U.S. Department of Labor

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

BRB No. 22-0239 BLA

PAUL JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE MARSHALL COUNTY COAL COMPANY	)	
	)	
and	)	
	)	
MURRAY ENERGY CORPORATION TRUST	)	DATE ISSUED: 5/08/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Aimee M. Stern (Dinsmore & Shohl, LLP), Wheeling, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2020-BLA-05604) on a miner's claim filed on September 12, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with fifteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant is totally disabled. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response.[2]

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 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).

Invocation of the Section 411(c)(4) Presumption

[1] Section 411(c)(4) 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] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10, 16.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 8; Director's Exhibit 3.

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, qualifying arterial blood gas studies,[4] 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).

Employer contends the ALJ erred in finding Claimant established total disability based on the medical opinions and in consideration of the evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12. We disagree.

The ALJ accurately summarized Claimant's testimony as to the exertional requirements of his usual coal mine work[6] and weighed Dr. Feicht's opinion that Claimant is totally disabled against Dr. Fino's contrary opinion.[7] Decision and Order at 12. The

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[4] 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).

[5] The ALJ found the two pulmonary function studies and two blood gas studies were non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. 718.204(b)(2)(i)-(iii); Decision and Order at 6, 11. The ALJ also found Claimant did not establish complicated pneumoconiosis at 20 C.F.R.§718.304.

[6] Claimant described that his position as a lead foreman required him to walk seven to ten miles per day, wearing a 15-pound miner's belt, lift and carry 120-300-pound jacks 40-300 feet multiple times in a month, carry 25-pound rock dust bags approximately 100 feet daily, carry 10-25-pound rollers, and ascend and descend five flights of stairs at least once per day. Decision and Order at 12; Hearing Transcript at 25-33; *see* Director's Exhibit 4.

[7] Employer argues the ALJ erred in crediting Dr. Krefft's opinion that Claimant is totally disabled. Employer's Brief at 6-7. However, the ALJ did not summarize or mention Dr. Krefft's opinion in his decision. Although Claimant was given an extension of time after the hearing to submit Dr. Krefft's opinion, it does not appear in the record at Claimant's Exhibit 1, as Employer alleges. Moreover, any alleged error by the ALJ with regard to Dr. Krefft's opinion would be harmless, as we affirm his crediting of Dr. Feicht's

ALJ credited Dr. Feicht's opinion as well-documented and reasoned and gave little weight to Dr. Fino's opinion. Decision and Order at 12.

Employer contends Dr. Feicht's opinion lacks credibility because he relied on non-qualifying objective testing and did not address the exertional requirements of Claimant's last coal mine employment. Employer's Brief at 6. Contrary to Employer's contention, a physician may conclude a miner is disabled even if the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Additionally, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion*.") (emphasis added); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may find total disability by comparing physician's impairment rating and any physical limitations due to that impairment with the exertional requirements of the miner's usual coal mine work).

Dr. Feicht conducted the Department of Labor's (DOL's) complete pulmonary evaluation of Claimant on September 27, 2018. Although Claimant's objective tests were non-qualifying, he concluded the pulmonary function study shows mild obstruction, the resting blood gas study was reduced, and Claimant had an impairment in blood gas exchange with exercise. Director's Exhibit 12. He also stated Claimant's pulmonary symptoms are "moderately severe" and noted Claimant suffers from frequent coughing and wheezing. *Id.* at 3-4. He also reviewed DOL Form CM-911a, Employment History, indicating Claimant last worked in a coal mine as a lead foreman, *Id.* at 1; Director's Exhibit 3, and considered Claimant's description of his physical limitations which included the ability to ascend only one flight of stairs, walk a maximum of fifty yards on level ground, and a limited ability to walk up an incline. Based on this information, Dr. Feicht

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opinion on total disability. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

concluded Claimant "is fully disabled as being unable to perform at the capacity required as a coal miner during his last year's duty." Director's Exhibit 12 at 4, 6.

In his April 11, 2019 supplemental report, Dr. Feicht stated Claimant would be "functionally unable" to work "at the level required [during] his last year of coal mining" based on the "physical finding[s] and documented exercise capacity[,] which is compromised." Director's Exhibit 20 at 1. In his December 2, 2019 supplemental report, Dr. Feicht noted Dr. Fino obtained "even worse . . . results" than the testing he conducted and explained Dr. Fino's blood gas results were characteristic of "moderately severe" chronic obstructive pulmonary disease. Director's Exhibit 21 at 1. He opined Claimant is "functionally disabled as confirmed by his symptom severity" and he is "severely compromised from a pulmonary perspective . . . ." *Id.* He also found a significant carbon monoxide diffusion capacity (DLCO) deficiency. *Id.* at 2. He concluded based on the pulmonary function results showing moderate COPD, the below normal blood gas results, and the "obvious documented diminished functional capacity[, that] it is uncontestable that the work product required [during his last year of coal mine employment] exceeds [his] capacity." *Id.*

We see no error in the ALJ's finding that Dr. Feicht's opinion is reasoned and documented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The ALJ permissibly relied upon Dr. Feicht's opinion, supported by the objective testing evidencing impairment, that Claimant cannot perform his usual coal mine work as a mine foreman. *See Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52; Decision and Order at 7-9, 11-12. We therefore affirm the ALJ conclusion that Dr. Feicht's opinion is sufficient to establish that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv). 20 C.F.R. §718.204(b)(2)(iv); *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 12.

Employer also generally contends the ALJ erred in discrediting Dr. Fino's opinion. Employer's Brief at 7. It notes that Dr. Fino explained Claimant's impairment would not preclude him from performing the work of a foreman that required "70% light to moderate labor and 30% heavy to very heavy manual labor" and that Dr. Fino is more qualified than Dr. Feicht. Director's Exhibit 17 at 40; Employer's Brief at 7. The ALJ permissibly found that given the most recent objective studies were "borderline," Dr. Fino failed to adequately explain how Claimant could perform the requirements of his usual coal mine work based on his level of impairment.[8] Decision and Order at 12; *see* 20 C.F.R. §718.204(b)(2)(iv);

[8] The ALJ also stated that Dr. Fino's "description of Claimant's exertional requirements was misleading given that [Dr. Fino] himself previously described them as

see Killman, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 587; Director's Exhibit 17. Because Employer identifies no error in the ALJ's specific rationale for discrediting Dr. Fino's opinion, we affirm it. 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Further, we reject Employer's assertion that the ALJ failed to properly consider that Dr. Fino "is more qualified than" Dr. Feicht. Employer's Brief at 7. Having found Dr. Fino's opinion not well-reasoned, the ALJ could not reasonably credit his opinion on total disability. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08, 211 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987); *Shinseki*, 556 U.S. at 413.

Employer's arguments on total disability are a request to reweigh the evidence, which the Board may not do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (Board must uphold decisions "that rest within the realm of rationality"). Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established total disability based on Dr. Feicht's medical opinion at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Compton*, 211 F.3d at 207-08; *Hicks*, 138 F.3d at 528; Decision and Order at 10-13. We therefore affirm the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); Decision and Order at 13.

Additionally, because Employer does not challenge the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption, we affirm that determination. *See Skrack*, 6 BLR at 1-711; Decision and Order at 13-16.

65% moderate labor and only 5% light labor, meaning that 95% of [Claimant's] work was moderate to very heavy labor." Decision and Order at 12; *see* Director's Exhibit 17 at 34.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge