U.S. Department of Labor

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

BRB No. 22-0073 BLA

JANICE P. JOHNSTON (Widow of STEPHEN R. JOHNSTON) Claimant-Petitioner v. U.S. STEEL MINING COMPANY, LLC and U.S. STEEL CORPORATION Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 5/30/2023 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Charleston, West Virginia, for Claimant.

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

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Denying Benefits (2020-BLA-05225) rendered on a claim filed pursuant to the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on May 14, 2019.[1]

The ALJ credited the Miner with thirty-one and one-quarter years of underground coal mine employment, but she found he did not have a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). She therefore found Claimant did not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). The ALJ then considered whether Claimant could establish entitlement under 20 C.F.R. Part 718 without the benefit of the presumption. She determined Claimant established the Miner had clinical pneumoconiosis arising out of coal mine employment, but did not establish legal pneumoconiosis or that his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(c). Thus, she denied benefits.

On appeal, Claimant argues the ALJ erred in finding she did not establish total disability and thereby invoke the presumption of death due to pneumoconiosis at Section 411(c)(4). Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response in this appeal.[3]

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

[1] Claimant is the widow of the Miner, who died on October 20, 2018. Director's Exhibit 9. Although the Miner had filed a living miner's claim on August 25, 2003, he was never determined to be eligible to receive benefits during his lifetime. Director's Exhibit 1; *see Johnston v. U.S. Steel Corp.*, BRB No. 16-0124 BLA (Oct. 19, 2016) (unpub.). 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 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).

[2] Section 411(c)(4) 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-one and one-quarter years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh 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).

The ALJ found the pulmonary function studies, arterial blood gas studies, and medical opinions insufficient to establish total disability.[5] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 11-21.

In challenging the ALJ's denial of benefits, Claimant argues that because the Miner established total disability in his unsuccessful claim for benefits, she is entitled to invoke the Section 411(c)(4) presumption here in her survivor's claim and thus has established entitlement to benefits. Claimant's Brief at 13-14. The argument is unpersuasive.

We first note that Claimant has not indicated whether she is raising the doctrine of res judicata or collateral estoppel. Neither doctrine would assist Claimant in this case. Under res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties based on the same cause of action. *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 327 (1979). Res judicata is inapplicable because the miner's claim and survivor's claim are plainly separate and involve different parties. Claimant could not be a party to the Miner's claim because "spouses *of living miners* . . . are not entitled to seek benefits

[4] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[5] The ALJ found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 12 n.10.

under the [Act]." *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 221 (4th Cir. 2006) (emphasis added). Further, the Act provides independent claims for miners and wholly distinct claims for their survivors, with different elements of entitlement and different remedies for each. *See, e.g.*, 30 U.S.C. §901(a) (purpose of the Act is to provide benefits "to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to the disease"); 20 C.F.R. §§718.204 (providing criteria to establish disability in a miner's claim), 718.205 (providing criteria to establish that a miner's death was due to pneumoconiosis in a survivor's claim), 725.520 (providing the computation of benefits for living miner's and survivor's claims).

Collateral estoppel[6] bars relitigating a previously raised issue when, among other requirements, the issue was previously adjudicated and the determination of that issue was necessary to the outcome of the prior proceedings. *See Collins*, 468 F.3d at 218-19. To be entitled to benefits under the Act, 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).

Although the Miner had established total disability in his claim for benefits, ALJ Scott R. Morris ultimately denied the miner's claim because he failed to establish

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[6] To successfully invoke the doctrine of collateral estoppel, a party must establish the following criteria:

> (1) the issue sought to be precluded is identical to the one previously litigated;
> (2) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
> (3) determination of the issue must have been necessary to the outcome of the prior determination;
> (4) the prior proceeding must have resulted in a final judgment on the merits; and
> (5) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Westmoreland Coal Co. v. Sharpe, 692 F.3d 317, 331 (4th Cir. 2012), *citing Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 218-19 (4th Cir. 2006).

pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b)(2); Director's Exhibit 1 at 116-18, 346-56. The Board affirmed ALJ Morris's finding that the Miner failed to establish pneumoconiosis and thus was not entitled to benefits.[7] *Johnston v. U.S. Steel Corp.*, BRB No. 16-0124 BLA, slip op. at 4-5 (Oct. 19, 2016) (unpub). Thus, a finding of total disability was not necessary to the outcome of the proceeding in the miner's claim – the denial of benefits – because ALJ Morris could have denied benefits based on the Miner's failure to establish pneumoconiosis and not reach the element of total disability. *See Arkansas Coals Inc. v. Lawson*, 739 F.3d 309, 320-21 (6th Cir. 2014) (The word "necessary" modifies "outcome of the proceeding." "To say that X is 'necessary' to Y is the same thing as saying that it is impossible for Y to exist unless X also exists."), *quoting Bies v. Bagley*, 535 F.3d 520, 525 (6th Cir.2008); *Collins*, 468 F.3d at 217; *Hughes*, 21 BLR at 1-137. Consequently, a requisite element for application of the doctrine of collateral estoppel was not established. *Id*. We therefore reject Claimant's argument to the extent she is arguing collateral estoppel is applicable in her survivor's claim.

[7] The procedural history of the miner's claim is more detailed. ALJ Richard A. Morgan first found the Miner established clinical pneumoconiosis and a totally disabling respiratory or pulmonary impairment, but failed to establish total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c); Director's Exhibit 1 at 346-56. The Board affirmed that denial. *S. J.* [*Johnston*] *v. U.S. Steel Corp.*, BRB No. 08-0726 BLA, slip. op. at 3-5 (Jun. 18, 2009) (unpub). The Miner filed a request for modification and, addressing the entire record *de novo*, ALJ Thomas M. Burke found the Miner failed to establish either clinical or legal pneumoconiosis and thus denied modification. 20 C.F.R. §718.202(a); Director's Exhibit 1 at 346-356. Pursuant to the Miner's appeal, the Board held ALJ Burke permissibly revisited the issue of pneumoconiosis as the Miner's modification request triggered his authority to reconsider the entirety of the record. *Johnston v. U.S. Steel Corp.*, BRB No. 11-0764 BLA, slip op. at 3-4 (Aug. 17, 2012) (unpub). The Board also affirmed his finding that the Miner failed to establish pneumoconiosis. *Id*. The Miner filed a second request for modification. Director's Exhibit 1 at 116-18. ALJ Scott R. Morris found the Miner failed to establish a basis for modification because he failed to establish pneumoconiosis. Director's Exhibit 1 at 62-80. The Miner appealed and the Board affirmed ALJ Morris's finding that the Miner failed to establish pneumoconiosis. *Johnston v. U.S. Steel Corp.*, BRB No. 16-0124 BLA, slip op. at 4-5 (Oct. 19, 2016) (unpub).

We agree with Claimant, however, that the ALJ erred in considering the medical opinion evidence[8] on the issue of total disability as she erred in weighing Dr. Forehand's opinion.[9] 20 C.F.R. §718.204(b)(2)(iv); Claimant's Brief at 12-13 (unpaginated).

Prior to weighing the medical opinions, the ALJ addressed the Miner's usual coal mine employment and found:

> [The] Miner last worked as a belt mechanic. In this role, [he] was responsible for maintain in the continued operation [sic] of the mine's belt line. This required pouring concrete, shoveling coal; drilling, cutting, and welding metal; installing belts; operating mainline motors; and rock dusting. He worked six day(s) per week for eight hour(s) each day. [He] testified that all of this work required lifting and carrying between 50 and 100 pounds every day. Based on this evidence, it must be concluded [his] work as a belt mechanic required lifting up to 100 pounds each day, six day(s) per week and constituted work at the heavy exertional level.

Decision and Order at 10, *citing* Director's Exhibit 1 at 456-57, 601-02. She then weighed Dr. Forehand's opinion that the Miner was totally disabled. Director's Exhibit 1 at 579-82.

Dr. Forehand recognized that the Miner worked as a "repairman, welder, truckman, [and] general inside [sic]," which required him to lift, shovel, and set belt drives. Director's Exhibit 1 at 579. He also noted the Miner had symptoms of wheezing every morning, dyspnea with "any type of physical activity," and daily sputum production. *Id*. at 580. In addition, he opined the Miner's September 17, 2003 pulmonary function study is consistent

[8] We affirm the ALJ's unchallenged finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 25.

[9] The ALJ also considered Dr. Hippensteel's opinion and found he did not address the issue of total disability. Decision and Order at 19; Director's Exhibit 1 at 473-77. This finding is affirmed as unchallenged. *See Skrack*, 6 BLR at 1-711. The ALJ also weighed Dr. Zaldivar's opinion that the Miner was totally disabled "from a pulmonary standpoint." Director's Exhibit 1 at 223-30. Contrary to Claimant's argument, the ALJ permissibly found his opinion "is entirely conclusory" because "Dr. Zaldivar provided no support for [his] conclusion" that the Miner was totally disabled as a result of any pulmonary impairment he diagnosed. Decision and Order at 20; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

with an obstructive ventilatory pattern. *Id*. at 581. Based on this test result, he concluded the Miner had a "significant respiratory impairment" and lacked the "residual ventilatory capacity" to return to his usual coal mine work as he is "unable to work." *Id*. at 582.

The ALJ found Dr. Forehand's opinion unpersuasive because "his report does not display any understanding of the exertional requirements of [the] Miner's usual coal mine work." Decision and Order at 19. Although the ALJ acknowledged Dr. Forehand had reviewed the Miner's employment history Form CM-911a, she found "this form does not include any information related to the exertional requirements of [the] Miner's" usual coal mine employment and "merely lists [the] Miner's job titles and years of employment." *Id*. However, contrary to the ALJ's analysis, Dr. Forehand did not "merely" list the Miner's job titles. *Id*. He specifically noted the Miner's job required him to set belt heads, weld, pour concrete, drill, and install belt lines. Director's Exhibit 1 at 579. Therefore substantial evidence does not support the ALJ's basis for discrediting Dr. Forehand's opinion. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

Furthermore, a physician need not phrase his opinion in terms of "total disability" to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985) ("[i]t is not essential for a physician to state specifically that an individual is totally impaired"). In determining whether a miner was totally disabled, the ALJ must compare the exertional requirements of the miner's usual coal mine work with a physician's description of the miner's pulmonary impairment and physical limitations. *See 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); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). 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 was unable to do his usual coal mine job. *See Scott v. Mason Coal Co*., 60 F.3d 1138, 1142 (4th Cir. 1995); *Poole*, 897 F.2d at 894; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

As discussed above, Dr. Forehand indicated the Miner experienced dyspnea with "any type of physical activity" and was "unable to work" as a result of an insufficient "residual ventilatory capacity" evidenced by pulmonary function testing. *Id*. at 581-82. Thus the ALJ erred in failing to address whether his opinion provides sufficient information from which she can reasonably infer the Miner was unable to do his usual coal mine employment. *See Addison*, 831 F.3d at 256-57; *Scott*, 60 F.3d at 1142; *Poole*, 897 F.2d at 894.

Based on the foregoing errors, we must vacate the ALJ's finding that the medical opinion evidence and the evidence, when weighed together, does not establish total disability. 20 C.F.R. §718.204(b)(2). Because we have vacated the ALJ's finding of total disability, we also vacate her finding Claimant cannot invoke the Section 411(c)(4) presumption of death due to pneumoconiosis, and therefore vacate the denial of benefits. 30 U.S.C. §921(c)(4). Thus we remand this case for further consideration of the issue of total disability.

On remand, the ALJ must reconsider Dr. Forehand's opinion and determine whether it establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). She must compare the exertional requirements of the Miner's usual coal mine work with the physician's descriptions of his pulmonary impairment and physical limitations. *Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4; *Cornett*, 227 F.3d at 578; *Ward*, 93 F.3d. at 218-19. When weighing Dr. Forehand's opinion, the ALJ must address the explanations for his medical finding, the documentation underlying his medical judgment, and the sophistication of and bases for his conclusion. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

If Claimant establishes total disability based on the medical opinion evidence, the ALJ must weigh all of the relevant evidence together to determine whether Claimant has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, and thereby invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305. If Claimant is unable to establish total disability, benefits are precluded as Claimant has not challenged the ALJ's finding that she did not establish death due to pneumoconiosis independent of the Section 411(c)(4) presumption.[10] 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc); *Skrack*, 6 BLR at 1-711.

[10] The irrebuttable presumption of death due to pneumoconiosis under Section 411(c)(3) of the Act is not applicable because there is no evidence of complicated pneumoconiosis in the record. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge