U.S. Department of Labor

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

BRB No. 22-0406 BLA

ANDY YATES	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 11/21/2023
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Awarding Benefits (2020-BLA-06043) rendered on a subsequent claim filed on

October 28, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ first found Claimant did not establish complicated pneumoconiosis and therefore 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) (2018); 20 C.F.R. §718.304. She accepted the parties' stipulation that Claimant had 22.84 years of qualifying coal mine employment and determined he established a totally disabling respiratory or pulmonary impairment. Thus, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. The ALJ further found Employer did not rebut the presumption and thus awarded benefits.

On appeal Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[3] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

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[1] Claimant filed three prior claims that he withdrew. Director's Exhibits 1-3. Withdrawn claims are considered not to have been filed. 20 C.F.R. §725.306(b).

The district director denied Claimant's fourth claim, filed on June 28, 2017, for failing to establish total disability. Director's Exhibit 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 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); *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 prior claim for failure to establish total disability, he had to submit new evidence establishing this element in order to obtain review of his current claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 4.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 22.84 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

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.[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).

Invocation of the Section 411(c)(4) Presumption — Total Disability

To invoke the Section 411(c)(4) presumption, a claimant must establish the miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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.[5] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[6] pulmonary function or 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 weigh the 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 established total disability based on the medical opinion evidence and the evidence as a whole.[7] Decision and Order at 10.

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[4] 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); Hearing Transcript at 11; Director's Exhibit 7.

[5] We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine employment as a roof bolter required "moderate exertion." *See Skrack*, 6 BLR at 1-711; Decision and Order at 3-4.

[6] A "qualifying" pulmonary function study or blood gas study yields results that are 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 that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The ALJ correctly noted the pulmonary function study and arterial blood gas study evidence is not qualifying and there is no evidence Claimant suffers from cor pulmonale with right-sided congestive heart failure. Decision and Order at 9-10; Director's Exhibit 18. We therefore affirm her finding that Claimant did not establish total disability at 20

The ALJ considered Dr. Forehand's medical opinion that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10; Director's Exhibit 18. Dr. Forehand conducted the Department of Labor's complete pulmonary evaluation of Claimant on January 13, 2020. Director's Exhibit 18. He acknowledged the pulmonary function and blood gas studies obtained in his examination were non-qualifying. *Id.* at 3. But he found a "significant respiratory impairment" due to the "extent of the damage from the fibrotic reaction to [Claimant's] lungs, visible on the x-ray of his chest [taken on January 13, 2020, showing complicated coal workers' pneumoconiosis with progressive fibrosis] which prevents him from returning to his last coal mining job." *Id.* at 4-5. The ALJ found Dr. Forehand's opinion well-reasoned and well-documented, noting he had access to a "multitude of information," including Claimant's work and social histories, his physical examination of Claimant, and the objective test results. Decision and Order at 10. Therefore, she accorded his opinion "significant probative weight" and found the medical opinion evidence supportive of total disability. *Id.*

Employer contends the ALJ failed to adequately explain how Dr. Forehand's opinion could be accorded weight when it was based entirely on an x-ray reading finding complicated pneumoconiosis and the ALJ found complicated pneumoconiosis was not established. Employer's Brief at 5-10. We agree.

As Employer argues, while the ALJ found simple clinical pneumoconiosis present, she found the evidence insufficient to establish complicated pneumoconiosis. Decision and Order at 6. Further, the record reflects that Dr. Forehand relied on Dr. DePonte's reading of the January 13, 2020 x-ray, which she interpreted as positive for complicated pneumoconiosis. Director's Exhibit 18 at 4-5. In his opinion regarding total disability, Dr. Forehand stated there is a "statutory totally and permanently disabling respiratory impairment (20 [C.F.R. §]718.304)" present, which is the regulation implementing the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), based on a finding of complicated pneumoconiosis. *Id.* at 4. Again, Dr. Forehand explained that Claimant is prevented from returning to his last coal mining job because of the "extent of the damage from the fibrotic reaction to [Claimant's] lungs" visible on the January 13, 2020 x-ray that Dr. DePonte read as showing complicated coal workers' pneumoconiosis. *Id.* at 4-5.

Further, while the ALJ found Dr. Forehand's opinion well-documented and reasoned given he considered a significant amount of information, including the objective testing, the ALJ did not indicate how such other information supported the doctor's opinion

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C.F.R. §718.204(b)(2)(i)-(iii). *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000).

that Claimant had a totally disabling respiratory impairment beyond the January 13, 2020 x-ray interpreted as showing complicated pneumoconiosis. Decision and Order at 10. As Employer argues, while Dr. Forehand's examination included objective testing, the doctor concluded the testing was normal. Director's Exhibit 18 at 3 (providing the pulmonary function study demonstrated a "normal ventilatory pattern" and the blood gases showed no hypoxemia); Employer's Brief at 9.

Based on the foregoing, the ALJ erred in crediting Dr. Forehand's total disability opinion as well-reasoned and documented without considering the bases underlying his opinion.[8] *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761-62 (4th Cir. 1999); *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); Decision and Order at 10.

Thus, we vacate the ALJ's determination that Claimant established total disability by the medical opinion evidence and thus based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 10. Therefore, we must also vacate the invocation of the Section 411(c)(4) presumption and award of benefits. 20 C.F.R. §718.305; Decision and Order at 10, 13.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2). She must reconsider whether Dr. Forehand's opinion supports total disability at 20 C.F.R. §718.204(b)(2)(iv), particularly considering his reliance on Dr. DePonte's interpretation of the January 13, 2020 x-ray showing complicated pneumoconiosis. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997). The ALJ must address whether, and to what extent, she finds that Dr. Forehand's disability opinion is based on a diagnosis of complicated pneumoconiosis. *See Hicks*, 138 F.3d at 532; *Akers*, 131 F.3d at 441. If she determines Dr. Forehand's opinion does not rely solely on a diagnosis of complicated pneumoconiosis, the ALJ must address whether Dr. Forehand's opinion supports a finding that Claimant's impairment precludes him from performing the exertional requirements of

[8] A medical opinion finding total disability relying on non-qualifying objective evidence may be credited, provided that the ALJ determines the physician adequately explained how the objective studies support his or her opinion. *See Smith v. Director, OWCP*, 8 BLR 1-258, 1-261 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985).

his last coal mine job.[9] *See* 20 C.F.R. §718.204(b)(2)(iv); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995); *Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991).

In rendering her credibility findings, the ALJ must consider the physician's qualifications, the explanations for his diagnoses, the documentation underlying his medical judgments, and the sophistication of, and bases for, his diagnoses. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441-42.

If Claimant establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must also reweigh the evidence as a whole and determine whether Claimant has established total disability and thus invoked the Section 411(c)(4) presumption. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198. If the ALJ again finds Claimant established total disability and thus invoked the presumption, she may reinstate the award of benefits, as Employer has not challenged the ALJ's finding that Employer failed to rebut the presumption. *See* 20 C.F.R. §718.305(d); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13.

Alternatively, if the ALJ finds Claimant is not totally disabled, she must deny benefits as Claimant will have failed to establish an essential element of entitlement. *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).

In rendering her findings on remand, the ALJ must explain the bases for all of her credibility determinations, findings of fact, and conclusions of law as the Administrative Procedure Act requires.[10] 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).

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[9] We also note that, to the extent the ALJ credited Dr. Forehand's statement that Claimant should not return to work in the mines to avoid further damage to his lungs from additional coal dust exposure, Director's Exhibit 18 at 4, such a recommendation on its own is insufficient to support a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989) (recommendation against further dust exposure is not a diagnosis of total respiratory or pulmonary disability); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

[10] The Administrative Procedure Act provides that 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).

Accordingly, the ALJ's Decision and Order Awarding 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

MELISSA LIN JONES
Administrative Appeals Judge