U.S. Department of Labor

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

BRB No. 22-0120 BLA

ROBERT D. PEASE, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	
	)	
and	)	DATE ISSUED: 10/31/2022
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2019-BLA-05566) rendered on a claim filed on March 16, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had 19.92 years of underground coal mine employment. However, she found Claimant did not establish a totally disabling pulmonary or respiratory impairment, and therefore could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. She also 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. Because Claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability, and therefore erred in finding he did not invoke the Section 411(c)(4) presumption.[2] Employer and its Carrier (Employer) respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

[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).

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 19.92 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

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 - Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. *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 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 the pulmonary function studies, arterial blood gas studies, and medical opinions do not establish total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 7 n.7, 9, 15. She therefore found the evidence as a whole does not establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 16.

Claimant contends the ALJ erred in weighing the conflicting medical opinions.[4] Claimant's Brief at 3-7. Claimant's contention, in part, has merit.

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine work. Based on Claimant's hearing testimony and CM-913 Description of Coal Mine Work form dated February 18, 2018, the ALJ noted the duties of Claimant's last coal mine job as a "mechanic/electrician" required him "to move heavy objects weighing up to hundreds of pounds by manual labor, lifting 10-50 pounds multiple times per day and repair mining equipment." Decision and Order at 5

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] We affirm, as unchallenged, the ALJ's findings that the pulmonary function and arterial blood gas studies do not establish total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 7 n.7, 9.

(citing Director's Exhibit 4; Hearing Tr. at 13-15). Consequently, she found Claimant's usual coal mine work required heavy labor. *Id.* As no party challenges this finding, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ then considered Drs. Posin's and Zlupko's medical opinions that Claimant is totally disabled by a respiratory or pulmonary impairment and Drs. Basheda's and Rosenberg's medical opinions that he is not. Decision and Order at 10-15; Director's Exhibits 12, 17; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 4, 5, 6. She found Drs. Basheda's and Rosenberg's opinions well-documented and well-reasoned, Dr. Posin's opinion documented and adequately-reasoned, and Dr. Zlupko's opinion poorly-documented and poorly-reasoned as he failed to identify Claimant's usual coal mine work and the exertional requirements of that job. Decision and Order at 14-15. Further, she found Drs. Basheda's and Rosenberg's qualifications superior to those of Drs. Posin and Zlupko. *Id.* at 14. Thus she concluded the medical opinions do not establish a totally disabling respiratory or pulmonary impairment. *Id.* at 15.

The ALJ erred in discrediting Dr. Zlupko's opinion for failing to identify the exertional requirements of Claimant's usual coal mine work. Claimant's Brief at 5-6. In his initial Department of Labor-sponsored complete pulmonary evaluation report, Dr. Zlupko opined Claimant has a moderate pulmonary function impairment and would not be able to perform his last coal mine job due to his impairment. Director's Exhibit 13. In his supplemental report, he noted Claimant "worked at the face as a mechanic" and also "worked a continuous miner, was a roof bolter, and worked the shuttle cars." Director's Exhibit 18. He stated "[a]ll of these jobs require a certain amount of physical activity." *Id.* Further, he opined Claimant would be unable to perform his previous coal mine work because he has "a mild obstructive ventilatory impairment on pulmonary function testing" and "his arterial [blood gas study] PO2" results dropped "by 18 mm during the exercise phase of his test." *Id.* The ALJ acknowledged "Dr. Zlupko pointed to specific data to support his conclusion," but found the doctor "did not indicate that he knew what Claimant's last mining position was, or [its] exertional requirements or what kind of workload it entailed." Decision and Order at 14.

A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer 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 may be 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."); *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). In determining whether a miner is totally disabled, the ALJ must compare the exertional requirements of the miner's usual coal mine work with a physician's description of the miner's pulmonary impairment and physical limitations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000).

The ALJ considered the exertional requirements of Claimant's usual coal mine work as a mechanic and found they required hard labor based, in part, on Claimant's Form CM-913. Decision and Order at 5. However, she erred in not comparing those exertional requirements with Dr. Zlupko's assessment of Claimant's pulmonary impairment to determine whether the evidence establishes total respiratory disability. *See Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Further, contrary to the ALJ's finding, Dr. Zlupko correctly recognized Claimant's last coal mine job was as a mechanic. Director's Exhibit 18. As discussed above, the ALJ's exertional requirements finding was based, in part, on Claimant's Form CM-913, which listed the duties in his last coal mine job as a mechanic "[a]t the face area" and his use of a continuous miner, roof bolter, shuttle cars, and track rovers. Director's Exhibit 4. Dr. Zlupko indicated, in his supplemental report, that he reviewed Claimant's Form CM-913, as he noted Claimant "worked at the face as a mechanic" and listed his use of a "continuous miner," "roof bolter," and "shuttle cars." Director's Exhibit 18. He also determined Claimant's last coal mine job as a mechanic required "a certain amount of physical activity" and Claimant would not be able to perform it. *Id.* Thus Dr. Zlupko's opinion provides sufficient information from which the ALJ may reasonably infer Claimant is unable to do his usual coal mine work. *See Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52.

Because the ALJ's credibility findings with respect to Dr. Zlupko's opinion are inconsistent with applicable law and not supported by substantial evidence, we vacate her finding that Claimant failed to establish total disability and remand the case for further consideration of the medical opinion evidence. *See* 20 C.F.R. §718.204(b)(2)(iv); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 15. We therefore also vacate her finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) and invocation of the Section 411(c)(4) presumption.

Remand Instructions

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must first address whether Dr. Zlupko's opinion is reasoned and documented. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155. If she finds it is reasoned and documented, his opinion supports Claimant's burden of establishing total disability. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155. She must then evaluate the medical opinions of Drs. Zlupko, Posin, Basheda and Rosenberg, and determine whether Claimant has established total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2)(iv). She should compare the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. *Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *Cornett*, 227 F.3d at 578; *Ward*, 93 F.3d. at 218-19.

When weighing the medical opinions, the ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155. She must also explain her findings in accordance with the Administrative Procedure Act.[5] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If Claimant establishes total disability based on the medical opinions, the ALJ should then weigh all of the relevant evidence together to determine whether he has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, and thereby invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305. If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[5] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge