U.S. Department of Labor

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

BRB No. 22-0225 BLA

J.B. NAPIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIC COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 5/12/2023
	)	
Employer/Carrier-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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

J.B. Napier, Cawood, Kentucky.

Michael A. Pusateri (Greenberg Traurig LLP), Washington D.C., for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits (2020-BLA-05019) rendered on a subsequent claim[2] filed on March 9, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twelve years of qualifying coal mine employment based on the parties' stipulation and found that he failed to establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and denied benefits without addressing the remaining elements of entitlement.[3]

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

In an appeal filed without representation, the Benefits Review 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

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed a previous claim on February 26, 1999, which the district director denied on June 11, 1999, for failure to establish any element of entitlement. *See* Decision and Order at 5; Director's Exhibits 1, 53; Employer's Closing Brief at 4. Claimant filed another claim which was withdrawn, and thus is considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibit 2.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, he must establish "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); *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 Claimant's prior claim was denied for failure to establish any element of entitlement, he had to submit evidence establishing at least one element of entitlement in order to obtain review of the merits of his current claim. 20 C.F.R. §725.309(c)(3), (4).

applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Without the Section 411(c)(3)[5] and (c)(4)[6] presumptions, 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. Failure to establish any one of these elements 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, 1-2 (1986) (en banc).

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. *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,[7] evidence of

[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); Director's Exhibit 5.

[5] Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes he has complicated pneumoconiosis. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. Any error the ALJ may have made in failing to address whether Claimant invoked the Section 411(c)(3) presumption is harmless as the record contains no evidence that he has complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[6] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Claimant cannot invoke the Section 411(c)(4) presumption because he stipulated to having only twelve years of coal mine employment. Hearing Transcript at 6; *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013) (voluntary stipulations are binding); *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996) (same); *Larioni*, 6 BLR at 1-1278.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718,

pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[8] 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 found Claimant failed to establish total disability under 20 C.F.R. Part 718.204(b)(2)(i)-(iv). Decision and Order at 14-15.

Pulmonary Function Studies

The ALJ considered the results of three pulmonary function studies.[9] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8. Dr. Ajjarapu's May 15, 2017 study produced non-qualifying values pre- and post-bronchodilator. Director's Exhibit 18 at 13. Dr. Forehand's June 15, 2017 study produced non-qualifying pre-bronchodilator values and did not include post-bronchodilator results. Claimant's Exhibit 4 at 1. Dr. Rosenberg's July 17, 2018 study produced qualifying pre- and post-bronchodilator results, based on the FEV1 and MVV values. Director's Exhibit 23.

In resolving the conflict in the pulmonary function study evidence, the ALJ observed that Dr. Vuskovich opined Claimant's qualifying MVV values on the July 17, 2018 study are invalid due to insufficient effort,[10] while Dr. Rosenberg validated the study

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Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] Because the record contains no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure, we affirm the ALJ's finding that Claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 11.

[9] Because the studies reported varying heights for Claimant ranging from 65.5 to 66 inches, the ALJ permissibly calculated an average height of 65.87 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 7-8. He then correctly used the closest greater table height at Appendix B of 20 C.F.R. Part 718 of 66.1 inches in determining whether each study is qualifying. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 8.

[10] Dr. Vuskovich stated Claimant's qualifying MVV values are "effort-related" rather than "a worsening of his pulmonary condition." Employer's Exhibit 2 at 13. He explained that a valid MVV requires a subject to increase his respiratory rate to about ninety breaths per minute and tidal volume to "close to 2 liters;" and "although [they were] not recorded," Dr. Vuskovich stated Claimant's MVV tracings indicated his respiratory

and described Claimant's effort as "good."[11] Decision and Order at 8-10; Director's Exhibit 23 at 27; Employer's Exhibit 2 at 13. The ALJ summarily credited Dr. Vuskovich's opinion as well-reasoned.[12] Decision and Order at 14. He further found the qualifying MVV values from Dr. Rosenberg's July 17, 2018 study did not comply with the quality standards. *Id.* at 10. Referencing 20 C.F.R. §718.103(b), the ALJ explained:

> All pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus times tracings. If the MVV is reported, two tracings of the MVV whose values are within 10% of each other shall be sufficient.
>
> [20 C.F.R. §718.103(b)].
>
> For Dr. Rosenberg's MVV, only one single effort was reported pre-bronchodilator and post-bronchodilator. This is insufficient to rise to the level of the two required tracings under §718.103(b). As such, the Tribunal finds that the MVV value of this test is invalid, and the test is thus insufficiently probative to establish total disability.

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rates were less than sixty breaths per minute and tidal volume less than one liter. *Id.* at 9, 13-14. He further explained a clinical MVV test:

> is not necessary because there is a universal stable relationship between MVV and FEV1: $MVV_{\text{liters per minute}} = FEV1_{\text{liters [per] second}} \times 40$. On [July 17, 2018, Claimant]'s valid pre bronchodilator FEV result was 1.76 liters. If he had put forth maximum effort then his pre bronchodilator MVV would have been: $MVV_{\text{liters per minute}} = 1.76 \text{ liters } FEV1_{\text{liters [per] second}} \times 40 = 70.4$ liters per minute. This would have exceeded [Claimant's] age 59 height 65.5 inch DOL criterion value for total ventilatory disability (69 liters per minute).

Id. at 13. Dr. Vuskovich did not perform any calculations regarding Claimant's post-bronchodilator MVV.

[11] Dr. Rosenberg stated Claimant's effort was "good" and the test met American Thoracic Society validity criteria. Director's Exhibit 23 at 27.

[12] The ALJ stated, "Dr. Vuskovich provided reasoning to support his conclusion, had a holistic view of all the evidence of record, and supported his conclusion with the objective medical evidence of record." Decision and Order at 14.

Id.

Having found Dr. Rosenberg's qualifying study invalid, the ALJ credited the May 15, 2017 and June 15, 2017 non-qualifying studies and concluded Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10. We cannot affirm the ALJ's findings.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the requirements of 20 C.F.R. §718.103 and 20 C.F.R. Part 718, Appendix B. 20 C.F.R. §§718.101(b), 718.103(c); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards at 20 C.F.R. Part 718, Appendix B, is presumed. 20 C.F.R. §718.103(c). If a study does not precisely conform to the requirements of 20 C.F.R. §718.103 and Appendix B, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in his role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

Although the ALJ found Dr. Rosenberg's July 17, 2018 qualifying pre-and post-bronchodilator studies non-conforming with 20 C.F.R §718.103(b) due to the lack of at least two MVV tracings, he failed to properly address whether the studies are in substantial compliance with the quality standards and therefore sufficiently reliable to support a finding that Claimant is totally disabled. The ALJ also failed to adequately explain why Dr. Vuskovich's opinion was well-reasoned in view of the applicable quality standards or consider whether it is sufficient to establish the study is unreliable.[13] *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir.1997) (remand is appropriate when the ALJ fails to consider the evidence under the proper legal standard); *Orek*, 10 BLR at 1-54 (party alleging objective study is invalid must "specify in what way the study fails to conform to the quality standards" and "demonstrate how this defect or omission renders the study unreliable"). Further, the ALJ did not explain why he gave more weight to Dr. Vuskovich's opinion regarding Claimant's effort in performing the test compared to Dr. Rosenberg's opinion that the study was valid. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22-24 (1993) (interpretation of

[13] To the extent the ALJ credited Dr. Vuskovich's invalidation of Claimant's pre-bronchodilator clinical MVV result based on the physician's calculating Claimant's MVV from his FEV1 result, the ALJ's finding is directly contradictory to the regulation, which provides that "[i]f the maximum voluntary ventilation (MVV) is reported, the results of such test shall be obtained independently rather than calculated from the results of the FEV1." 20 C.F.R. §718.103(a).

medical data is a matter for medical experts); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985) (ALJ must provide a reason for preferring the consultative physician's interpretation of an objective study over the administering physician). We thus vacate the ALJ's conclusion that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Arterial Blood Gas Studies

The ALJ considered the results of two arterial blood gas studies and properly concluded they were both non-qualifying.[14] *See* 20 C.F.R. Part 718, Appendix C; Decision and order at 10-11; Director's Exhibits 18 at 9, 23 at 16. We therefore affirm the ALJ's finding that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinions

Prior to weighing the medical opinions, the ALJ determined the exertional requirements of Claimant's usual coal mine employment. He accurately observed Claimant listed his last coal mine job as "shuttle car" and described driving, loading, pulling, and tugging duties that match the position description of a "shuttle car operator" in the *Dictionary of Occupational Titles* (DOT), which classifies the position as requiring medium exertion.[15] Decision and Order at 4-5 (quoting and referencing the *Dictionary of Occupational Titles*, Shuttle-Car Operator (4th Ed., Rev. 1991), *available at* https://occupationalinfo.org/93/932683022.html); Director's Exhibit 6. As the ALJ notified the parties in his May 14, 2020 Notice of Hearing and Pre-Hearing Order that he would take official notice of the DOT, we affirm the ALJ's finding that Claimant's usual

[14] Dr. Ajjarapu's May 15, 2017 study produced non-qualifying values at rest and with exercise. *See* 20 C.F.R. Part 718, Appendix C; Director's Exhibit 18 at 9. Dr. Rosenberg's July 17, 2018 study produced non-qualifying values at rest. *See* 20 C.F.R. Part 718, Appendix C; Director's Exhibit 23 at 16. Dr. Rosenberg explained he did not conduct an exercise study "because of the numbness down into [Claimant's] legs from his previous back injury." *Id.* at 6.

[15] The ALJ used the term "moderate work" interchangeably with the DOT's strength factor designation of "medium work." *See Dictionary of Occupational Titles*, Appendix C (4th Ed., Rev. 1991), *available at* https://www.dol.gov/agencies/oalj/PUBLIC/DOT/REFERENCES/DOTAPPC/ (setting forth five terms in which strength factor is expressed: "S-Sedentary Work," "L-Light Work," "M-Medium Work," "H-Heavy Work," and "V-Very Heavy Work"); Decision and Order at 4-5 (interpreting the DOT's strength factor designation of "M" as specifying that a shuttle-car operator position requires "moderate exertion").

coal mine employment involved medium exertion.[16] *See* 29 C.F.R. §18.84; *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989); Decision and Order at 4-5.

The ALJ then weighed the opinions of Drs. Ajjarapu and Rosenberg that Claimant is totally disabled from a respiratory or pulmonary impairment, and of Dr. Vuskovich that Claimant is not totally disabled. Decision and Order at 12-14. Although the ALJ found Drs. Ajjarapu and Rosenberg accurately understood Claimant's usual coal mine work required exerting fifty pounds of force, he discounted Dr. Ajjarapu's opinion as not well-reasoned because she relied on non-qualifying objective studies and otherwise did not explain her diagnosis. *Id.* at 14. He discounted Dr. Rosenberg's opinion as predicated on an invalid MVV value on pulmonary function testing, contrary to the ALJ's finding at 20 C.F.R. §718.204(b)(2)(i) that the results are invalid. *Id.* Further finding Dr. Vuskovich's opinion well-reasoned and supported by the weight of the pulmonary function study evidence, the ALJ found Dr. Vuskovich's opinion entitled to determinative weight. *Id.* He thus concluded Claimant failed to establish total disability by a preponderance of the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14.

Because the ALJ's findings regarding the credibility of the medical opinions rely, in significant part, on his findings at 20 C.F.R. §718.204(b)(2)(i), which we have vacated, we also vacate his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, as the ALJ has not properly resolved the conflict in the evidence as to the reliability of Dr. Rosenberg's July 17, 2018 qualifying pulmonary study, he has not provided a valid reason for discounting Dr. Rosenberg's opinion that Claimant is totally disabled or giving determinative weight to Dr. Vuskovich's opinion.

The ALJ also erred in discrediting Dr. Ajjarapu's opinion that Claimant is totally disabled because the physician relied on non-qualifying objective tests without providing any further explanation. Contrary to the ALJ's characterization, Dr. Ajjarapu opined Claimant is totally disabled because the pulmonary function and blood gas studies she conducted showed "marked declines in pulmonary measures" that lead her to believe Claimant "does not have the pulmonary capacity to do his previous coal mine employment," which she characterized as requiring him to shovel and pull up to fifty

[16] The ALJ has the discretion to take judicial notice of the *Dictionary of Occupational Titles,* provided he follows the correct procedure in doing so. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989).

pounds.[17] *Id.* at 1, 7. As the ALJ did not fully consider this aspect of Dr. Ajjarapu's opinion, we vacate his determination to discount it. 20 C.F.R. §718.204(b)(2)(iv) (total disability can be established by a reasoned medical opinion that a miner's pulmonary condition prevents his performing his usual coal mine work); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (a claimant can establish total disability despite non-qualifying objective tests).

Remand Instructions

On remand, the ALJ must reconsider the pulmonary function studies and resolve the conflicts in the evidence. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 634 (6th Cir. 2009). Specifically, he must consider if the qualifying July 17, 2018 pre-and post-bronchodilator studies are in substantial compliance with the regulatory quality standards and explain the basis for his findings. *See* 20 C.F.R. §§718.101(b), 718.103(c). Then he must weigh the pulmonary function studies together and reach a determination as to whether Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i).

The ALJ also must reweigh the medical opinions on total disability, comparing the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett*, 227 F.3d at 578. If Claimant establishes total disability at either 20 C.F.R. §718.204(b)(2)(i) or (iv), or both, the ALJ must determine whether the evidence as a whole establishes that Claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant does not establish total disability at 20 C.F.R. §718.204(b)(2), the ALJ may reinstate the denial of benefits. 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). If Claimant establishes total disability, the ALJ must consider Claimant's entitlement pursuant to 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2 (1986).

In reaching his conclusions on remand, the ALJ must explain the bases for all of his credibility determinations, findings of fact, and conclusions of law as the Administrative Procedure Act requires.[18] 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).

[17] Dr. Ajjarapu interpreted Claimant's May 15, 2017 blood gas study as showing "exercise induced hypoxemia." Director's Exhibit 18 at 7.

[18] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

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.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

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).