

U.S. Department of Labor

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



BRB Nos. 23-0502 BLA
and 23-0503 BLA

MILDRED STILWELL (o/b/o and Widow of)
CURTIS D. STILWELL))

Claimant-Respondent)

v.)

ISLAND CREEK KENTUCKY MINING)
COMPANY c/o CONSOL ENERGY)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 01/30/2025

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jodeen M. Hobbs,
Administrative Law Judge, United States Department of Labor.

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

John R. Sigmond and Jason A. Mullins (Penn, Stuart & Eskridge), Bristol,
Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2021-BLA-06018 and 2021-BLA-06029) 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 subsequent miner's claim filed on May 22, 2020,¹ and a survivor's claim filed on August 10, 2020.²

The ALJ credited the Miner with twenty-eight years of qualifying coal mine employment based on Employer's concession and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she determined Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),³ and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).⁴

¹ This is the Miner's sixth claim for benefits. The Miner's first three claims were closed and the record files were destroyed. He withdrew his fourth claim. Decision and Order at 2; Director's Exhibit 53; 20 C.F.R. §725.306(b). The district director denied the Miner's most recent prior claim, filed on February 24, 2017, for failing to establish total disability. Director's Exhibit 54.

² Claimant is the widow of the Miner, who died on June 6, 2020. Director's Exhibits 11, 12. She is pursuing the miner's claim on his behalf and her own survivor's claim. Survivor's Claim Director's Exhibit 2. Employer's appeal in the miner's claim was assigned BRB No. 23-0502 BLA, and its appeal in the survivor's claim was assigned BRB No. 23-0503 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only. *Stilwell v. Island Creek Kentucky Mining Co.*, BRB Nos. 23-0502 BLA and 23-0503 BLA (Oct. 4, 2023) (Order) (unpub.).

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(b).

⁴ 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 "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); *see 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 district director denied the Miner's prior claim for failure to establish total disability, Claimant was required to submit new evidence establishing the

She further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).⁵

Employer argues the ALJ erred in relying on Dr. Sood's opinion to find the Miner was totally disabled and that Claimant established a change in an applicable condition of entitlement. Thus, Employer asserts the ALJ erred in concluding Claimant invoked the Section 411(c)(4) presumption. Employer further argues the ALJ erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits in the miner's and survivor's claims.⁶ The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer replied to Claimant's brief, reiterating its prior contentions.

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.⁷ 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).

Miner's Claim

Invocation of the Section 411(c)(4) Presumption - Total Disability

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

Miner was totally disabled in order to warrant a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 54.

⁵ Section 422(l) of the Act provides that the survivor of a miner who was determined to be 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).

⁶ We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had twenty-eight years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 5, 13.

⁷ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14.

work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,⁸ 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 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).

Employer contends the ALJ erred in finding Claimant established total disability based on Dr. Sood's opinion and when weighing the evidence as a whole.¹⁰ Employer's Brief at 8-16. We disagree.

The ALJ considered the opinions of Drs. Sood, Basheda, and Fino, and the Miner's autopsy, treatment, and hospitalization records.¹¹ Decision and Order at 6-12. Dr. Sood reviewed the Miner's medical records and noted his history of respiratory symptoms and

⁸ A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

⁹ The ALJ found all of the pulmonary function and blood gas studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(i)-(ii); Decision and Order at 6. Although Dr. Sood diagnosed cor pulmonale, the ALJ determined that diagnosis was not documented and thus insufficient to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 6; Claimant's Exhibit 2 at 8, 12-13.

¹⁰ Employer contends for the first time on appeal that Dr. Sood's opinion is insufficient to establish a change in an applicable condition of entitlement because he relied on objective testing generated before the district director's February 9, 2018 Proposed Decision and Order denying the Miner's prior claim. Employer Brief at 6-7 (citing 20 C.F.R. §725.309(c)); Employer's Reply Brief at 1-2 (unpaginated); Claimant's Exhibit 2; Director's Exhibit 54 at 9-11. Employer forfeited this argument by failing to raise it to the ALJ. *See Edd Potter Coal Co. v. Dir., OWCP [Salmons]*, 39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ); Employer's Post-Hearing Brief at 3, 5; Director's Exhibit 1 at 4; Hearing Transcript at 14.

¹¹ The ALJ determined the Miner's usual coal mine employment as a general laborer required moderate exertion with some heavy exertion. Decision and Order at 5; Director's Exhibits 4; 5; 54 at 98-99. We affirm that finding as unchallenged on appeal. *Skrack*, 6 BLR at 1-711; Decision and Order at 5.

use of supplemental oxygen. Claimant's Exhibit 2 at 3, 5. He opined the Miner's pulmonary function study results were normal but his diffusing capacity was "severely reduced" and his blood gas study results demonstrated a "severe exercise intolerance[.]" *Id.* at 5-7. Dr. Sood diagnosed the Miner with mixed chronic bronchitis and emphysema/chronic obstructive pulmonary disease (COPD) and opined the Miner "could no longer do his last coal mining job because of his pulmonary impairment." *Id.* at 10, 12-14.

Dr. Basheda reviewed the Miner's medical records. Director's Exhibit 20; Employer's Exhibit 1. He opined there was no evidence of an obstruction based on the Miner's pulmonary function study results and no oxygenation impairment based on his blood gas study results, and he further opined the Miner would have been able to perform "any exertional work related to coal mining." Director's Exhibit 20 at 6-8; Employer's Exhibit 1 at 21-24. Dr. Basheda also opined the Miner had asthma, which required multiple medications, but his clinical history was inconsistent with occupational asthma. Employer's Exhibit 1 at 22-24.

Dr. Fino reviewed the Miner's medical records and opined there was no evidence of a respiratory impairment based on his review of the Miner's non-qualifying objective testing results. Director's Exhibit 20 at 28-29. In his supplemental report, he disagreed with multiple diagnoses of COPD in the Miner's treatment and hospitalization records because the Miner's pulmonary function study results did not show an obstruction as the Miner's reported FEV1/FVC ratios were all 71% or greater. Employer's Exhibit 2 at 2, 5, 7-9.

The ALJ found Dr. Sood's opinion well-reasoned and documented based on his consideration of the Miner's medical history and objective testing results, and she found Drs. Basheda's and Fino's opinions to be not well-reasoned or documented. Decision and Order at 7-12. Furthermore, the ALJ found that although the Miner's autopsy, treatment, and hospitalization records documented "ongoing respiratory impairments and diseases[.]" including severe emphysema, bronchitis, chronic shortness of breath with exertion and when lying down, wheezing, and COPD, the records did not establish whether any of the Miner's conditions were disabling.¹² *Id.* at 11-12; Director's Exhibits 14-18, 22;

¹² Contrary to Employer's assertion, the ALJ did not find the Miner's treatment records support a finding of total disability. Employer's Brief at 15-16. Additionally, we are not persuaded that the ALJ failed to consider whether the treatment records were reasoned and documented pursuant to 20 C.F.R. §718.104(d). *Id.* at 16; *see* 20 C.F.R. §718.104(d) (listing factors ALJ's must consider when weighing a treating physician's *medical report*). The ALJ permissibly found the Miner's autopsy, treatment, and hospitalization records were consistent and document an ongoing respiratory or pulmonary

Claimant's Exhibit 1. The ALJ concluded the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 11-12. Weighing the evidence as a whole, the ALJ found Claimant established a totally disabling respiratory or pulmonary impairment. *Id.* at 12.

Employer contends the ALJ erred in crediting Dr. Sood's opinion because he relied on evidence that was not in the record or mischaracterized the evidence he did review. Employer's Brief at 8-11. Specifically, Employer argues that in opining the Miner was totally disabled, Dr. Sood references a diffusing capacity test, a six-minute walk test, and an echocardiogram that are not in the record.¹³ *Id.* at 10-11.

We reject Employer's argument that Dr. Sood either mischaracterized the results of a six-minute walk test or relied upon one that is not in the record. As Claimant points out, Dr. Sood's reference to a March 28, 2015 study was a scrivener's mistake, as his description of the actual values aligns with those of the October 28, 2015 study, which is in the record.¹⁴ Claimant's Brief at 17 (citing Claimant's Exhibits 1, 2). Additionally, contrary to Employer's argument, the results of the June 26, 2014 diffusing capacity test are noted in the Miner's treatment records, which were admitted without objection.¹⁵ Claimant's Exhibit 2 at 6, 12; Claimant's Exhibit 1 at 17, 24 (unpaginated); Claimant's Evidence Summary Form at 8; Hearing Transcript at 9; May 2, 2023 Order Admitting Evidence and Closing Record. We, therefore, reject Employer's assertion that Dr. Sood based his disability opinion on testing that is not in the record.

impairment but did not establish whether that impairment is totally disabling. Decision and Order at 11-12.

¹³ The ALJ specifically acknowledged that Dr. Sood relied on an unidentified echocardiogram to diagnose the Miner with cor pulmonale and rejected this aspect of Dr. Sood's opinion as undocumented. Employer fails to explain why remand on this issue is required. Decision and Order at 6 (citing Claimant's Exhibit 2 at 8, 12-13); Employer's Brief at 10-11.

¹⁴ We note moreover that Employer forfeited the argument by failing to raise it to the ALJ. *See Salmons*, 39 F.4th at 208; Employer's Post-Hearing Brief at 6.

¹⁵ Employer also contends that the ALJ failed to consider whether Claimant established the reliability of the diffusion capacity results and six-minute walk test pursuant to 20 C.F.R. §718.107(b). Employer's Brief at 11. Employer has forfeited these arguments by failing to raise them to the ALJ. *See Salmons*, 39 F.4th at 208.

Employer also argues that the ALJ mischaracterized Dr. Sood's opinion because, it asserts, the physician did not reference "COPD, the [M]iner's medical history, or his subjective complaints" in concluding the Miner was totally disabled but merely summarized the Miner's treatment records. Employer's Brief at 8-10. Contrary to Employer's assertion, Dr. Sood specifically opined the Miner's COPD was totally disabling. Claimant's Exhibit 2 at 12. Further, as the ALJ found, Dr. Sood's clinical evaluation included a review of the Miner's objective testing results and treatment records; his medications, including the use of supplemental oxygen; his history of symptoms, exercise limitations, and hospitalizations; and the exertional requirements of the Miner's usual coal mine employment. Decision and Order at 7-8; Claimant's Exhibit 2 at 2-14. Thus, we see no error in the ALJ finding Dr. Sood's opinion is well-documented and reasoned and sufficient to satisfy Claimant's burden of proof. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 7-8, 11-12; Claimant's Exhibit 2.

With respect to Employer's experts, the ALJ accurately noted that Dr. Basheda found the Miner had asthma that required multiple medications and opined his asthma was unrelated to his coal mine dust exposure. Decision and Order at 9; Employer's Exhibit 1 at 22-23. The ALJ also noted Dr. Basheda reviewed the Miner's pathology report but did not address whether the Miner would have been impaired by his severe emphysema. Decision and Order at 9-10; Employer's Exhibit 1 at 2; Director's Exhibit 22 at 2. Because Dr. Basheda failed to address evidence of the Miner's severe emphysema and did not consider whether the Miner was impaired by asthma but rather focused on its cause, the ALJ permissibly found Dr. Basheda did not adequately address the issue of total disability.¹⁶ 20 C.F.R. §718.204(b)(2)(iv); *see Looney*, 678 F.3d at 316-17; *Hicks*, 138 F.3d at 533; Decision and Order at 9-10.

The ALJ accurately noted that Dr. Fino reviewed the Miner's treatment and hospitalization records and discounted the multiple diagnoses of COPD throughout the medical treatment records, including a hospitalization for acute COPD exacerbation in 2018, based on the Miner's pulmonary function study results. Decision and Order at 10-11; Employer's Exhibit 2 at 2, 5, 8-9. The ALJ permissibly found Dr. Fino's opinion entitled to limited probative weight because he failed to adequately address whether the Miner's documented respiratory impairments – including acute bronchitis and COPD with

¹⁶ The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the evidence establishes the Miner had a totally disabling respiratory or pulmonary impairment, while the cause of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether the Section 411(c)(4) presumption is rebutted.

corroborating x-ray results, and severe emphysema – found within the medical evidence he reviewed were disabling. 20 C.F.R. §718.204(b)(2)(iv); *see Looney*, 678 F.3d at 316-17; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 10-11 (citing Director’s Exhibits 15 at 33-36; 22 at 2); Employer’s Exhibit 2 at 2, 5, 8-9.

Finally, we reject Employer’s contention that the ALJ “clearly misconstrued subjective complaints and diagnoses of diseases as evidence of impairment when weighing the medical opinions.” Employer’s Brief at 12. The ALJ did not conflate diagnoses of diseases with proof of impairment. She permissibly considered whether the opinions of Employer’s experts diagnosing no obstructive respiratory impairment were supported by the underlying evidence, including the Miner’s treatment records indicating he suffered from COPD and severe emphysema. Decision and Order at 6-12.

The ALJ has discretion to evaluate the medical evidence, draw inferences, and assess its probative value. *See Looney*, 678 F.3d at 316-17; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the ALJ’s credibility determinations are rational and supported by substantial evidence, we affirm her finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and on the record as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 6-12. We therefore also affirm her conclusions that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c); Decision and Order at 12-13.

Employer does not specifically challenge the ALJ’s determination that it failed to rebut the Section 411(c)(4) presumption apart from generally asserting the ALJ’s finding should be vacated. We therefore affirm her finding and the award of benefits in the miner’s claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13-17; Employer’s Brief at 16.

Survivor’s Claim

The ALJ found Claimant is entitled to benefits under Section 422(l). Decision and Order at 18-19. Employer raises no specific challenge to the survivor’s claim award, other than its assertion that the miner’s claim was improperly awarded, which we have rejected. Employer’s Brief at 17. We therefore affirm the ALJ’s determination that Claimant is derivatively entitled to survivor’s benefits. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 18-19.

Accordingly, we affirm the ALJ's 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