U.S. Department of Labor

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

BRB Nos. 21-0437 BLA
and 22-0025 BLA

JANICE COLLINS (o/b/o and Widow of HURLEY C. COLLINS) Claimant-Respondent v. CLINCHFIELD COAL COMPANY/ PITTSON COMPANY and c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 8/15/2022 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Dana Rosen and Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judges, United States Department of Labor.

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

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order on Remand Awarding Benefits (2016-BLA-05282) and ALJ Theodore W. Annos's Decision and Order Awarding Benefits (2021-BLA-05217) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on June 3, 2014,[1] which is before the Benefits Review Board for the second time, and a survivor's claim filed on November 18, 2020.

In her initial Decision and Order Awarding Benefits in the miner's claim, ALJ Rosen credited the Miner with thirty 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, she found he established a change in an applicable condition of entitlement[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, the Board affirmed ALJ Rosen's findings that the Miner had thirty years of underground coal mine employment and was totally disabled and therefore invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. *Collins v. Clinchfield Coal Co.*, BRB No. 19-0079 BLA, slip op. at 2 n.4 (Feb.

---

[1] The Miner filed two prior claims. Director's Exhibits 1, 2. The district director denied the more recent of those claims, filed on June 1, 1995, because he failed to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 2.

[2] Where 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)(1); *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 Miner did not establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id.*

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled 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.

11, 2020) (unpub.). The Board vacated, however, her conclusion that Employer failed to rebut the presumption of pneumoconiosis because she did not consider relevant evidence and because she made credibility findings inconsistent with applicable law on the issues of clinical and legal pneumoconiosis. *Id.* at 3-6; 20 C.F.R. §718.305(d)(1)(i). Having vacated ALJ Rosen's findings that Employer failed to rebut the existence of both legal and clinical pneumoconiosis, the Board also vacated her determination that Employer failed to establish no part of the Miner's total disability was caused by pneumoconiosis. *Collins*, BRB No. 19-0079 BLA, slip op. at 7-8; C.F.R. §718.305(d)(1)(ii). Thus, the Board remanded the miner's claim and instructed ALJ Rosen to reconsider the issue of rebuttal of the Section 411(c)(4) presumption. *Collins*, BRB No. 19-0079 BLA, slip op. at 8-9. Subsequently, the Board denied Employer's motion for reconsideration. *Collins v. Clinchfield Coal Co.*, BRB No. 19-0079 BLA (May 27, 2020) (unpub. Order).

While the miner's claim was pending on remand, the Miner died on November 7, 2020. Survivor's Claim (SC) Director's Exhibit 4. Claimant, the Miner's widow, indicated she would pursue his claim on behalf of his estate. She also separately filed a survivor's claim.

On remand, ALJ Rosen again found Employer failed to rebut the Section 411(c)(4) presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, ALJ Annos determined Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

On appeal, Employer asserts ALJ Rosen erred in finding it failed to rebut the Section 411(c)(4) presumption in the miner's claim. Neither Claimant nor the Director, Office of Workers' Compensation Programs (Director), has filed a response brief in the miner's claim. With respect to the survivor's claim, Employer argues ALJ Annos erred in finding Claimant derivatively entitled to survivor's benefits. Claimant has not filed a response in the survivor's claim. The Director responds and argues Claimant is derivatively entitled to survivor's benefits.[5]

[4] Under Section 422(*l*) of the Act, a 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 the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[5] The Board consolidated Employer's appeals in the miner's and survivor's claims for purposes of decision only. *Collins v. Clinchfield Coal Co.*, BRB No. 21-0437 BLA (June 14, 2022) (unpub. Order). The Board denied Employer's motion to hold the survivor's claim in abeyance. *Id.*

The Board's scope of review is defined by statute. We must affirm the ALJs' Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Miner's Claim - Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption in the miner's claim, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[7] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). ALJ Rosen found Employer failed to rebut the presumption by either method.

Clinical Pneumoconiosis

ALJ Rosen found the x-ray, computed tomography (CT) scan, medical opinion, and the Miner's treatment record evidence does not rebut the presumption of clinical pneumoconiosis. Decision and Order on Remand at 4-12. Employer argues ALJ Rosen erred in her evaluation of the x-ray and CT scan evidence.[8] Employer's Brief at 3-8. We disagree.

In consideration of Employer's prior appeal, the Board held ALJ Rosen properly performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the number of interpretations and the readers' qualifications when resolving the conflict in the x-ray readings. *Collins,* BRB No. 19-0079 BLA, slip op. at 5-6. Thus

---

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[7] "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). "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).

[8] As Employer does not challenge ALJ Rosen's finding that the medical opinion and the Miner's treatment record evidence is insufficient to rebut the presumption of clinical pneumoconiosis, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 5-12.

the Board affirmed her conclusion that the x-ray evidence does not rebut the presumption of clinical pneumoconiosis. *Id.* As the Board's holding on this issue constitutes the law of the case, and Employer has not shown that an exception to the doctrine applies here, we decline to address Employer's argument. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990).

Employer also argues ALJ Rosen did not adequately explain why she found the CT scan evidence does not rebut the presumption of clinical pneumoconiosis in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[9] Employer's Brief at 7-8. We disagree.

ALJ Rosen considered readings of six CT scans of the Miner's chest dated August 3, 2011, January 19, 2012, July 13, 2012, August 8, 2013, November 20, 2014, and October 2, 2017. Decision and Order on Remand at 4-6; Miner's Claim (MC) Director's Exhibits 12, 13; MC Employer's Exhibits 3, 7. She found the November 20, 2014 and October 2, 2017 CT scans neither confirm nor disprove clinical pneumoconiosis because the interpreting doctor for each identified pulmonary abnormalities but did not address the cause of these conditions. Decision and Order on Remand at 5-6. Employer does not challenge this finding. Thus we affirm it. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

The remaining CT scans include negative readings by Drs. Sargent and Fino. Dr. Sargent read the August 8, 2013 CT scan as negative for clinical pneumoconiosis, and Dr. Fino read the August 3, 2011, January 19, 2012, and July 13, 2012 CT scans as negative for the disease. Director's Exhibit 12; Employer's Exhibit 3. ALJ Rosen noted Dr. Fino is a B reader and Dr. Sargent has no demonstrable radiological qualifications of record. Decision and Order on Remand at 5. Contrary to Employer's argument, ALJ Rosen permissibly found the positive x-ray readings from Drs. Wolfe, DePonte, and Alexander outweigh the negative CT scan readings of Drs. Fino and Sargent because of the better qualifications of Drs. Wolfe, DePonte, and Alexander as dually-qualified B readers and Board-certified radiologists. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order on Remand at 5.

Because we can discern ALJ Rosen's rationale underlying her credibility findings, we are not persuaded by Employer's argument that her CT scan findings do not satisfy the APA. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012)

---

[9] 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).

(if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation under the APA is satisfied). Employer generally argues that Drs. Fino and Sargent are more qualified than Drs. Wolfe, DePonte, and Alexander and thus ALJ Rosen should have found the negative CT scan evidence outweighs the positive x-ray evidence. Employer's Brief at 7-8. Its argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As Employer raises no further argument on this issue, we affirm ALJ Rosen's finding that Employer did not disprove the presumed existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order on Remand at 12. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

ALJ Rosen next addressed whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). We disagree with Employer's argument that she did not explain her basis for finding the opinions of Drs. Sargent and Fino not credible on the issue of total disability due to clinical pneumoconiosis. Employer's Brief at 21-22.

With respect to Dr. Sargent, ALJ Rosen noted the doctor excluded total disability due to clinical pneumoconiosis because he assumed "the x-ray evidence in this claim [does] not support a finding of clinical pneumoconiosis." Decision and Order on Remand at 13-14; *see* MC Director's Exhibit 12. Because this is contrary to ALJ Rosen's finding that the x-ray evidence is positive for clinical pneumoconiosis, she permissibly discredited his opinion. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order on Remand at 13-14.

In weighing Dr. Fino's disability causation medical opinion, ALJ Rosen noted the doctor cited medical studies indicating that if a miner "has a negative chest x-ray, or even a 1/0 chest x-ray, there will only be a [seven percent] additional loss of FEV1 [on pulmonary function testing] due to coal [mine] dust" as a basis to opine the Miner's total

[10] Because ALJ Rosen's determination that Employer did not disprove clinical pneumoconiosis precludes a finding that the Miner did not have pneumoconiosis, we need not address Employer's argument that she erred in finding it failed to disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

disability was unrelated to pneumoconiosis. Decision and Order on Remand at 14; *see* Employer's Exhibit 3 at 10. ALJ Rosen permissibly found this reasoning unpersuasive because Dr. Fino did not explain how these general statistics "applied to the specific facts of this case." Decision and Order on Remand at 14; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Because it is supported by substantial evidence, we affirm ALJ Rosen's determination that Employer failed to prove that no part of the Miner's total disability was caused by clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 13-14. We therefore affirm the award of benefits in the miner's claim.

The Survivor's Claim

Based on the award of benefits in the miner's claim, ALJ Annos found Claimant satisfied her burden to establish each fact necessary to demonstrate entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Survivor's Claim Decision and Order at 4.

Employer contends ALJ Annos erred in determining that Claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*) because the miner's award of benefits was not final and effective. SC Employer's Brief at 25-26. The Board has previously rejected this argument, holding an award of benefits in a miner's claim need not be final or effective for a claimant to receive benefits under Section 932(*l*). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). For the reasons set forth in *Rothwell*, we reject Employer's argument. Because we have affirmed the award of benefits in the miner's claim, we affirm ALJ Annos's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*).[11] 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[11] Employer's argument that ALJ Annos should have held the survivor's claim in abeyance pending resolution of its appeal in the miner's claim is therefore rendered moot. SC Employer's Brief at 24.

Accordingly, ALJ Rosen's Decision and Order on Remand Awarding Benefits and ALJ Annos's Decision and Order Awarding Benefits are affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge