U.S. Department of Labor

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

BRB No. 22-0336 BLA

ROBERT P. BALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DICKENSON-RUSSELL COAL COMPANY, LLC	)	
	)	
	)	
and	)	DATE ISSUED: 11/07/2023
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY,	)	
	)	
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 William P. Farley, Administrative Law Judge, United States Department of Labor.

Robert P. Ball, Honaker, Virginia.

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

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) William P. Farley's Decision and Order Denying Benefits (2020-BLA-05473), rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ credited Claimant with at least twenty-seven years of coal mine employment, with more than fifteen years underground, but found that he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Because Claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.[4]

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds, urging affirmance of the denial.[5] The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response brief.

In an appeal filed without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*,

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

[2] Claimant filed a prior claim which was withdrawn. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[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); *see* 20 C.F.R. §718.305.

[4] Because there is no evidence of complicated pneumoconiosis in the record, we affirm the ALJ's finding that Claimant cannot 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). 20 C.F.R. §718.304; Decision and Order at 15.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has more than fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

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 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 - Total Disability

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b), 718.305(b)(1)(i). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work.[7] *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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 by any method.[8] 20 C.F.R. §718.204(b)(2); Decision and Order at 16-17.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 15.

[7] The ALJ found that Claimant's usual coal mine employment as an electrician, diesel mechanic, pumper, and first-class foreman required heavy exertion. Decision and Order at 6. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[8] The ALJ rationally found the arterial blood gas study evidence does not support total disability as all of the studies of record were non-qualifying. Decision and Order at 9, 16. A "qualifying" blood gas study yields results that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(ii). The ALJ also correctly observed the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 16. Therefore, we affirm, as supported by

Pulmonary Function Studies

The ALJ considered five pulmonary function studies of record, dated January 3, 2019,[9] February 19, 2019, August 21, 2019, January 21, 2020, and December 10, 2020. Decision and Order at 8, 16; Director's Exhibits 14, 19, 21; Claimant's Exhibit 4; Employer's Exhibit 2. He found two studies were qualifying[10] and three studies were non-qualifying based on a height of 67.7 inches.[11] Decision and Order at 8, 16. Weighing the studies together, and noting the most recent study was non-qualifying, he found the preponderance of the pulmonary function study evidence fails to establish total disability. Decision and Order at 16. The ALJ erred in his consideration of the pulmonary function studies.

First, the ALJ found the January 3, 2019 study was non-qualifying, based on an FEV1 value of 1.45 and an FVC value of 3.48. Decision and Order at 8. However, the FVC value obtained in the study was actually 2.15.[12] Director's Exhibit 19. Considering

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substantial evidence, his findings that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *Id*.

[9] The ALJ identified January 3, 2018 as the date of the pulmonary function study contained in Director's Exhibit 19; however, this appears to be a scrivener error. Decision and Order at 8.

[10] A "qualifying" pulmonary function study yields results that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[11] The ALJ noted varying heights were listed in Claimant's studies, and permissibly resolved the discrepancy by averaging the heights together to find 67.4 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order at 7-8. As the height falls between those provided in Appendix B, the ALJ used 67.7 inches, the next highest height provided, to determine the qualifying values. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995); *Carpenter v. GMS Mine Repair Maint. Inc.*, BLR , BRB No. 22-0100 BLA, slip op. at 4-5 (Sept. 6, 2023); Decision and Order at 7-8. We note that the ALJ later references a height of 69.7 inches; however, that appears to be a scrivener error as the values provided correspond with the values in Appendix B for a height of 67.7 inches.

[12] An MVV value of 54.85 was also obtained, but the ALJ did not record it. Decision and Order at 8; Director's Exhibit 19.

the correct values, the January 3, 2019 pulmonary function is qualifying.[13] *See* Appendix B of 20 C.F.R. Part 718. Thus, we vacate the ALJ's finding that the January 3, 2019 study is non-qualifying.

In addition, the ALJ did not weigh evidence which may undermine the probative value of some of the pulmonary function studies. Dr. Fino questioned the validity of the February 19, 2019, August 21, 2019, and January 21, 2020 studies, as well as the December 10, 2020 pre-bronchodilator study.[14] Director's Exhibit 21; Employer's Exhibit 4 at 9-12. Dr. Basheda noted "unacceptable reproducibility" of the FEV1 in the December 10, 2020 study and "no acceptable reproducibility with the postbronchodilator study." Employer's Exhibit 2 at 5-6. He also stated the August 21, 2019 study did not demonstrate "acceptable reproducibility." *Id.* at 13. However, unlike Dr. Fino, Dr. Basheda indicated the January 21, 2020 study demonstrated acceptable and reproduceable results. *Id.* at 14.

When weighing pulmonary function studies, the ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, 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 fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). In the absence of evidence to the contrary, compliance with the [quality standards in] Appendix B shall be presumed." 20 C.F.R. §718.103(c). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

[13] The qualifying values for a sixty-three-year-old man, 67.7 inches in height, are an FEV1 of 1.82, an FVC of 2.34, and an MVV of 73. Appendix B of 20 C.F.R. Part 718.

[14] Dr. Fino indicated Claimant did not give "valid effort" in the February 19, 2019 study. Director's Exhibit 21 at 10. He found the August 21, 2019 study invalid because of "premature termination to exhalation and a lack of reproducibility in the expiratory tracings" and "lack of abrupt onset of exhalation." Director's Exhibit 21 at 8; Employer's Exhibit 4 at 9-10. Dr. Fino further found the January 21, 2020 pulmonary function study was invalid because Claimant did not give "a maximum effort, did not force air out." Employer's Exhibit 4 at 11-12. He also opined the December 10, 2020 pre-bronchodilator study did not show "maximum effort." Employer's Exhibit 4 at 12.

While the ALJ addressed conflicting evidence regarding whether the February 19, 2019 study is valid,[15] he failed to address such evidence regarding the August 21, 2019, January 21, 2020, and December 10, 2020 studies. Because the ALJ failed to address whether these studies are in substantial compliance with the quality standards and thus can be relied upon as probative evidence, we vacate his findings regarding these studies.[16] *See* 20 C.F.R. §718.103(c); *Keener*, 23 BLR at 1-237; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). Therefore, we also vacate the ALJ's finding that a preponderance of pulmonary function study evidence does not support total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 16.

Medical Opinions

The ALJ considered the medical opinions of Drs. Raj, Fino, and Basheda. Decision and Order at 16-17. Drs. Fino and Basheda opined Claimant is not totally disabled and capable of performing his usual coal mine employment based on the non-qualifying arterial blood gas studies and valid, non-qualifying pulmonary function studies.[17] Director's Exhibit 21; Employer's Exhibits 2, 4. Dr. Raj, the Department of Labor (DOL) examining physician, provided in his initial report that Claimant was disabled based on the qualifying pulmonary function study in his examination which demonstrated moderate obstruction, and he opined Claimant would be unable to perform his usual coal mine employment based

[15] We affirm, as unchallenged on appeal, the ALJ's finding that both Drs. Gaziano's and Fino's opinions regarding the validity of the February 19, 2019 study were conclusory and thus that the study is valid. *Skrack*, 6 BLR at 1-711; Director's Exhibits 17, 21; Decision and Order at 16.

[16] It is unclear whether the January 3, 2019 and January 21, 2020 studies Dr. Forehand administered were obtained in the course of litigation or treatment. Director's Exhibit 19; Claimant's Exhibit 4. The quality standards do not apply to pulmonary function studies conducted as part of Claimant's treatment; rather, the ALJ must determine whether they are sufficiently reliable to support a finding of total disability. 20 C.F.R. §§718.101, 718.103; 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010). Thus, the ALJ should determine if these studies were obtained for litigation or in the course of treatment.

[17] We note both doctors reference a valid, non-qualifying study dated April 2, 2018. Director's Exhibit 21; Employer's Exhibits 2, 4. However, as the ALJ notes, this study was not designated as evidence. Decision and Order at 11; Employer's Evidence Summary Form; Claimant's Evidence Summary Form.

on his "reduced physical capacity." Director's Exhibit 14. Thereafter, the claims examiner requested that Dr. Raj provide a supplemental opinion after addressing additional evidence, including Dr. Fino's report and testing, as well as the January 3, 2019 pulmonary function study. Director's Exhibit 24. In response, Dr. Raj changed his opinion, indicating while the latest study obtained by Dr. Fino was abnormal and demonstrated moderate restriction, because it was non-qualifying he found Claimant not totally disabled. *Id.*

The ALJ found Drs. Fino's and Basheda's opinions that Claimant can perform his usual coal mine employment "weigh against" total disability, noting they understood the exertional requirement of Claimant's usual coal mine work. Decision and Order at 17. He found Dr. Raj's opinions to be inconsistent and equivocal and his supplemental report failed to address the appropriate standard when assessing total disability; thus, he provided Dr. Raj's opinion "diminished weight." *Id.* Therefore, the ALJ concluded the medical opinion evidence does not establish total disability under 20 C.F.R. §718.204(b)(2)(iv). *Id.*

All the physicians' opinions are at least partially based on pulmonary function study evidence, and it is unclear what credibility determinations the ALJ would make notwithstanding the experts' reliance on the various pulmonary function studies. *See* Director's Exhibits 17, 21, 24; Employer's Exhibits 2, 4. Thus, given the ALJ's errors in considering the pulmonary function study evidence, we also vacate his credibility findings regarding the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17. Therefore, we further vacate his finding that Claimant failed to establish total disability and the denial of benefits. 20 C.F.R. §718.204(b)(2); Decision and Order at 17-18.

Remand Instructions

The ALJ must reconsider whether Claimant established a totally disabling respiratory impairment. First, the ALJ must reconsider the pulmonary function study evidence and determine whether it supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i). Specifically, he must undertake a quantitative and qualitative analysis of the conflicting results and provide an adequate rationale for how he resolves the conflict in the evidence.[18] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016).

[18] Given the ALJ relied at least in part on recency in his weighing of the pulmonary function studies, we advise that the Fourth Circuit, within whose jurisdiction this case arises, has held it is irrational to credit evidence solely based on recency when a miner's condition improves. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins*

The ALJ must then reconsider the medical opinions to determine if they establish Claimant is totally disabled from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). The ALJ must evaluate the opinions in light of his finding that Claimant's usual coal mine employment required heavy exertion. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). In evaluating the medical opinions, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *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). If the ALJ determines total disability is demonstrated by the pulmonary function studies or medical opinions or both, he must weigh all the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232 (1987); *Shedlock*, 9 BLR at 1-198.

Moreover, if on remand the ALJ again finds that Dr. Raj, the DOL examining physician, did not address whether Claimant can perform the exertional requirements of his usual coal mine employment, Decision and Order at 17, then the ALJ should address whether the Director met his duty to provide Claimant with a complete pulmonary evaluation and thus whether remand to the district director is necessary. *See* 30 U.S.C. §923(b); 20 C.F.R. §§725.406, 725.456(e); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994); *see also Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640 (6th Cir. 2009) (DOL must provide a medical opinion that addresses "all of the essential elements of entitlement."). If the ALJ finds Dr. Raj's opinion meets the Director's duty to provide a complete pulmonary evaluation and again finds a preponderance of the evidence insufficient to establish total disability, he may reinstate his denial 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).

However, if the ALJ finds Claimant has established total disability, then he will have invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305. The ALJ must then determine whether Employer has rebutted it. *See* 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015).

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v. Director, OWCP, 958 F.2d 49, 51-52 (4th Cir. 1992); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 10 (June 27, 2023).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part, vacated in part, and remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge