U.S. Department of Labor

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

BRB Nos. 21-0247 BLA
and 21-0248 BLA

WANDA LEMARR (Widow of and o/b/o FLOYD LEMARR)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 4/11/2022
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits in Miner's Claim and in Survivor's Claim of Monica Markley, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Catherine Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor).

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits in Miner's Claim and in Survivor's Claim (2018-BLA-05943 and 2019-BLA-05503) rendered on a subsequent miner's claim[1] filed on August 24, 2015, and a survivor's claim filed on September 25, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act).[2]

The ALJ credited the Miner with 19.75 years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant[3] invoked 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),[4] in the miner's claim and thus demonstrated a change in an applicable condition of entitlement.[5] She further found Employer failed to rebut the presumption and

---

[1] The Miner filed three prior claims. On September 21, 1992, the district director denied his initial claim, filed on June 5, 1992, because he failed to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. The Miner withdrew his second and third claims, and thus they are considered not to have been filed. 20 C.F.R. §725.306(b); MC Director's Exhibits 2, 3.

[2] We have consolidated for decision Employer's appeals of the awards in the miner's and the survivor's claims.

[3] Claimant is the widow of the Miner, who died on January 21, 2016. MC Director's Exhibit 14. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's total disability (in a miner's claim) and death (in a survivor's claim) were due to pneumoconiosis if he had 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.

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also 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.

awarded benefits in both claims, determining that Claimant was entitled to derivative survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6]

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. As to the merits, Employer argues the ALJ erred in evaluating the pulmonary function study and medical opinion evidence and thus erred in finding the presumption invoked and not rebutted. Thus, Employer argues the ALJ erred in awarding benefits in the miner's claim, and in finding automatic entitlement established in the survivor's claim. Claimant responded, urging affirmance of both awards. The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Benefits Review Board to reject Employer's constitutional challenges to the Section 411(c)(4) presumption.[7]

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 with applicable law.[8] 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).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act

---

§725.309(c)(3). The district director denied the Miner's prior claim because he did not establish any element of entitlement; therefore, Claimant had to submit new evidence establishing at least one of the elements of entitlement in order to have the miner's claim reviewed on the merits. 20 C.F.R. §725.309(c).

[6] Under Section 422(*l*) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[7] We affirm, as unchallenged on appeal, the ALJ's findings of 19.75 years of underground coal mine employment and a smoking history of approximately 50 pack-years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7.

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Tennessee. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 6-7; Hearing Transcript at 29.

(ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 4-6. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

The Miner's Claim

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 and gainful work. *See* 20 C.F.R. §718.204(b)(1). 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.[9] 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.*, 9 BLR 1-27, 1-28-29 (1988); *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 pulmonary function study and medical opinion evidence and the evidence overall. Decision and Order at 16, 18.

Pulmonary Function Study Evidence

The record contains one pulmonary function study, dated October 13, 2015, submitted with the Miner's subsequent claim. Applying the Miner's measured height at the time of the study and the table values for a 71 year-old male at 20 C.F.R. Part 718, Appendix B,[10] the ALJ found the FEV1 and MVV values were qualifying pre-

[9] The ALJ found Claimant did not establish total disability based on the blood gas study evidence and found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 16.

[10] The Miner was 72 years old when the study was conducted and the table values at 20 C.F.R. Part 718, Appendix B, do not go beyond 71 years of age.

bronchodilator but non-qualifying post-bronchodilator.[11] MC Director's Exhibit 17. Having discredited Dr. Rosenberg's extrapolation of Appendix B values to account for the Miner's age[12] and relying on the qualifying pre-bronchodilator values, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 16.

On appeal, Employer argues the ALJ erred in not applying Dr. Rosenberg's extrapolated values and failing to adequately explain why the pre-bronchodilator values are more reliable for assessing the Miner's respiratory disability. Employer's Brief at 6-7. We disagree.

Although an ALJ may use extrapolated values to determine a miner's disability when he is over the age of 71, the medical evidence must support the extrapolation. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008) (absent contrary probative evidence, the values for a 71-year-old miner listed in Appendix B of the regulations should be used to determine if miners over the age of 71 qualify as totally disabled). Here, the ALJ permissibly found Dr. Rosenberg did not adequately explain how he reached his calculations. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 16; MC Employer's Exhibit 1. Moreover, Employer has not explained any adverse consequences of its alleged error as the Miner's pre-bronchodilator FEV1 results are qualifying based on either the Appendix B table values for a 71-year-old male or Dr. Rosenberg's extrapolated value. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any

---

[11] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at Appendix B for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[12] Dr. Rosenberg stated:

> One should appreciate that based on a height of 69 inches and age 71, the qualifying FEV1 for a height of 69.3 inches (close[s]t value in the D.O.L. table) is 1.82 liters, and the qualifying FVC is 2.35 liters. However, because age directly affects the qualifying levels and the D.O.L. has not extended the table beyond 71 years, with [the Miner's] pulmonary function tests being performed at age 72, the qualifying FVC would be reduced to 2.33 liters, and the qualifying FEV1 would be 1.80 liters.

MC Employer's Exhibit 1 at 5.

difference”); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); MC Director’s Exhibit 17.

In addition, Dr. Rosenberg did not provide an extrapolated MVV value to counter the Appendix B table value for a qualifying MVV.[13] Therefore, we reject Employer’s arguments regarding Dr. Rosenberg’s opinion.

Next, we also find no error in the ALJ’s reliance on the qualifying pre-bronchodilator values over the non-qualifying post-bronchodilator values. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating “the use of a bronchodilator does not provide an adequate assessment of the miner’s disability, [although] it may aid in determining the presence or absence of pneumoconiosis.”); *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 15-16; MC Director’s Exhibit 17. We therefore affirm the ALJ’s finding that Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinion Evidence/Evidence as a Whole

The ALJ considered three medical opinions when assessing the Miner’s total disability. Dr. Marantz conducted the Department of Labor complete pulmonary evaluation on October 13, 2015, and opined the Miner was totally disabled based on the qualifying pre-bronchodilator values Claimant achieved during his pulmonary function testing. MC Director’s Exhibit 68 at 2. Dr. Basheda reviewed the Miner’s medical records on May 3, 2017, and opined the Miner had not been properly treated for his airway diseases and is not totally disabled, relying on non-qualifying post-bronchodilator results from Dr.

[13] Total disability may be established based on pulmonary function studies showing a forced expiratory volume in one second (FEV1) value that is equal to or less than those listed in Table B1 (Males), Appendix B, 20 C.F.R. Part 718, “for an individual of the miner’s age, sex, and height,” if such tests also show either a forced vital capacity (FVC) or maximum voluntary ventilation (MVV) value that is equal to or less than the applicable table values, or an FEV1/FVC ratio of fifty-five percent or less. *See* 20 C.F.R. §718.204(b)(2)(i). The Miner’s pre-bronchodilator FEV1 value was 1.68 which is both below the FEV1 table value of 1.82 and Dr. Rosenberg’s extrapolated value of 1.80. MC Director’s Exhibit 17; MC Employer’s Exhibit 1 at 5. The Miner’s pre-bronchodilator MVV value was 48, which is below the table value of 73 and Dr. Rosenberg provided no extrapolated MVV value to contradict the table value. *Id.*

Marantz's October 13, 2015 pulmonary function study.[14] MC Director's Exhibit 28 at 13. Dr. Rosenberg reviewed the Miner's medical records on December 5, 2018, and opined his pulmonary function study did not show total disability based on extrapolated values, as previously discussed, and his blood gas studies were preserved with no gas exchange abnormality. MC Employer's Exhibit 1 at 5-6.

The ALJ gave "significant weight" to Dr. Marantz's opinion, finding it "well-reasoned and supported by the objective medical evidence." Decision and Order at 17. She gave less weight to Drs. Basheda's and Rosenberg's opinions because they did not adequately address the Miner's qualifying pre-bronchodilator study. *Id.* at 18.

Employer generally asserts the ALJ erred in rejecting the opinions of Drs. Basheda and Rosenberg on total disability, reiterating its challenges to the ALJ's weighing of the pulmonary function study evidence, which we have rejected. We therefore affirm the ALJ's finding that Claimant established the Miner's total disability at 20 C.F.R. §718.204(b)(2)(iv). We further affirm, as supported by substantial evidence, the ALJ's overall finding that Claimant established the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death and thereby invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[15] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as

---

[14] Dr. Marantz disagreed with Dr. Basheda that disability should be assessed based on the "best" spirometry because that was a concept used in Social Security Administration cases but not in federal black lung claims. MC Director's Exhibits 28 at 13; 68 at 2.

[15] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[16]

Legal Pneumoconiosis

To prove the Miner did not have legal pneumoconiosis, Employer must establish he did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, requires Employer establish the Miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Basheda and Rosenberg. Employer's Brief at 8-11. Both physicians concluded the Miner's respiratory impairment was due to tobacco-induced chronic obstructive pulmonary disease/asthma. MC Director's Exhibit 28 at 11, 12-13; MC Employer's Exhibit 1 at 5-6. Employer recites various portions of Drs. Basheda's and Rosenberg's medical opinions and asserts the ALJ did not give proper reasons for rejecting them in favor of Dr. Marantz's view that both smoking and coal mine dust exposure contributed to the Miner's totally disabling pulmonary condition.[17] *See* Employer's Brief at 8-11. We disagree.

As the ALJ noted, in opining the Miner did not have legal pneumoconiosis, both Dr. Basheda and Dr. Rosenberg relied on the fact the Miner's respiratory or pulmonary impairment developed and progressed after he left the mines. Decision and Order at 22-23; MC Director's Exhibit 28 at 12; MC Employer's Exhibit 1 at 6. The ALJ permissibly found that even if that fact was true, they expressed opinions that are inconsistent with the regulations which recognize that pneumoconiosis is "a latent and progressive disease which

---

[16] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 20.

[17] Because Employer bears the burden of proof on rebuttal and having affirmed the ALJ's discrediting of its experts, we need not address Employer's contentions regarding the weight the ALJ accorded Dr. Marantz's opinion that the Miner had legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 23-24; Employer's Brief at 8; MC Director's Exhibits 17, 24, 68.

may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Young*, 947 F.3d at 408; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-40 (6th Cir. 2014); C*umberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012); Decision and Order at 22-23; MC Director's Exhibit 28 at 12; MC Employer's Exhibit 1 at 6.

Moreover, the ALJ found neither physician addressed why the effects of the Miner's coal mine dust exposure were not additive to his respiratory impairment even if it was primarily caused by smoking.[18] *See* 65 Fed. Reg. at 79,940; Decision and Order at 22-23; MC Director's Exhibit 28; MC Employer's Exhibit 1. Thus, we affirm the ALJ's permissible finding that neither Dr. Basheda nor Dr. Rosenberg adequately explained why coal mine dust exposure did not significantly contribute to or substantially aggravate the Miner's respiratory or pulmonary impairment. *See Banks*, 690 F.3d at 489; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 23; MC Director's Exhibit 28; MC Employer's Exhibit 1.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do.[19] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's determination that Employer did not disprove the existence of legal pneumoconiosis.[20] 20 C.F.R. §718.305(d)(1)(i).

---

[18] While Employer asserts that Drs. Basheda and Rosenberg "considered the additive effects" of the Miner's coal mine dust exposure, it does not identify where the physicians discussed aggravation in their reports and merely reiterates their view that coal mine dust exposure did not *cause* the impairment. Employer's Brief at 8-9.

[19] Because the ALJ provided valid reasons for according less weight to the opinions of Drs. Basheda and Rosenberg at legal pneumoconiosis, we need not address Employer's additional allegations of error regarding the ALJ's consideration of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[20] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B).

Disability Causation

To disprove disability causation, Employer must establish "no part of the [m]iner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). The ALJ permissibly found the opinions of Drs. Basheda and Rosenberg on the cause of the Miner's respiratory disability unpersuasive because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 25; MC Director's Exhibit 28; MC Employer's Exhibit 1. Thus, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory impairment was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24-26. We therefore affirm the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption, and we affirm the award of benefits in the Miner's claim.

The Survivor's Claim - Derivative Entitlement

The ALJ found Claimant entitled to survivor's benefits based on the award in the Miner's claim pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018), and on invocation of the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, which Employer did not rebut. Decision and Order at 26-28. Employer raises no specific error with regard to these findings. Employer's Brief at 11. Having affirmed the ALJ's award of benefits in the miner's claim, we affirm her determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 27-28.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in Miner's Claim and in Survivor's Claim.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge