

U.S. Department of Labor

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



BRB No. 24-0208 BLA

SUSAN A. MILAM
(Widow of JUNIOR L. MILAM)

Claimant-Respondent

v.

U.S. STEEL MINING COMPANY, LLC

Employer-Petitioner

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 03/25/2025

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification of
Carrie Bland, Associate Chief Administrative Law Judge, United States
Department of Labor.

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

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West
Virginia, for Employer.

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

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits on Modification (2017-BLA-05679) rendered on a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves Claimant's¹ request for modification of a survivor's claim filed on February 3, 2016.²

The ALJ found Claimant established the Miner had at least seventeen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,³ 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption. Consequently, she found Claimant established modification based on a mistake in a

¹ Claimant is the widow of the Miner, who died on June 13, 2010. Director's Exhibits 2, 5. Claimant does not allege, nor does the record reflect, that the Miner successfully established entitlement to benefits during his lifetime. Thus, Claimant is not entitled to benefits under Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner 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).

² The district director issued a Proposed Decision and Order Denial of Benefits on March 2, 2017, denying Claimant's survivor's claim because she failed to establish the Miner had pneumoconiosis, that his lung disease was, at least in part, caused by coal mine employment or that his death was due to pneumoconiosis. Director's Exhibit 20. Following Claimant's May 3, 2017 request for modification, the district director issued a Proposed Decision and Order on July 31, 2017, denying the request for modification, finding the evidence insufficient to establish total disability and the existence of pneumoconiosis. Director's Exhibit 27. After Claimant's request for a hearing, the case was transferred to the Office of Administrative Law Judges (OALJ) and assigned to ALJ William Barto, who issued an order cancelling the June 26, 2018 hearing and returning the case to docketing for reassignment. Director's Exhibit 32. On July 15, 2019, the case was reassigned to ALJ Bland (the ALJ).

³ 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 or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

determination of fact and found that granting modification would render justice under the Act. 20 C.F.R. §725.310. She therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.⁴ Employer also argues the ALJ erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs, has not filed a substantive response.

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.⁵ 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).

Modification

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits. *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). A party need not submit new evidence, as the ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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

⁴ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least seventeen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 6; Hearing Transcript at 12; Employer's Brief at 2, 9.

⁵ 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 and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 21-22.

C.F.R. §718.305(b)(1)(i). A miner is considered to have been 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). 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 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). Qualifying evidence in any of the four categories establishes total disability when there is no “contrary probative evidence.” 20 C.F.R. §718.204(b)(2).

The ALJ found that the pulmonary function studies and arterial blood gas studies are non-qualifying,⁶ and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order on Modification at 8-10; Director’s Exhibit 9-10. However, she determined Dr. Gaziano’s medical opinion, Claimant’s testimony, and the evidence as a whole supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Modification at 10-13.

Employer contends the ALJ’s finding of total disability must be reversed because there is no probative evidence in the record that is sufficient for Claimant to meet her burden of proof. Employer’s Brief at 8-13.

Before weighing the medical opinions, the ALJ addressed the exertional requirements of the Miner’s usual coal mine work. Decision and Order on Modification at 6. She considered Claimant’s listing of the Miner’s coal mine jobs on Form CM-911a, Employment History, as a timberman, mechanic, continuous miner helper, roof bolter, and in “all types [of] labor inside mine.” *Id.* (quoting Director’s Exhibit 3). The ALJ indicated Claimant’s list is consistent with Employer’s documentation from 1990, reflecting that all of the Miner’s work for Employer was inside the mine and his last two jobs were working as a general inside laborer from February 1984 to September 1984 and as a roof bolter from January 1985 to July 1986. Decision and Order on Modification at 6; Director’s Exhibit 4. Based on this documentation and the nature of the Miner’s last job working as a roof bolter, the ALJ concluded his job required “routine heavy strenuous labor.” Decision and

⁶ 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).

Order on Modification at 6. As this finding is unchallenged, we affirm it. *See Skrack*, 6 BLR at 1-711.

Next, the ALJ considered the medical opinions of Drs. Gaziano and Zaldivar, finding they are both Board-certified in internal medicine and pulmonary/chest disease and had “like access” to the record. Decision and Order on Modification at 11; Director’s Exhibit 25; Employer’s Exhibit 1. The ALJ credited Dr. Gaziano’s opinion that the Miner had a totally disabling pulmonary condition, to the “exclusion” of a totally disabling cardiac condition, because she found it was consistent with the medical evidence, including the Miner’s treatment records and the May 2010 computed tomography (CT) scan.⁷ Decision and Order on Modification at 12-13. She gave less probative weight to Dr. Zaldivar’s opinion because she determined his conclusion concerning the existence of cardiac disease was “assumptive and inferential” and not supported by the evidence of record. *Id.* at 11.

In addition, she considered Claimant’s “impeachment evidence” of Dr. Zaldivar, consisting of a November 18, 2015 letter from the Office of Workers’ Compensation Programs’ Division of Coal Mine Worker’s Compensation (DCMWC), which notified Dr. Zaldivar that he was suspended from the DCMWC’s approved provider list, and a March 25, 2015 letter permanently removing him from the list. Decision and Order on Modification at 12; *see* Claimant’s Exhibit 1. The ALJ indicated she gave less weight to Dr. Zaldivar’s opinion based on the reasons provided in the March 2015 removal letter, which included the inconsistency of his views with the preamble to the 2001 revised regulations, the regulations themselves, and the Act, and his failure to “seek confirmation of [his] views from the scientific community.” Claimant’s Exhibit 1 at 5; Decision and Order on Modification at 12. Thus, she found the medical opinion evidence supports a finding of total disability. Decision and Order on Modification at 13.

The ALJ also determined Claimant’s testimony concerning the Miner’s respiratory condition and her belief that the Miner could “[a]bsolutely not” have returned to his coal mining work during the last year of his life supports a finding that he had a totally disabling respiratory impairment at the time of his death. Decision and Order on Modification at 13 (quoting Hearing Transcript at 20-21).

⁷ The ALJ references a May 2010 CT scan as supporting the absence of an advanced cardiac condition preceding the Miner’s death. Decision and Order on Modification at 13. We assume she is referring to the May 31, 2010 CT scan as it is the only May 2010 chest CT scan in the record. *See* Director’s Exhibit 4.

Employer argues no clinical test, including the non-qualifying pulmonary function and blood gas studies, indicates the Miner had a totally disabling respiratory impairment and asserts the ALJ erred in crediting Dr. Gaziano's opinion.⁸ Employer's Brief at 6, 9-12. It contends Dr. Gaziano did not cite any evidence to support his diagnosis of a disabling respiratory impairment. It further states that Dr. Gaziano's conclusion that the Miner did not have advanced cardiac disease is not reasoned because it is based upon a "normal" 2009 echocardiogram report despite the doctor also reviewing a more recent May 31, 2010 CT scan and the Miner's death certificate which "document the presence of 'extensive generalized arteriosclerotic vascular disease' and 'advanced arteriosclerosis,' respectively." Employer's Brief at 10, 12; *see* Director's Exhibits 4 at 29; 5; 25 at 3-4; Claimant's Exhibit 2 at 2; Employer's Exhibit 4. Thus, Employer asserts Dr. Gaziano's opinion is not reasoned and cannot support a finding of total disability. Employer's Brief at 12. Employer further contends that without a probative medical opinion, Claimant's hearing testimony cannot independently meet her burden of proof on total disability. *Id.* Employer's arguments have merit, in part.

As an initial matter, contrary to Employer's contention, it is well established that total disability can be demonstrated with a reasoned medical opinion even in the absence of qualifying pulmonary function or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); *see Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"). Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott*, 60 F.3d at 1141; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). However, we agree with Employer that the ALJ erred in her consideration of Dr. Gaziano's opinion.

⁸ Employer generally states that it "disagrees with much of [the ALJ's] reason for ascribing little probative weight to Dr. Zaldivar's medical opinion" but indicates "her rationale for crediting the opinion of Dr. Gaziano is more troubling" Employer's Brief at 12. In addition, Employer asserts the ALJ erred in giving less weight to Dr. Zaldivar's opinion to the extent "she relied on the so-called impeachment evidence" over Employer's objection below. Employer's Brief at 17 n.13. As Employer does not identify any specific error in the ALJ's weighing of Dr. Zaldivar's opinion, we affirm her decision to give it less weight at 20 C.F.R. §718.204(b)(2)(iv). *See* 20 C.F.R. §§802.211(b), 802.301(a); *see also Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order on Modification at 11-12.

Based on a review of the Miner's death certificate, a July 9, 1985 spirometry report, a May 21, 2010 blood gas study; a May 31, 2010 CT scan with contrast and the Miner's 2009 Princeton Community Hospital treatment records, Dr. Gaziano diagnosed "end-stage lung disease." Director's Exhibit 25 at 3. He found various x-rays and CT scans showed the presence of significant emphysema, the Miner's treatment records indicated chronic lung disease and occupational pneumoconiosis, and the Miner's death certificate supported that he died of advanced lung disease. *Id.* at 3-4. Dr. Gaziano stated advanced chronic lung disease was the primary cause of death because the echocardiogram performed prior to the Miner's death was normal, indicating he did not have an advanced cardiac condition. *Id.* at 4. He concluded that the evidence supported the existence of a totally disabling pulmonary impairment. *Id.*

The ALJ found Dr. Gaziano's opinion "probative . . . despite the limitations of the record as it is not reliant on inference but rather draws conclusions based on the medical evidence." Decision and Order on Modification at 12. She noted Dr. Gaziano acknowledged the approximate length of the Miner's coal mine employment but did not discuss the specific exertional requirements of his job. *Id.* at 10. However, she determined Dr. Gaziano's opinion was supported by the Miner's treatment records indicating the "objective presence of 'significant emphysema' and 'chronic lung disease,' and the objective absence of an advanced cardiac condition in the May 2010 CT scan preceding [the] Miner's death." *Id.* at 12-13.

As Employer asserts, the ALJ mischaracterized the May 31, 2010 CT scan, because it specifically diagnoses an aortic arch aneurysm and "[e]xtensive generalized arteriosclerotic vascular disease, including the coronary arteries." Director's Exhibit 4 at 29; *see* Employer's Brief at 10, 12. Further, the Miner's death certificate⁹ lists "advanced

⁹ The record contains two versions of the death certificate. *See* Director's Exhibit 5; Employer's Exhibit 4. One is from the County Clerk's office and lists only "end stage lung disease" as the cause of death. Director's Exhibit 5 at 1. It also indicates that Claimant provided the information to complete the certificate. *Id.* The ALJ determined that the conclusions in the death certificate could not be credited as Claimant is identified on the death certificate as the "person giving information," there is no evidence in the record to corroborate the cause of death, and there is no evidence that the individual signing the certificate had any relevant qualifications or personal knowledge of the Miner upon which to base the cause of death. Decision and Order on Modification at 19. The other version is from the West Virginia Department of Health & Human Resources and is identified as the "Medical Examiner's Certificate of Death." Employer's Exhibit 4 at 1. It lists "end stage lung disease" as the "immediate cause" of death and "advanced arteriosclerosis" and "hypertension" as "underlying causes." *Id.*

arteriosclerosis” as an “underlying cause” of death. Employer’s Exhibit 4. Dr. Gaziano noted these diagnoses in his report, in addition to the presence of emphysema, as well as the additional causes of death listed on the death certificate. Director’s Exhibit 25 at 3. Thus, as Employer asserts, the ALJ’s analysis fails to reconcile her crediting of Dr. Gaziano’s opinion that the Miner had a totally disabling respiratory or pulmonary impairment to the exclusion of a cardiac condition with the diagnoses on the May 31, 2010 chest CT scan and the Miner’s death certificate. *See* Decision and Order on Modification at 10-12; Director’s Exhibit 25 at 3-4. Further, given that Claimant bears the burden of proving the existence of total disability in order to invoke the Section 411(c)(4) presumption, the ALJ did not adequately explain, as the Administrative Procedure Act (APA) requires,¹⁰ why Dr. Gaziano’s opinion was credible and documented “despite the limitations of the record.” Decision and Order at 12; *Wojtowicz*, 12 BLR at 1-165; Employer’s Brief at 10-12.

Thus, we vacate the ALJ’s finding that Dr. Gaziano’s opinion credibly supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). As Claimant’s testimony alone cannot establish total disability, we must also vacate the ALJ’s determination that Claimant established the existence of total disability at 20 C.F.R. §718.204(b)(2), thereby invoking the Section 411(c)(4) presumption of death due to pneumoconiosis. 20 C.F.R. §718.305(b)(4); Decision and Order on Modification at 13. Consequently, we further vacate the ALJ’s findings that Employer did not rebut the presumption¹¹ and that Claimant established a basis for modification at 20 C.F.R. §725.310.

Remand Instructions

On remand, the ALJ must reconsider whether Dr. Gaziano’s medical opinion is credible and sufficient to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). In rendering her credibility findings, she must consider Dr. Gaziano’s comparative credentials, his explanations for his medical findings, the documentation underlying his medical judgments, and the sophistication of, and bases for, his conclusions. *See 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). The ALJ must also

¹⁰ The Administrative Procedure Act provides 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).

¹¹ Thus, we decline to address, as premature, Employer’s arguments pertaining to the ALJ’s rebuttal findings. *See* Employer’s Brief at 13-17.

compare the exertional requirements of Claimant's usual coal mine employment to the physicians' descriptions of his pulmonary impairment and physical limitations. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); 20 C.F.R. §718.204(b)(2)(iv).

The ALJ must then weigh all relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. The ALJ must keep in mind that 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 Island Creek Coal Co. v. Blankenship*, 123 F.4th 684, 692 (4th Cir. 2024); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co., LLC*, 26 BLR 1-1, 1-10-11 (2023).

If Claimant establishes total disability, she will invoke the Section 411(c)(4) presumption and the ALJ must then consider whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant fails to establish total disability, she cannot establish invocation of the Section 411(c)(4) presumption, in which case the ALJ must determine if Claimant has independently met her burden on the elements of entitlement to establish the existence of pneumoconiosis and that the Miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202(a), 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). On remand, the ALJ must explain the bases for her findings and credibility determinations as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.¹²

¹² Because this appeal concerns a request for modification, the ALJ also must determine whether granting modification will render justice under the Act. *Westmoreland Coal Co. v. Sharpe [Sharpe II]*, 692 F.3d 317, 327-28 (4th Cir. 2012).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits on Modification and remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge