U.S. Department of Labor

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

BRB Nos. 23-0121 BLA
and 23-0123 BLA

PEGGY I. WEBBER (o/b/o and Widow of EDDIE WEBBER) Claimant-Respondent v. CONSOLIDATION COAL COMPANY and CONSOL ENERGY, INCORPORATED Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/07/2024 DECISION and ORDER

Appeal of December 13, 2022 Decision and Order Awarding Benefits and December 16, 2022 Decision and Order Awarding Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Sean M. Ramaley's December 13, 2022 Decision and Order Awarding Benefits in a miner's claim and December 16, 2022 Decision and Order Awarding Benefits in a survivor's claim (2021-BLA-05609 and 2019-BLA-05965) filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim[1] filed on December 13, 2017, and a survivor's claim filed on August 23, 2018.[2]

The ALJ credited the Miner with twenty-four years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant 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). He further found Employer did not rebut the presumption and awarded benefits in the miner's claim. In the survivor's claim, he determined that because the Miner was entitled to benefits at the time of his death, Claimant is automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act,[4] 30 U.S.C. §932(*l*) (2018).

[1] Claimant is the widow of the Miner, who died on June 1, 2018. Miner's Claim (MC) Director's Exhibit 10; Survivor's Claim (SC) Director's Exhibit 13. She is pursuing the miner's claim on her husband's behalf and also is pursuing her own survivor's claim.

[2] Employer's appeal in the miner's claim was assigned BRB No. 23-0121 BLA, and its appeal in the survivor's claim was assigned BRB No. 23-0123 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

[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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Alternatively, Employer argues the ALJ erred in finding it did not rebut the presumption.[5] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[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, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable 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. 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.*, 12 BLR 1-27, 1-28-29 (1988); *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).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had twenty-four years of surface coal mine employment in conditions substantially similar to those in an underground mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6.

[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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibits 3, 6, 7.

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 5-12.

Employer does not challenge the ALJ's finding that the pulmonary function study evidence establishes total disability. *See* 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 23. Thus, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Medical Opinions

The ALJ considered the medical opinions of Drs. Perper, Green, Farney, and Vey.[8] Decision and Order at 25-26; Miner's Claim (MC) Director's Exhibits 12, 14, 21, 36; MC Employer's Exhibits 1, 2; MC Claimant's Exhibit 1. Drs. Perper and Green opined the Miner had a totally disabling pulmonary or respiratory impairment. MC Claimant's Exhibit 1 at 7; MC Director's Exhibit 12 at 29; MC Employer's Exhibit 1 at 19. Dr. Farney opined the Miner was "totally and permanently disabled from performing his physically strenuous duties as a coal miner or similar work due to congestive heart failure." MC Employer's Exhibit 1 at 17, 19. Dr. Vey opined the Miner was not "totally and permanently disabled from an intrinsic respiratory disease." MC Employer's Exhibit 2 at 55-56. The ALJ found Drs. Perper's and Green's opinions well-reasoned and documented, and Drs. Farney's and Vey's opinions not reasoned. Decision and Order at 26. He thus found the medical opinions support a finding of total disability. *Id.*

Employer contends the ALJ erred in crediting Dr. Perper's opinion without resolving the conflict between his diagnosis of a totally disabling respiratory or pulmonary impairment and Drs. Farney's and Vey's attribution of the Miner's pulmonary issues to his cardiac conditions. Employer's Brief at 21-23. In addition, Employer argues that Dr. Perper's opinion should be discredited because he diagnosed chronic obstructive

[7] The ALJ found Claimant did not establish total disability based on either the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 24.

[8] The ALJ also considered Dr. Bafakih's autopsy report and deposition testimony. Decision and Order at 9-11, 25. Dr. Bafakih opined that he was "not sure" how the Miner's pneumoconiosis would have affected his lung function. Director's Exhibit 19 at 32. We affirm as unchallenged the ALJ's finding that Dr. Bafakih's opinion is ambiguous on the issue of total disability. *Skrack*, 6 BLR at 1-711; Decision and Order at 25.

pulmonary disease (COPD) based on a pulmonary function study that revealed only restriction and not obstruction. Employer's Brief at 25.

Contrary to Employer's arguments, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

As we noted above, Employer does not challenge the ALJ's finding that the pulmonary function study evidence is qualifying[9] and establishes total disability. Whether the disabling impairment reflected by that testing was due to restriction or obstruction, or to a cardiac condition, is not relevant to determining whether the Miner is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Rather, Employer's arguments relate to the cause of the Miner's disability, not whether he suffered from a totally disabling respiratory or pulmonary impairment at all.

Given Dr. Perper's consideration of the Miner's occupational history, symptoms, physical examination, and objective testing,[10] the ALJ permissibly found his opinion reasoned and documented. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); Decision and Order at 25-26; Employer's Brief at 21-23, 25.

We also reject Employer's argument that the ALJ erred in finding Drs. Farney's and Vey's opinions not credible because, according to Employer, they "show[ed] why pneumoconiosis was not causing disability" and "explain[ed] why the [Miner's] longstanding and progressive cardiac disease caused acute and chronic respiratory or pulmonary impairment." Employer's Brief at 21-22, 24-26. Once again, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R.

[9] A "qualifying" pulmonary function study yields results 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 exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[10] Dr. Perper opined the Miner was totally disabled from returning to his previous coal mine work based on his objective testing, hypoxia, severe restriction, and severe shortness of breath on minor exertion. MC Director's Exhibit 12 at 29.

§§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco*, 892 F.2d at 1480-81.

Employer further argues the ALJ erred in failing to explain why he found Dr. Perper's qualifications superior to those of Drs. Farney and Vey. Employer's Brief at 23-24. The ALJ considered the credentials of the physicians' "Board-certification, relevant experience, publications related to black lung and/or miners, professorships, and affiliation with a sizeable/teaching hospital" and found "Dr. Perper the best qualified, followed by Dr. Farney and Dr. Green." Decision and Order at 25. In view of our affirmance of the ALJ's crediting of Dr. Perper's opinion and discrediting of Drs. Farney's and Vey's contrary opinions based on the reasons they provided for their conclusions, any alleged error in weighing the physicians' credentials would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Finally, we affirm as unchallenged the ALJ's finding that Dr. Green's opinion is reasoned and documented, and sufficient to establish total disability. *See Skrack*, 6 BLR at 1-711. Employer generally asserts Drs. Farney's and Vey's opinions are equally credible to Dr. Green's because they "also rel[ied] on the objective medical evidence and synthesized the relevant findings" and "explain[ed] why . . . cardiac disease caused [the Miner's] acute and *chronic respiratory or pulmonary impairment*." Employer's Brief at 25 (emphasis added). But as explained, this argument relates to the cause of the Miner's totally disabling respiratory or pulmonary impairment, not its existence.

Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 21-26. Because the ALJ acted within his discretion in crediting Drs. Perper's and Green's opinions and discrediting Drs. Farney's and Vey's opinions, we affirm his finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 26.

We further affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 26. Thus, we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 26-27.

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,[11] 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). The ALJ found Employer failed to establish rebuttal by either method.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish the Miner did not have any of the 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. §§718.305(d)(1)(i)(B), 718.201(a)(1).

We affirm the ALJ's finding that Employer failed to disprove clinical pneumoconiosis as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 32, 35. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[12] *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of [the Miner's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20

[11] "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).

[12] Because Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis, we need not address its arguments regarding the ALJ's findings on legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 17-21.

C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 38-39. He discredited Dr. Farney's opinion on disability causation because the physician did not diagnose clinical pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 39; MC Employer's Exhibit 1 at 17-20.

Further, the ALJ discredited Dr. Vey's opinion on disability causation because he did not diagnose a "total respiratory disability," contrary to his finding that Claimant established the Miner was totally disabled. *See Epling*, 783 F.3d at 504-05; Decision and Order at 39; MC Director's Exhibits 14 at 6, 8; 21 at 5; MC Employer's Exhibit 2 at 35-39. In addition, the ALJ found that Dr. Vey did not adequately explain how the Miner's coal workers' pneumoconiosis or coal dust exposure did not also contribute to the Miner's disabling respiratory impairment. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441.

As the ALJ's finding that Employer failed to prove that no part of the Miner's total respiratory disability was due to clinical pneumoconiosis is unchallenged, we affirm it. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 39.

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits in the miner's claim. Decision and Order at 39.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, we affirm the ALJ's December 13, 2022 Decision and Order Awarding Benefits and his December 16, 2022 Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge