U.S. Department of Labor

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

BRB Nos. 22-0399 BLA
and 22-0399 BLA-A

JOHN W. HILL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 5/19/2023
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.

Alice B. Catlin (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Employer cross-appeals, Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits (2020-BLA-05168) rendered on a claim filed on July 27, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish a totally disabling respiratory or pulmonary impairment and thus could not invoke 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); *see* 20 C.F.R. §718.305. Because Claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718,[2] the ALJ denied benefits.[3]

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Benefits Review Board to vacate the ALJ's finding on total disability.

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

[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] Because Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304, the ALJ also found he could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 17.

[3] The ALJ did not render any findings regarding the length of Claimant's coal mine employment. Decision and Order at 20 n.102.

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).

Employer's Cross-Appeal

Initially, we address Employer's cross-appeal, which was filed on June 28, 2022. On August 18, 2022, Employer filed a Motion for Extension requesting consolidation of Claimant's appeal and Employer's cross-appeal, and an extension of time through September 12, 2022, to file its consolidated brief on cross-appeal and in response to Claimant's appeal. On September 12, 2022, Employer filed another Motion for Extension of Time requesting an extension through September 30, 2022, to file its consolidated brief. In an Order dated September 23, 2022, the Board granted Employer ten days from receipt of the Order to file its consolidated brief. *Hill v. Heritage Coal Co.*, BRB Nos. 22-0399 BLA/A (Sept. 23, 2022) (unpub. Order). Employer has not, however, filed any pleadings after its September 12, 2022 request for an extension. We thus dismiss Employer's cross-appeal as abandoned. 20 C.F.R. §802.211(d).

Entitlement to Benefits - 20 C.F.R. Part 718

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. 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 (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[5] pulmonary function studies, arterial blood gas studies, evidence of

[4] 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 Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 12.

[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.

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).

The ALJ found the pulmonary function and arterial blood gas studies do not establish total disability, but the medical opinions support a finding of total disability.[6] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 17-20. Weighing the evidence together, the ALJ found the pulmonary function and arterial blood gas studies outweigh the medical opinions, and thus the evidence as a whole does not establish total disability. *Id*.

Claimant and the Director argue the ALJ erred in finding the medical opinions do not establish total disability when weighed against the non-qualifying objective studies. Claimant's Brief at 6-7; Director's Brief at 3-5. We agree.

The ALJ considered Claimant's treatment records and the medical opinions of Drs. Feicht, Tuteur, and Rosenberg that Claimant is totally disabled. Decision and Order at 18-19; Director's Exhibits 13, 14, 71; Employer's Exhibits 2, 3, 7, 8. He found "none of the treatment records made any finding on disability."[7] Decision and Order at 20. In addition, he found Drs. Feicht's, Tuteur's, and Rosenberg's opinions support a finding of total

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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 on appeal, the ALJ's findings that the pulmonary function and arterial blood gas studies do not establish total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 17-18. The ALJ further found there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 17.

[7] Contrary to the ALJ's finding, Claimant's treatment records are relevant to the issue of total disability as they contain assessments of moderate to severe chronic obstructive pulmonary disease/reactive airway disease, moderate obstructive ventilatory defect, and severe obstructive pulmonary impairment. Decision and Order at 20; Claimant's Exhibit 2 at 11, 14-15, 21; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment).

disability. Decision and Order at 19. However, he found none of the physicians considered the non-qualifying September 28, 2020 pulmonary function study "taken four years later . . . with [] considerably improved pre-bronchodilator FEV_1 and FVC" values. *Id.* He therefore found the objective studies, which did not establish total disability, outweighed Drs. Feicht's, Tuteur's, and Rosenberg's opinions, and concluded Claimant failed to establish total disability. *Id.* at 19-20.

As the Director asserts, a physician may conclude a miner is totally disabled based on non-qualifying objective studies if the studies nonetheless demonstrate sufficient impairment to preclude the miner's usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); Director's Brief at 3-4. In addition, a medical opinion need not be phrased explicitly in terms of "total disability" to support a finding that a miner is, in fact, disabled. Rather, the ALJ must consider all relevant evidence concerning a miner's respiratory capacity and may rationally conclude he is totally disabled based on a physician's report as to the extent of his impairment. *See Cornett*, 227 F.3d at 578. In doing so, the ALJ must determine the exertional requirements of a miner's usual coal mine work and then consider them in conjunction with the medical opinions assessing the extent of his impairment. *See id.*; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-10 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to his work capabilities).

Dr. Feicht opined Claimant is totally disabled based on the pulmonary function and arterial blood gas studies and his symptoms. Director's Exhibits 13 at 7, 14, 71. He acknowledged the pulmonary function and arterial blood gas studies produced non-qualifying results but opined they are abnormal. Director's Exhibit 14. Because Claimant reported he could lift twenty pounds, climb one flight of stairs slowly, and walk one hundred yards slowly, Dr. Feicht explained that Claimant would not be able to perform his usual coal mine work driving the shuttle car, loading coal, working on the belt line, rock dusting, and hanging curtains, as these jobs require him to lift ten to fifteen pounds of coal hundreds of times, lift rock dust bags weighing fifty pounds ten to twelve times per day, and hang curtains weighing up to fifty or more pounds a couple of times per day. *Id.*

Dr. Tuteur opined the non-qualifying October 4, 2016 pulmonary function study indicates a severe obstructive ventilatory defect, and that the pre-bronchodilator study values are clearly at a level of disability. Employer's Exhibits 2, 7 at 9. He further opined

the pulmonary function study showed Claimant is impaired to such a degree that he would not be able to work in a coal mine. Employer's Exhibit 7 at 11-12, 18.

Dr. Rosenberg opined Claimant would not be considered disabled if he had appropriate treatment, but without medication he is disabled from a pulmonary standpoint. Employer's Exhibits 3, 8 at 18. He also opined the blood gas studies show mild impairment at rest and the pre-bronchodilator results of the October 4, 2016 pulmonary function study are consistent with disability. Employer's Exhibit 8 at 8-9.

The ALJ found Drs. Feicht's, Tuteur's, and Rosenberg's opinions that Claimant is totally disabled "reasoned and documented" because they are "based on the 2016 pre-bronchodilator [pulmonary function study], which was borderline qualifying." Decision and Order at 19. He further found, as discussed, that the preponderance of the non-qualifying pulmonary function and arterial blood gas studies outweighed Drs. Feicht's, Tuteur's, and Rosenberg's opinions because they did not consider the September 28, 2020 non-qualifying pulmonary function study. However, the ALJ did not render a finding on the exertional requirements of Claimant's usual coal mine work.[8] Thus, he erred in failing to render the necessary factual findings which would have allowed him to determine whether the medical opinions are credible to outweigh the preponderantly non-qualifying objective studies. *See Rowe*, 710 F.2d at 254-55 (ALJ has duty to consider all the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal bases for his decision); *McMath*, 12 BLR at 1-10.

Further, we agree with the Director that the ALJ failed to consider relevant evidence.[9] Director's Brief at 4-5. As the Director points out, the ALJ stated the September 28, 2020 pulmonary function study showed "considerably improved pre-bronchodilator FEV_1 and FVC" values, but he did not consider that the FEV_1 value is qualifying on all

[8] A miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982).

[9] To the extent the ALJ found Drs. Feicht's, Tuteur's, and Rosenberg's opinions not credible because the September 28, 2020 pulmonary function study showed significant improvement that would have altered their assessments, we agree with the Director that the ALJ impermissibly substituted his opinion for that of the medical experts. Decision and Order at 19; *see Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22-24 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) ("The interpretation of objective data is a medical determination and an [ALJ] may not substitute his opinion for that of a physician[.]"); Director's Brief at 4.

three of the pulmonary function studies. Decision and Order at 19; Director's Brief at 4. He also failed to consider that the physician who conducted the study opined the results demonstrate a "moderate obstructive ventilatory defect." Claimant's Exhibit 2 at 21; Director's Brief at 4. Further, he failed to discuss the fact that Dr. Feicht's opinion is not based solely on the non-qualifying October 4, 2016 pulmonary function study but also on the blood gas studies, the overall picture of Claimant's pulmonary symptoms, and the exertional requirements of his usual coal mine work. Director's Brief at 4-5; Director's Exhibits 13, 14, 71. Similarly, Drs. Tuteur and Rosenberg based their opinions, in part, on the October 4, 2016 pulmonary function study producing qualifying FEV_1 values like the September 28, 2020 study, and Dr. Tuteur also based his opinion on Dr. Feicht's assessment of Claimant's exertional limitations. Employer's Exhibit 2.

Because the ALJ did not adequately address all of the relevant evidence, his findings do not satisfy the Administrative Procedure Act (APA).[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

We thus vacate the ALJ's finding that the evidence as a whole does not establish total disability and remand the case for further consideration of the evidence. 20 C.F.R. §718.204(b)(2). Consequently, we vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption.

Remand Instructions

On remand, the ALJ must reweigh the evidence as a whole and determine whether Claimant established total disability at 20 C.F.R. §718.204(b)(2). In so doing, he must determine the exertional requirements of Claimant's usual coal mine work and consider all relevant evidence, including the entirety of the medical opinions diagnosing total disability. *See Cornett*, 227 F.3d at 578; *Rowe*, 710 F.2d at 254-55; *McMath*, 12 BLR at 1-10; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If the ALJ finds Claimant has established total disability, he must determine whether Claimant established at least fifteen years of underground coal mine employment or surface coal employment in conditions substantially similar to those in an underground coal mine.[11]

[10] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires the ALJ to set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

[11] The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that

20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

If Claimant establishes both fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, he will invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. The ALJ must then consider whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(1). However, if Claimant establishes total disability but not fifteen years of qualifying coal mine employment, the ALJ must consider if he has established the other elements of entitlement under 20 C.F.R. Part 718 by a preponderance of the evidence. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In rendering his findings on remand, the ALJ must comply with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

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the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

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 proceedings consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge