U.S. Department of Labor

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

BRB Nos. 24-0271 BLA
and 24-0272 BLA

TRACIE JEFFERSON (Executrix of the Estate of BRENDA S. JEFFERSON, Deceased Widow of and o/b/o WILLIE JEFFERSON)

Claimant-Respondent

v.

ZEIGLER COAL COMPANY

and

OLD REPUBLIC INSURANCE COMPANY

Employer/Carrier-Petitioners

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 03/03/2026

DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits in Miner's and Survivor's Claims of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels, David Littrell III, and Scott Lu (Vowels Law PLC), Henderson, Kentucky, for Claimant.

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

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and ULMER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order on Remand Granting Benefits in Miner's and Survivor's Claims (2011-BLA-05932 and 2013-BLA-06100) 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 request for modification of a miner's subsequent claim filed on July 28, 2006, and a survivor's subsequent claim filed on August 20, 2010. Both claims are before the Benefits Review Board for the third time.[1]

ALJ Calianos (the ALJ) adjudicated the request for modification in his May 11, 2017 Decision and Order Denying Benefits in Living Miner's and Survivor's Claims. He credited the Miner with at least twenty-seven years of underground coal mine employment but found the evidence insufficient to establish the Miner had pneumoconiosis or a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.202, 718.204(b)(2). Therefore, he found Claimant[2] could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] or establish a basis for modification in the miner's claim, 20 C.F.R. §725.310. As the Miner was not entitled to benefits at the time of his death, the ALJ found no basis to award derivative

[1] We incorporate the procedural history of both claims and the Board's holdings as set forth in the Board's prior decisions in this case. *Jefferson v. Zeigler Coal Co*., BRB Nos. 21-0171 BLA, 21-0172 BLA (Sep. 28, 2022) (unpub.); BRB Nos. 17-0471 BLA, 17-0472 BLA (Sep. 26, 2018) (unpub.).

[2] Claimant is the surviving daughter of the Miner and his widow, who are both deceased. She is pursuing their respective claims.

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

survivor's benefits under Section 422(*l*) of the Act,[4] 30 U.S.C. §932(*l*) (2018). He also denied benefits in the subsequent survivor's claim because Claimant did not establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

Pursuant to Claimant's appeal, the Board affirmed the ALJ's finding that the Miner had at least twenty-seven years of underground coal mine employment. *Jefferson v. Zeigler Coal Co.*, BRB Nos. 17-0471 BLA, 17-0472 BLA, slip op. at 3 n.5 (Sep. 26, 2018) (unpub.). The Board, however, vacated the ALJ's finding that Claimant failed to establish the Miner was totally disabled based on the pulmonary function studies and medical opinion evidence. *Id.* at 7-9; *see* 20 C.F.R. §718.204(b)(2)(i), (iv). Thus, the Board also vacated his finding that Claimant failed to invoke the Section 411(c)(4) presumption in the Miner's claim or establish derivative entitlement in the survivor's claim under Section 422(*l*),[5] and remanded both claims for further consideration. *Jefferson*, BRB Nos. 17-0471 BLA, 17-0472 BLA, slip op. at 10.

On remand, the ALJ again found the evidence insufficient to establish total disability and therefore determined Claimant could not invoke the Section 411(c)(4) presumption or establish a basis for modification in the miner's claim. 20 C.F.R. §§718.204(b)(2), 725.310. He thus denied benefits in both claims. Pursuant to Claimant's request for reconsideration, the ALJ agreed that he erred in finding the diffusion capacity evidence invalid but nevertheless found the medical evidence does not establish total disability based on the diffusion capacity evidence. Consequently, he again denied benefits.

Pursuant to Claimant's second appeal, the Board affirmed the ALJ's determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). *Jefferson v. Zeigler Coal Co*., BRB Nos. 21-0171 BLA, 21-0172 BLA, slip op. at 5 n.7 (Sep. 28, 2022) (unpub.). But the Board vacated the ALJ's finding that Claimant failed to

[4] Section 422(*l*) of the Act provides 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).

[5] As the Board previously recognized, the district director denied the initial survivor's claim because the evidence did not establish that the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *Jefferson*, BRB Nos. 17-0471 BLA, 17-0472 BLA, slip op. at 11 n.17. As the denial became final, the only avenue for Claimant to establish entitlement in this subsequent survivor's claim is through Section 932(*l*). *See Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 328 (6th Cir. 2014).

establish the Miner was totally disabled based on the pulmonary function studies and medical opinion evidence. *Id.* at 9, 16; *see* 20 C.F.R. §718.204(b)(2)(i), (iv). The Board also vacated the ALJ's finding on the exertional requirements of the Miner's usual coal mine work as he failed to weigh all of the relevant evidence and did not satisfy the explanatory requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) (2018).[6] *Jefferson*, BRB Nos. 21-0171 BLA, 21-0172 BLA, slip op. at 13. Consequently, the Board vacated the ALJ's determination that Claimant failed to invoke the Section 411(c)(4) presumption in the miner's claim or establish derivative entitlement in the survivor's claim under Section 422(*l*) and remanded both claims for further consideration.[7] *Id*. at 18.

On second remand, the ALJ found Claimant established the Miner was totally disabled by a respiratory impairment at the time of his death. Thus, he found Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. He also determined Employer did not rebut the presumption. 30 U.S.C. §921(c)(4) (2018). The ALJ concluded that Claimant established a change in condition and that granting modification would render justice under the Act. Consequently, he awarded benefits in the miner's claim and found Claimant is derivatively entitled to survivor's benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ erred in finding Claimant established the Miner was totally disabled by a respiratory impairment at the time of his death and invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits.

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[6] 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).

[7] On October 27, 2022, Employer filed a "Request for Reconsideration *En Banc* with Oral Argument" of the Board's decision vacating the ALJ's finding that Claimant failed to establish total disability and thus also vacating the denial of benefits in the miner's and survivor's claims. A majority of the Board voted not to reconsider the decision. *Jefferson v. Zeigler Coal Co*., BRB Nos. 21-0171 BLA, 21-0172 BLA (Jan. 20, 2023) (Order on Recon.) (unpub.); *see* 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b), (c); 802.407; 802.409. Employer has not advanced any persuasive arguments in support of altering the Board's previous disposition of the case. We therefore reject Employer's arguments on appeal that the Board erred by vacating the ALJ's prior denial of benefits in 2020 and should correct this error by reinstating the denial of benefits in both claims. *See* Employer's Brief at 17-22.

The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response. Employer filed a reply brief, reiterating its 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.[8] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a) (2018); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

In considering whether to grant modification of the prior denial of the Miner's subsequent claim, the ALJ was required to determine whether the denial contained a mistake in a determination of fact or whether the evidence submitted on modification, along with the evidence previously submitted in the subsequent claim, was sufficient to establish a change in an applicable condition of entitlement.[9] 20 C.F.R. §§725.309(c), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). 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."[10] *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

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[8] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Jefferson*, BRB Nos. 21-0171 BLA, 21-0172 BLA, slip op. at 4 n.5.

[9] Where 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 he finds that "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)(1); *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 Miner did not establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of the current miner's claim. *See White*, 23 BLR at 1-3; MC Director's Exhibits 1-3.

[10] Thus, we reject Employer's arguments that the ALJ could not reconsider findings or evidence from either his or other ALJs' decisions in the current or prior claims and reach a different conclusion. *See* Employer's Brief at 1, 15-21; Employer's Reply Brief at 3.

The Miner's Claim

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

A miner is considered to have been totally disabled if he had a pulmonary or respiratory impairment which, 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 the miner was totally disabled 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 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).

On remand, the ALJ concluded that the medical opinion evidence, in conjunction with the lay opinion testimony and the Miner's medical treatment records, establish total disability.[11] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 21.

Usual Coal Mine Employment

In assessing total disability, an ALJ must determine the exertional requirements of a miner's usual coal mine work and then consider them in conjunction with the medical opinions. *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). On second remand, the ALJ indicated that he considered the Miner's August 24, 2006 Department of Labor complete pulmonary evaluation conducted by Dr. Simpao; CM-913 (Description of Coal Mine Work and Other Employment) forms from this claim and the Miner's prior claims; the Miner's hearing testimony from July 22, 1986, before ALJ Rudolf L. Jansen; and the Miner's March 15, 1978 testimony before the Kentucky Workers' Compensation Board. *Id.*

[11] The ALJ found the pulmonary function studies do not support the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Second Remand at 13. The Board also previously affirmed, as unchallenged, the ALJ's findings that the blood gas study evidence does not establish total disability, 20 C.F.R. §718.204(b)(2)(ii), and there is no evidence of cor pulmonale with right-sided congestive heart failure, 20 C.F.R. §718.204(b)(2)(iii). *Jefferson*, BRB Nos. 21-0171 BLA, 21-0172 BLA, slip op. at 5 n.7.

Dr. Simpao noted that the Miner's last job was working as a coal driller six to seven days a week and eight to sixteen hours a day. Miner's Claim (MC) Director's Exhibit 1 at 1778.[12] He indicated that the Miner stated he worked at the face of the mine where the ceiling height was forty-eight to sixty inches and the job required him to work in "awkward positions" and to continuously lift, bend, and stoop. *Id.*

On the Miner's CM-913 form, submitted in conjunction with his current claim, he indicated that he was required to sit, stand, and crawl for "various" amounts of time and lift and carry "various" weights. MC Director's Exhibit 1 at 840. On the completed CM-913 form from the Miner's June 28, 2002 claim, he stated that he lifted twenty pounds 100 times per day, but not every day, and carried 200 pounds for thirty feet two times a day with assistance from others.[13] In addition, on the CM-913 form from the Miner's May 5, 1989 claim, he indicated he lifted 0.5 pounds three times per day and carried fifty pounds a distance of five feet 150 times per day. Survivor's Claim (SC) Director's Exhibit 3 at 831.

On July 22, 1986, the Miner testified that drilling was light and moderate work, consisting mainly of sitting and moving levers to move the drill boom. SC Director's Exhibit 3 at 345. He then explained that while he waited to drill, he would have to do something else like timbering or "whatever needed to be done."[14] *Id.* at 346. On March

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[12] As the ALJ indicated, on remand the Director filed digitized versions of the official case files in both claims with new exhibit numbering and pagination. Decision and Order on Second Remand at 2-3 n.3. The ALJ noted "[t]here are significant issues with the organization and completeness of these digitized copies of the case files, and the renumbering of exhibits prevent[ed] [him] from citing to the evidence consistently with prior decisions." *Id.*

[13] The ALJ noted that a copy of this exhibit was missing from the digitized files provided by the Director, but that Claimant provided a copy based on the ALJ's request. It was previously labeled as MC Director's Exhibit 3 at 865. Decision and Order on Second Remand at 14 n.13.

[14] The Miner was asked: "[I]n the job of driller, wouldn't you have the opportunity to set [sic] and wait on other individuals because it doesn't take as long to drill as to—say—pin a place[?]" SC Director's Exhibit 3 at 346. He responded: "No. You wouldn't have no opportunity to sit. You would have to do something else while you were waiting." *Id.* Employer's counsel then asked: "Okay. What was that, filling the water dummy?" *Id.* And the Miner responded: "Well—no. You'd probably have to timber. And just whatever

15, 1978, the Miner testified that his "job was to drill coal, but you not only did your job; you did just a little of everything that needed to be done, timber, pull cables, move boxes, shovel ribs, clean headers." *Id.* at 575. He again stated that the work of a coal driller is "a light moderate job if you just can do your job, but you can't just do your job; you have to do everybody's job." *Id.* at 576.

The ALJ gave more weight to the Miner's prior CM-913 forms because he found they identify specific lifting and carrying amounts and frequencies. Decision and Order on Second Remand at 15. Based on these forms and the *Dictionary of Occupational Titles* (DOT), which the ALJ took official notice of, he found the Miner's usual coal mine employment as a coal driller required heavy manual labor. *Id.* at 14-15.

Employer argues the ALJ erred by taking notice of the DOT when Claimant did not raise that issue and erred in finding the Miner's coal mine work as a coal driller constituted heavy labor. Employer's Brief at 14-17. We disagree.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc). As we recognized when this case was most recently before the Board, to assist in fulfilling this duty, the ALJ has the discretion to take official notice of the DOT, provided he follows the correct procedure in doing so.[15] *Jefferson*, BRB Nos. 21-0171 BLA, 21-0172 BLA, slip op. at 13 n.19 (citing *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989)); *see Maddaleni v. Pittsburg & Midway Coal Mining Co*., 14 BLR 1-135, 1-138-139 (1990) The Board has recognized that the position descriptions in the DOT may be especially useful in a case, like this one, where the miner is deceased. *See Onderko*, 14 BLR at 1-4 (instructing the ALJ on remand to consider reopening the record to take official notice of the DOT).

On second remand, the ALJ notified the parties of his intent to take official notice of the DOT, to which Employer objected. 29 C.F.R. §18.84; *see Onderko*, 14 BLR at 1-2. Employer asserted that the Miner sufficiently explained the rigors of his last job at the July 22, 1986 hearing and that taking official notice now "would change the record made in 2016 and denies a full and fair hearing as the record is unknown and the parties are unable

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needed to be done. You just can't sit down and wait on everybody else. See you have to help the other people to survive." *Id.*

[15] An ALJ is granted discretion to take official notice "of any adjudicative fact or other matter subject to judicial notice" provided that "[t]he parties must be given an adequate opportunity to show the contrary of the matter noticed." 29 C.F.R. §18.84; *see Maddaleni v. Pittsburg & Midway Coal Mining Co*., 14 BLR 1-135 (1990); *Jordan v. James G. Davis Constr. Corp*., 9 BRBS 528.9 (1978).

to address the impact of any notice taken."[16] Employer's Objection Before the ALJ to Take Official Notice of Occupational Exertion Requirements in DOT at 2-3. The ALJ was unpersuaded by Employer's reasoning because he permissibly found the Miner's statement referring to light and moderate work referred only to his work operating the driller and did not encompass the entirety of his physical duties in that role.[17] *See Martin v. Ligon Preparation Co.,* 400 F.3d 302, 305 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Heavilin v. Consolidation Coal Co*., 6 BLR 1-1209, 1-1213 (1984) (determination of nature of usual coal mine work and its physical requirements is for the factfinder); Decision and Order on Second Remand at 15 n.14; SC Director's Exhibit 3 at 345-46. Thus, we see no error in the ALJ's reliance on the DOT in assessing the exertional requirements of the Miner's usual coal mine work. *See* Decision and Order on Remand at 15 (citing DOT (4th Ed., Rev. 1991) Appendix C).

Moreover, the ALJ acted within his discretion in according more weight to the Miner's previous CM-913 forms as the only evidence that identifies his specific lifting and carrying requirements and frequencies. *Jefferson*, BRB Nos. 21-0171 BLA, 21-0172 BLA, slip op. at 13; Decision and Order on Second Remand at 15; *see Napier*, 301 F.3d at 713-14; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Heavilin*, 6 BLR at 1-1213; *see also Bizarri v. Consolidation Coal Co*., 7 BLR 1-343, 1-344-45 (1984) (ALJ may rely on miner's testimony, especially if the testimony is not contradicted by any documentation of record). Per the Board's remand instructions, the ALJ adequately explained that the Miner's CM-913 forms from his June 28, 2002 and May 5, 1989 claims detail exertional requirements that meet the definition of heavy labor in the DOT and there is no contrary evidence. Decision and Order on Remand at 15 (citing DOT, (4th Ed., Rev. 1991) Appendix C); MC Director's Exhibit 3 at 865 (carried 200 pounds for thirty feet with assistance from others); SC Director's Exhibit 3 at 831 (carried fifty pounds a distance of

[16] We also reject Employer's contention that the ALJ could not reconsider the exertional requirements of the Miner's usual coal mine work because Claimant allegedly waived her ability to challenge this finding by failing to raise it before the prior ALJs in association with the prior denials. Employer's Brief at 14-15; Employer's Reply Brief at 3. Nothing prevents the ALJ from considering the exertional requirement issue in the normal course of modification. *O'Keeffe*, 404 U.S. at 256.

[17] As the ALJ noted, the Miner testified that he left coal mine employment in 1976 due to a back injury from lifting timber that occurred when he was working as a coal driller. Decision and Order on Second Remand at 15; SC Director's Exhibit 3 at 577-84.

five feet 150 times per day); *see Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989).

We therefore affirm, as supported by substantial evidence, the ALJ's determination that the Miner's usual coal mine work as a coal driller required heavy manual labor. Decision and Order on Remand at 15; *see Martin*, 400 F.3d at 305.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Simpao, Chavda, Selby, and Repsher. Decision and Order on Second Remand at 15-21. Drs. Simpao and Chavda opined that the Miner was totally disabled, while Drs. Selby and Repsher opined that he was not. MC Director's Exhibit 1 at 240-47, 261-87, 512-529, 543-58, 1592-1614, 1778-99; MC ALJ Exhibits 9 at 173-79, 10 at 35-76.

The ALJ gave no weight to Dr. Simpao's opinion because he relied solely on the August 24, 2006 pulmonary function study, which the ALJ found was invalid. Decision and Order on Second Remand at 16. He accorded more weight to Dr. Chavda's opinion, diagnosing a totally disabling respiratory or pulmonary impairment based on the Miner's low diffusion capacity, finding it better reasoned than the opinions of Drs. Selby and Repsher.[18] *Id.* at 19.

Employer contends that in weighing the medical opinions, the ALJ "misallocate[ed] . . . the burden of proof," arguing Claimant had the burden to establish the Miner's diffusing capacity of the lung for carbon monoxide (DLCO) values are sufficient to establish total disability[19] and "to disprove the validity of Dr. Repsher's and Selby's opinion [that the

[18] The ALJ indicated that to the extent Drs. Chavda, Selby, and Repsher relied on the pulmonary function study values in reaching their diagnoses, he did not give that portion of their opinions any weight since he found all the pulmonary function studies invalid. Decision and Order on Second Remand at 18.

[19] Because we have affirmed the ALJ's finding that the Miner's usual coal mine work required heavy manual labor, we reject Employer's contentions that Claimant was required to prove the Miner was totally disabled from performing "a moderate degree of physical labor." Employer's Brief at 21, 24-25. We also note that the ALJ specifically indicated that he would no longer discredit Dr. Chavda's opinion based on an inaccurate understanding of the exertional requirements of the Miner's usual coal mine work. Decision and Order on Second Remand at 19 n.19.

diffusion capacity testing revealed no impairment when adjusted for alveolar capacity]." Employer's Brief at 23. We disagree.

Dr. Chavda indicated that the Miner's DLCO readings "were very low," with the October 24, 20026 DLCO being 57% of predicted and the February 15, 2007 DLCO being 47% of predicted. MC ALJ Exhibit 9 at 176. At his May 6, 2016 deposition, he reiterated these values and agreed that the Miner would be unable to perform "hard, manual labor" based on the DLCO values. MC ALJ Exhibit 10 at 69-74. The ALJ permissibly concluded that Dr. Chavda provided "persuasive reasoning" for why the Miner's low DLCO values would cause a disabling impairment because he explained that the Miner's values "were at the highest or near highest level of impairment as assigned under the [American Medical Association (AMA)] Guides and would prevent him from maintaining oxygen, resulting in shortness of breath." Decision and Order on Second Remand at 19; MC ALJ Exhibit 10 at 70-72; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Clark*, 12 BLR at 1-155; *see also Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991) (physician's opinion that a miner is disabled due to a reduced diffusing capacity may constitute a valid basis for an ALJ's finding of total disability). We therefore affirm, as supported by substantial evidence, the ALJ's determination to accord the most weight to Dr. Chavda's opinion that the Miner was disabled based on his low DLCO values. Decision and Order on Second Remand at 19, 21; *see Martin*, 400 F.3d at 305.

We also reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Repsher and Selby. Employer's Brief at 21, 23-25. The Board previously affirmed the ALJ's rejection of Dr. Repsher's opinion because "the record is silent as to what, if anything, Repsher knew about the exertional demands of the Miner's job" and, thus, this holding constitutes the law of the case. *Jefferson*, BRB Nos. 21-0171 BLA, 21-0172 BLA, slip op. at 14; Decision and Order on Second Remand at 19 n.20. We decline to disturb this determination as Employer has not shown that the Board's prior decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine. *Messenger v. Anderson*, 225 U.S. 436 (1912) ("law of the case" doctrine "expresses the practice of courts generally to refuse to reopen what has been decided"); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984).

In his February 15, 2007 report, Dr. Selby observed the Miner's "diffusion capacity was 8.9 or 47% of predicted and the [diffusing capacity of the lung for carbon monoxide divided by alveolar volume (DLCO/VA)] is 3.75 or 109% of predicted." MC Director's Exhibit 1 at 1594. He then concluded that the Miner's "diffusion capacity is normal." *Id.* Dr. Selby reiterated these findings during his November 17, 2009 deposition. *Id*. at 276. Dr. Repsher similarly noted, in his November 7, 2006 report, that the Miner's "diffusing capacity is supranormal when adjusted for alveolar volume." *Id*. at 545. Again, Dr.

Repsher reiterated this finding at his April 20, 2007 deposition, stating "[t]he diffusing capacity . . . is probably normal."[20] *Id*. at 526. Although both physicians indicated that a normal diffusing capacity when adjusted for alveolar volume is inconsistent with clinically significant coal workers' pneumoconiosis, as the ALJ permissibly found, none of the physicians addressed the interplay between the DLCO and the DLCO/VA values and Drs. Repsher and Selby did not explain how this different measurement somehow negates the impairment Dr. Chavda diagnosed based on the low DLCO values.[21] *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Rowe*, 710 F.2d at 255; *Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order on Second Remand at 19.

Employer's argument is a request to reweigh the evidence, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's determination that the opinions of Drs. Repsher and Selby are not persuasive. Decision and Order on Second Remand at 19. Consequently, we affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Second Remand at 19.

We also affirm, as unchallenged on appeal, the ALJ's determination that the Miner's treatment records and lay testimony support a finding of totally disability. Decision and Order on Remand at 20-21; *see Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). We therefore further affirm the ALJ's conclusion that Claimant established the Miner had a totally disabling respiratory or pulmonary impairment based on the medical opinion evidence, in conjunction with the lay testimony and medical treatment records.[22]

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[20] Dr. Repsher also authored a September 17, 2009 supplemental report based on a review of records but did not directly address the Miner's diffusing capacity values. *See* MC Director's Exhibit 1 at 240-47.

[21] Contrary to Employer's assertion, Claimant does not have to "disprove the validity of Dr. Repsher's and Dr. Selby's opinions [concerning the DLCO/VA values]" because they did not opine that the DLCO value, on which Dr. Chavda relied, would not disable the Miner, and, as the ALJ recognized, these are different measurements. Employer's Brief at 23; *see* Decision and Order on Second Remand at 19.

[22] As the ALJ did not rely on the pulmonary function studies in finding Claimant established total disability at 20 C.F.R. §718.204(b)(2), we need not address Employer's arguments concerning the Board's prior treatment of this evidence, including our reliance on *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), any waiver by Claimant concerning the quality standards, or the ALJ's weighing of this evidence on remand. *See*

20 C.F.R. §§718.204(b)(2), 725.309(c); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order on Second Remand at 21. Consequently, we affirm his determination that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c); Decision and Order on Second Remand at 21 n.21.

Employer does not challenge the ALJ's finding that it failed to establish rebuttal of the Section 411(c)(4) presumption and thus we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order on Second Remand at 27-28. We therefore affirm the award of benefits in the miner's claim.[23]

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge as to 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).

Shinseki v. Sanders, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Second Remand at 13; Employer's Brief at 9-14; Employer's Reply Brief at 1-3.

[23] We also affirm, as unchallenged on appeal, the ALJ's finding that the interests of justice are served by granting the request for modification in the miner's claim. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §725.310; Decision and Order on Second Remand at 29.

Accordingly, we affirm the ALJ's Decision and Order on Remand Granting Benefits in Miner's and Survivor's Claims.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge