U.S. Department of Labor

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

BRB Nos. 24-0209 BLA
and 24-0210 BLA

PAMELA KITE (o/b/o and Widow of CECIL G. KITE) Claimant-Respondent v. BIG HORN COAL COMPANY and LIGHTHOUSE RESOURCES, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 01/31/2025 DECISION and ORDER

Appeal of the Decisions and Orders Awarding Benefits in Living Miner and Survivor Claims and Order Denying Employer's Motion to Reconsider December 28, 2023, Award in Living Miner and Survivor Claims of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joesph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

John S. Lopatto, III, Alexandria, Virginia, for Employer.

Amanda Torres (Emily H. Su, Deputy Solicitor for the National Office; Jennifer Feldman Jones, Acting Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decisions and Orders Awarding Benefits in Living Miner and Survivor Claims (Decision and Order) and Order Denying Employer's Motion to Reconsider December 28, 2023 Award in Living Miner and Survivor Claims (Order Denying Reconsideration) (2016-BLA-05382, 2021-BLA-05433), pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on June 23, 2014, and a survivor's claim filed on January 12, 2018.[1]

In the miner's claim, the ALJ credited the Miner with ten years of coal mine employment and thus found Claimant[2] could not invoke 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). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the Miner had clinical and legal pneumoconiosis, 20 C.F.R. §§718.201, 718.202(a), and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c). Therefore, he awarded benefits in the miner's claim. Because the

[1] Employer's appeal in the miner's claim was assigned BRB No. 24-0209 BLA, and its appeal in the survivor's claim was assigned BRB No. 24-0210 BLA. The Board has consolidated these appeals for purposes of decision only.

[2] Claimant is the widow of the Miner, who died on July 15, 2016. Miner's Claim (MC) ALJ's Exhibit 1. She is pursuing the miner's claim on her husband's estate's behalf, and her own survivor's claim. Survivor's Claim (SC) Director's Exhibit 3.

[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.

Miner was entitled to benefits at the time of his death, the ALJ also found Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act,[4] 30 U.S.C. §932(*l*) (2018).

Employer filed a Motion for Reconsideration, challenging the ALJ's application of the evidentiary limitations, his allocation of the burden of proof in weighing the evidence, and his reliance on the preamble to the 2001 revised regulations. Jan. 18, 2024 Employer's Motion for Reconsideration. The ALJ denied the motion. Feb. 12, 2024 Order Denying Reconsideration.

On appeal, Employer argues the ALJ erred in excluding from the record x-ray and treatment records it submitted in excess of the evidentiary limitations.[5] It also argues the ALJ erred in relying on the preamble to the 2001 revised regulations because it amounts to an unlawful rulemaking. On the merits of entitlement, Employer argues the ALJ erred in finding the Miner had clinical and legal pneumoconiosis and his pneumoconiosis was a substantially contributing cause of his totally disabling respiratory or pulmonary impairment.[6] Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's challenges to the evidentiary limitation regulations and the ALJ's reliance on the preamble.

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

[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).

[5] Employer states it intends to preserve its right to challenge the Department of Labor's (DOL's) authority to promulgate regulations limiting the submission of evidence in claims. Employer's Brief at 5.

[6] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established the Miner had ten years of coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R §718.204(b); Decision and Order at 4-5, 19.

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.*, 280 U.S. 359 (1965).

Motion for De Novo Hearing

Employer filed a Motion for De Novo Hearing on November 1, 2024. 20 C.F.R. §802.219; Employer's Motion for De Novo Hearing. It argues the Supreme Court's holdings in *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799 (2024), and *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), require the Board to vacate the awards and remand the claims for a de novo hearing before the ALJ who, on remand, should be prohibited from applying the preamble to the 2001 revised regulations when deciding "medical eligibility and causation issues." Employer's Motion for De Novo Hearing at 11.

Claimant and the Director respond to Employer's motion, urging the Board to reject its request for a de novo hearing. We agree with the Director's assertion that nothing in the Supreme Court's decision in *Loper Bright* supports Employer's argument that the ALJ's award of benefits must be "voided" because he referenced the preamble when weighing the medical opinions. In *Loper Bright*, which overruled *Chevron U.S.A., Inc. v. v. Natural Res.'s Def. Council, Inc.,* 467 U.S. 837 (1984), the Court held that "courts need not and under the [Administrative Procedure Act (APA)] may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright*, 603 U. S. at 413. Here, as the Director argues, the preamble is not a rule and the ALJ did not treat it as a rule. Director's Response to Employer's Motion for De Novo Hearing at 4. In addition, the ALJ did not defer to the preamble; he permissibly referenced it in determining whether the medical opinions are credible on the issue of legal pneumoconiosis. *See Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1223-24 (10th Cir. 2018); *Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830 (10th Cir. 2017). As the Director asserts, the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, stated an ALJ's reliance on scientific facts in the preamble does not implicate *Chevron* deference. *Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015); Director's Response to Employer's Motion for De Novo Hearing at 4.

[7] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit because the Miner performed his last coal mine employment in Wyoming. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 31; SC Director's Exhibits 3, 5.

Further, we agree with Claimant's and the Director's assertions that the Court's decision in *Loper Bright* does not "call into question prior cases" that relied on *Chevron* deference, as the Court stated that prior holdings "that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology." Claimant's Response to Employer's Motion for De Novo Hearing at 1-2 (unpaginated) (citing *Loper Bright*, 603 U. S. at 412); Director's Response to Employer's Motion for De Novo Hearing at 4.

Finally, we agree with the Director's assertion that *Corner Post* is inapplicable to this case. Director's Response to Employer's Motion for De Novo Hearing at 3 n.1. In *Corner Post*, the Court held the statute of limitations for an APA claim is triggered when the complaining party is injured by the final agency action, not when the regulation is published. *Corner Post*, 603 U.S. at 825. Here, as the Director notes, Employer's challenges relate to the ALJ's reliance on the preamble in weighing the evidence in this case, not the time limit for challenging agency action following an injury from a regulation.

Thus, we deny Employer's Motion for De Novo Hearing. 20 C.F.R. §802.219.

Entitlement to Benefits - 20 C.F.R. Part 718

Without the benefit of the statutory presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had 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).

Medical Opinions

The ALJ considered the medical opinions of Drs. Sood and Fino. Decision and Order at 14-16. Dr. Sood opined the Miner had legal pneumoconiosis in the form of mild chronic obstructive pulmonary disease (COPD) and disabling hypoxia related to coal mine dust exposure and cigarette smoking. Survivor's Claim (SC) Director's Exhibit 9 at 118, 122-23. In contrast, Dr. Fino opined the Miner did not have legal pneumoconiosis but had

a disabling oxygenation impairment related to asbestosis and tobacco smoke exposure and unrelated to coal mine dust exposure.[8] Miner's Claim (MC) Employer's Exhibit 7 at 6-7. The ALJ found Dr. Sood's opinion reasoned, documented, and entitled to probative weight. Conversely, he found Dr. Fino's opinion inadequately explained and entitled to little weight. *Id*. He thus found the medical opinion evidence establishes the existence of legal pneumoconiosis based on Dr. Sood's opinion. *Id*. at 16.

First, we reject Employer's argument that the ALJ erred in relying on the preamble to the 2001 revised regulations when weighing the medical opinions. Contrary to Employer's argument, the comments in the preamble about the additive risk of cigarette smoking and coal dust exposure are not an unlawful rule that is binding on ALJs, nor did the ALJ treat it as such in this case. Employer's Brief at 18-22. Federal circuit courts have consistently held that an ALJ may permissibly evaluate expert opinions in conjunction with the Department of Labor's (DOL's) resolution of questions of scientific fact relevant to the elements of entitlement. *See McLean*, 881 F.3d at 1223-24; *Estate of Blackburn*, 857 F.3d at 830; *Gunderson*, 805 F.3d at 1260-62; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Here, the ALJ permissibly evaluated the medical opinions in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *See McLean*, 881 F.3d at 1223-24; *Estate of Blackburn*, 857 F.3d at 830; *Gunderson*, 805 F.3d at 1260-62; Decision and Order at 15-16. He did not apply the preamble as a binding rule, but instead properly considered it as a "tool to gauge an expert's credibility." *See Estate of Blackburn*, 857 F.3d at 830-31; Decision and Order at 15.

We also reject Employer's argument that the ALJ erred in shifting the burden of proof from Claimant to Employer. Employer's Brief at 12-14. The ALJ properly acknowledged that Claimant bears the burden of proof and ultimately concluded that she

[8] We reject Employer's argument that the ALJ erred in failing to "acknowledge the significance of the medical fact that [the Miner's] FEV-1 and FVC [results on pulmonary function testing] were normal and not qualifying under DOL criteria in 20 C.F.R. Part 718" in determining whether he had legal pneumoconiosis. Employer's Brief at 11. Contrary to Employer's argument, a claimant may establish a lung disease or respiratory or pulmonary impairment that constitutes legal pneumoconiosis even in the absence of qualifying objective testing. *See* 20 C.F.R §§718.201(a)(2), 718.202(a)(1)-(4).

"met her burden of establishing that the Miner had legal pneumoconiosis." Decision and Order at 16.

We additionally reject Employer's argument that the ALJ erred in crediting Dr. Sood's opinion because he did not review all of the medical evidence in the record or directly address Dr. Fino's contrary opinion. Employer's Brief at 13-14, 22. An ALJ is not required to discredit a physician who did not review all of the medical evidence in the record when the opinion is otherwise well-reasoned, documented, and based on the physician's own examination of the miner, objective test results, and exposure histories. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); *see also Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986) (ALJ properly considered whether the objective data offered as documentation adequately supported the opinion).

Dr. Sood examined the Miner and considered his social, medical, and work histories, symptoms, and objective testing. SC Director's Exhibit 9 at 115-123. He diagnosed mild COPD with disabling hypoxia based on the Miner's pulmonary function and arterial blood gas studies. *Id*. at 122-23. Further, he opined the Miner's coal mine dust and tobacco smoke exposures significantly contributed to his pulmonary conditions based on his exposure histories. *Id*. at 118, 122-23. Given that Dr. Sood's opinion is based on the Miner's employment, smoking, and medical histories, symptoms, and objective testing, and the ALJ rationally determined it is consistent with the discussion in the preamble to the 2001 revised regulations regarding the additive nature of coal mine dust exposure and cigarette smoking, the ALJ permissibly found the doctor's opinion reasoned and documented. *See McLean*, 881 F.3d at 1223-24; *Estate of Blackburn*, 857 F.3d at 830; *Gunderson*, 805 F.3d at 1260-62; Decision and Order at 15.

Further, we reject Employer's argument that the ALJ provided invalid reasons for finding Dr. Fino's opinion not credible. Employer's Brief at 12-16. Dr. Fino diagnosed the Miner with a disabling oxygenation impairment caused by asbestosis and tobacco smoke exposure and unrelated to coal mine dust exposure. Employer's Exhibit 7 at 6-7. The ALJ permissibly found his opinion entitled to little weight because he did not explain why he excluded coal mine dust exposure as a contributing cause or factor of the Miner's obstructive impairment.[9] *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d

[9] Because the ALJ provided a valid reason for discrediting Dr. Fino's opinion that the Miner did not have a chronic lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure, we need not consider Employer's remaining arguments concerning the ALJ's weighing of the doctor's opinion. *See Kozele*

871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); Decision and Order at 16. Employer's general argument that Dr. Fino's opinion is more reasoned than Dr. Sood's is a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113; Employer's Brief at 13-14.

Because the ALJ acted within his discretion in weighing the medical opinions, we affirm his finding that Claimant established legal pneumoconiosis based upon Dr. Sood's opinion.[10] *See Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1217 (10th Cir. 2009); 20 C.F.R. §§718.201(b), 718.202(a); Decision and Order at 16.

Disability Causation

To establish total disability due to pneumoconiosis, Claimant must prove pneumoconiosis was a "substantially contributing cause" of the Miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis was a substantially contributing cause if it had "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsen[ed] a totally disabling respiratory or pulmonary impairment which [was] caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Employer asserts the ALJ erred in concluding the Miner's legal pneumoconiosis was a substantial cause of his disabling pulmonary impairment. Employer's Brief at 22. We disagree.

The ALJ permissibly determined that the Miner's disabling COPD constituted legal pneumoconiosis, which necessarily encompassed a finding that the Miner was totally disabled due to legal pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d

---

v. Rochester & Pittsburgh Coal Co., 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 12-16, 18-22.

[10] Because we have affirmed the ALJ's finding that Claimant established legal pneumoconiosis, we decline to consider Employer's arguments concerning clinical pneumoconiosis, including its argument that the ALJ erred by excluding x-ray evidence it submitted. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 7-11, 16-18. We further decline to address Employer's argument that the ALJ erred in excluding treatment record evidence, as it has not identified what treatment record evidence, if any, would be relevant to the ALJ's findings on legal pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Employer's Brief at 16-18.

1050, 1062 (6th Cir. 2013); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019); Decision and Order at 20. Further, the ALJ permissibly discredited Dr. Fino's opinion on disability causation because he did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that the Miner had the disease, which we have affirmed. *See Energy W. Mining Co. v. Director, OWCP* [*Bristow*], 49 F.4th 1362, 1372 (10th Cir. 2022); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 20; Employer's Exhibit 7 at 6-7.

Thus, we reject Employer's assertion and affirm the ALJ's finding that the Miner's legal pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment. 20 C.F.R. §718.204(c); Decision and Order at 20; Employer's Brief at 22. We therefore affirm the award of benefits in the miner's claim.

Survivor's Claim

The ALJ found Claimant established each element necessary to demonstrate entitlement under Section 422(*l*): 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*); Decision and Order at 22-23. 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); Decision and Order at 22-23.

Accordingly, the ALJ's Decisions and Orders Awarding Benefits in Living Miner and Survivor Claims and Order Denying Employer's Motion to Reconsider December 28, 2023 Award in Living Miner and Survivor Claims are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge