U.S. Department of Labor

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

BRB No. 21-0049 BLA

LUPE MARTINEZ (Widow of JOE L. MARTINEZ) Claimant-Respondent v. CHEVRON and BROADSPIRE/CRAWFORD SERVICES Employer-Petitioner	)	DATE ISSUED: 01/24/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

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

Timothy S. Hale (Hale & Dixon, P.C.), Albuquerque, New Mexico, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Awarding Benefits (2017-BLA-06239) rendered on a survivor's claim[1] filed on

[1] Claimant is the widow of the Miner, who died on December 17, 2014. Director's Exhibit 34.

March 16, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found the Miner had twenty-one years of underground coal mine employment and was totally disabled at the time of his death. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the ALJ erred in finding the Miner was totally disabled and Claimant invoked the Section 411(c)(4) presumption. It further asserts the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, declined to file a 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 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).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment at the time of his death. 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 twenty-one years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 14.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit because the Miner performed his coal mine employment in New Mexico. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibits 7 at 1,507; 26-31. The ALJ incorrectly stated this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Decision and Order at 21. However, as the ALJ relied on no precedent of the Ninth Circuit contrary to that of the Tenth Circuit, this error was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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 at the time of his death, a totally disabling respiratory or pulmonary impairment." 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. 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 the relevant evidence supporting a finding of total disability against the 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 determined Claimant established total disability based on the medical opinion evidence and the evidence as a whole.[5]

The ALJ considered the opinions of Drs. Oesterling and Perper, as well as the Miner's treatment records. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 15-17. Dr. Oesterling reviewed the Miner's death certificate and autopsy slides and opined the Miner did not have any coal mine dust induced lesions that could have led to respiratory disability. Employer's Exhibit 1 at 1, 5. He further opined he could not answer whether the Miner had become disabled prior to his death, though he assumed the Miner was disabled by his renal and cardiac conditions, but coal mine dust exposure did not cause these conditions or any structural changes in the Miner's lungs. Employer's Exhibit 2 at 6, 12. Dr. Perper reviewed medical records, the Miner's death certificate, autopsy slides, and Dr. Oesterling's report. Claimant's Exhibit 1 at 1. He opined the Miner had a totally disabling respiratory impairment as evidenced by acute and chronic respiratory failure and his need for bronchodilators and daily oxygen supplementation. *Id.* at 53; Claimant's Exhibit 2 at 52-54.

Employer initially asserts the ALJ erred in discrediting Dr. Oesterling's opinion. Employer's Brief at 3-8. We disagree. The ALJ permissibly gave Dr. Oesterling's opinion little weight because, though he opined there were no coal dust induced lesions seen on autopsy that could have caused respiratory disability, Employer's Exhibit 1 at 5, he did not otherwise address whether the Miner had a totally disabling respiratory or pulmonary

[5] The ALJ found Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(i)-(iii); Decision and Order at 15.

impairment. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989) (the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present; the cause of that impairment and its relation to coal mine dust exposure is a distinct and separate issue); Decision and Order at 15. Employer's argument is a request to reweigh the evidence, which we are not authorized to do. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Employer next contends the ALJ did not sufficiently explain her determination that Dr. Perper's opinion is entitled to great weight, asserting Dr. Perper did not explain the bases for his conclusions. Employer's Brief at 9. We disagree. Contrary to Employer's contention, the ALJ explained, in accordance with the Administrative Procedure Act,[6] why she gave great weight to Dr. Perper's opinion. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As the ALJ noted, Dr. Perper reviewed the autopsy slides and medical records and concluded that, based on evidence of acute and chronic respiratory failure impairing the Miner's daily living activities, as well as his need for supplemental oxygen, bronchodilators, and steroids, the Miner had a totally disabling respiratory impairment. Decision and Order at 16; Claimant's Exhibit 1 at 1, 53. She thus permissibly found Dr. Perper's opinion well-supported "by explanation and underlying documentation." *See Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370.

The ALJ next noted the Miner's treatment records document, among other conditions, oxygen dependent chronic obstructive pulmonary disease. Decision and Order at 16-17; Director's Exhibit 40 at 2. She determined the Miner's treatment records support the conclusion that Claimant did not have the respiratory capacity to return to his previous coal mine work. Decision and Order at 16-17. Because Employer does not challenge this finding on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We thus affirm, as supported by substantial evidence, the ALJ's determination that Dr. Perper's medical opinion and the Miner's treatment records establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 17. Consequently, we further affirm the ALJ's determination, based on a weighing of the evidence as a whole, that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, invoked the Section

[6] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and reasons or basis therefor, on all 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).

411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(iii); *see Rafferty*, 9 BLR at 1-232; Decision and Order at 17.

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

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[7] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

To disprove legal pneumoconiosis, Employer must demonstrate the Miner 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)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015).

Employer relies on Dr. Oesterling's opinion to disprove legal pneumoconiosis. As the ALJ observed, Dr. Oesterling reported the Miner's autopsy slides showed moderate centrilobular emphysema, which he opined is "typically" associated with cigarette smoke exposure, and he noted the Miner "had cells suggesting he was exposed to tobacco smoke." Decision and Order at 20-21; Employer's Exhibit 1 at 5. He further opined the tissue slides did not "confirm" the presence of legal pneumoconiosis. Employer's Exhibit 2 at 8. The ALJ determined Dr. Oesterling's opinion is insufficient to disprove legal pneumoconiosis because he did not adequately explain why the Miner's history of coal mine dust exposure was not a significant factor in his totally disabling respiratory impairment. Decision and Order at 20.

Employer contends the ALJ erred in his consideration of Dr. Oesterling's opinion. We disagree. As the ALJ explained, because Claimant invoked the Section 411(c)(4) presumption, she was entitled to a presumption that the Miner's emphysema and other respiratory impairments constituted legal pneumoconiosis. *See Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1336-37 (10th Cir. 2014); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80 (6th Cir. 2011) (record must contain an

[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).

affirmative showing that the Miner did not suffer from pneumoconiosis, or that the disease was not related to coal mine work, for the medical opinion evidence to rebut the §921(c)(4) presumption); Decision and Order at 20-21. Thus, it became Employer's burden to establish that the Miner's pulmonary disease or respiratory or pulmonary impairment was not significantly related to or substantially aggravated by his coal mine dust exposure. *See Goodin*, 743 F.3d at 1336-37.

As the ALJ correctly observed, although Dr. Oesterling concluded that the Miner's "primary pulmonary diseases are unrelated to his mining experience" and that his autopsy did not "confirm" the presence of legal pneumoconiosis, he did not explain why the Miner's coal mine dust exposure was not a significant contributor, along with tobacco smoke, to his emphysema. Decision and Order at 20-21. Rather, he opined emphysema is typically associated with tobacco smoke inhalation and the Miner's autopsy slides contained cells suggesting the Miner had been exposed to tobacco smoke. Employer's Exhibits 1 at 5; 2 at 8. The ALJ thus permissibly found Dr. Oesterling's opinion inadequately reasoned and therefore insufficient to satisfy Employer's burden to disprove legal pneumoconiosis. *See Goodin*, 743 F.3d at 1335-37; Decision and Order at 21.

As the trier of fact, the ALJ has the discretion to assess the credibility of the medical opinions and to assign them weight; the Board may not reweigh the evidence or substitute its own inferences for those of the ALJ. *See Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; *Anderson*, 12 BLR at 1-113. Because substantial evidence supports the ALJ's determination that Dr. Oesterling's opinion does not satisfy Employer's burden to affirmatively establish Claimant does not have legal pneumoconiosis, we affirm her finding that Employer failed to disprove the disease. Decision and Order at 21. Employer's failure to disprove legal pneumoconiosis precludes a finding that it rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i).

The ALJ next addressed whether Employer established that "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(ii). She rationally discounted the opinion of Dr. Oesterling, that the

[8] We need not address Employer's arguments that the ALJ erred in crediting the opinion of Dr. Perper, Employer's Brief at 9, because his opinion does not assist Employer in establishing that the Miner did not have legal pneumoconiosis. *See Larioni*, 6 BLR 1-at 1-1278. We also need not address Employer's argument that the ALJ erred in evaluating Dr. Oesterling's opinion that the Miner did not have clinical pneumoconiosis, as its failure to disprove legal pneumoconiosis precludes a finding that it rebutted the presumption at 20 C.F.R. §718.305(d)(1). *See id.*; Employer's Brief at 3-8.

Miner's death was not due to pneumoconiosis, because he did not diagnose legal pneumoconiosis, contrary to her determination that Employer failed to disprove that the Miner had the disease.[9] *See Goodin*, 743 F.3d at 1346 n.20, 25 BLR at 2-579 n.20; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013). We therefore affirm the ALJ's finding that employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii). Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[9] Because the ALJ provided a valid reason to discredit Dr. Oesterling's opinion, we need not address the remainder of Employer's arguments regarding the additional reasons she gave for rejecting his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 3-8.