the ALJ must reconsider whether the opinions of Drs. Forehand and Fino are reasoned and sufficient to establish Claimant is totally disabled from a respiratory or pulmonary impairment that prevents him from performing his usual coal mine employment at 20 C.F.R. §718.204(b)(2)(iv). *See Walker*, 927 F.2d at 184-85; *Cornett*, 227 F.3d at 577. If Claimant establishes total disability based on the medical opinions, she must then weigh all the relevant evidence together to determine whether Claimant has established total disability based on the record as a whole. *See* 20 C.F.R. §718.204(b)(2); *Shedlock*, 9 BLR at 1-198.

Because Claimant established fifteen years of underground coal mine employment, if the ALJ finds Claimant established he is totally disabled, he will have invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The ALJ then must consider whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(1). However, if Claimant is unable to establish total disability, benefits are precluded and the ALJ may reinstate the denial of benefits. 20 C.F.R. Part 718; *see 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, 1-2 (1986) (en banc). In rendering her

findings on remand, the ALJ must comply with the Administrative Procedure Act.[13] 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).

Accordingly, the ALJ's Decision and Order Denying Benefits is vacated, and the case is remanded to the ALJ 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

[13] 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).