



BRB Nos. 21-0002 BLA
and 21-0003 BLA

LILLIAN SHORTRIDGE)
(o/b/o and Widow of CHESTER R.)
SHORTRIDGE))

Claimant-Respondent)

v.)

ISLAND CREEK KENTUCKY MINING)

and)

DATE ISSUED: 11/23/2021

ISLAND CREEK COAL COMPANY, c/o)
HEALTHSMART CASUALTY)

Employer/Carrier-)
Petitioners)

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

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Living Miner's
Claim and Survivor's Claim of Monica Markley, Administrative Law Judge,
United States Department of Labor.

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim (2017-BLA-05260, 2018-BLA-05089) on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on April 22, 2015,¹ and a survivor's claim filed on August 11, 2017.²

The ALJ credited the Miner with seventeen years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined Claimant invoked the presumption the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),³ and established a change in an applicable condition of entitlement.⁴ 20

¹ The Miner filed a previous claim on December 19, 1991, which the district director denied because the evidence did not establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1.

² Claimant is the widow of the Miner, who died on July 27, 2017. Survivor's Claim (SC) Director's Exhibit 4. She is pursuing the miner's claim as well as her own survivor's claim. SC Director's Exhibit 1.

³ Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the 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); 20 C.F.R. §718.305(b).

⁴ When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds 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); *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's prior claim was denied for failure to establish any

C.F.R. §§718.305, 725.309. The ALJ further determined Employer did not rebut the presumption and awarded benefits in the Miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).⁵

On appeal, Employer argues the ALJ erred in finding the Miner was totally disabled and in invoking the Section 411(c)(4) presumption. Employer also argues the ALJ therefore erred in awarding Claimant derivative survivor's benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁶

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.⁷ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Miner's Claim

Invocation of the Section 411(c)(4) Presumption

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary

element of entitlement, Claimant has to submit new evidence establishing at least one element to warrant a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; MC Director's Exhibit 1.

⁵ Under Section 422(l) of the Act, a 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 that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

⁶ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established seventeen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

⁷ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 30; MC Director's Exhibits 4, 6.

function studies, qualifying arterial blood gas studies,⁸ 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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).

The ALJ found Claimant established total disability based on the blood gas studies, the medical opinions, and the evidence as a whole.⁹ 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 18-22. Although Employer correctly contends the ALJ did not fully explain her finding that Claimant established total disability based on the blood gas study evidence, we need not remand this case for further consideration. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the “error to which [it] points could have made any difference”). As discussed below, the ALJ permissibly found Claimant established total disability based on Dr. Werchowski’s undisputed opinion that the Miner had a disabling oxygenation impairment.¹⁰

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

⁹ The ALJ found the pulmonary function study evidence did not establish total disability and found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 3-6, 18-19. The ALJ also found Claimant did not establish complicated pneumoconiosis and, thus, could not invoke the irrebuttable presumption that the Miner was totally disabled due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 18.

¹⁰ The ALJ considered five blood gas studies. Dr. Werchowski’s May 6, 2015 study had non-qualifying values at rest and qualifying values with exercise; Dr. Titha’s June 9, 2015 resting study was non-qualifying; an October 30, 2015 resting study taken during the Miner’s hospitalization was qualifying; Dr. McSharry’s March 22, 2016 resting study was non-qualifying; and Dr. Delaughter’s April 19, 2017 resting study was qualifying. Decision and Order at 9; MC Director’s Exhibits 11, 16; MC Employer’s Exhibits 4, 7, 15. The ALJ found Dr. Delaughter’s April 19, 2017 qualifying resting study “most probative of the [M]iner’s condition at the time of his death in July 2017” and Dr. Werchowski’s exercise study “more closely reflect[ed] the exertional requirements of [his] coal mine employment.” Decision and Order at 19. Employer asserts the ALJ failed to properly address whether the April 19, 2017 blood gas study, which was obtained while the Miner

Medical Opinions

Three physicians provided medical opinions: Dr. Werchowski; Dr. McSharry; and Dr. Fino. Dr. Werchowski conducted the Miner's Department of Labor complete pulmonary evaluation on May 6, 2015, and obtained a non-qualifying pulmonary function study and a qualifying exercise blood gas study. MC Director's Exhibit 11 (unpaginated) at 20-21. He opined the Miner was totally disabled based on his "severely abnormal blood gas response to exercise," further supported by the Miner's symptoms of "wheezing, shortness of breath, cough, and mucus production, his abnormal FEV1/FVC ratio [on pulmonary function testing], his abnormal diffusing capacity, [and] his abnormal lung examination." *Id.* at 21. In his September 5, 2016 supplemental letter, Dr. Werchowski reviewed Dr. McSharry's medical report and noted Dr. McSharry's pulmonary function test yielded qualifying results and the Miner showed significant oxygen desaturation based on a pulse oximetry test. *Id.* at 1. He reiterated the Miner had a "significant lung disease" that was totally disabling. *Id.*

Dr. McSharry examined the Miner on March 22, 2016, and reviewed his medical records. MC Director's Exhibit 16 (unpaginated) at 4-5. He administered both a pulmonary function study, which yielded qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values, and a non-qualifying resting blood gas study. *Id.* at 4-5, 16. He opined that the Miner had a mild restriction and a moderate obstruction, without significant response to bronchodilators, and diffusion abnormalities. *Id.* at 3-5, 10. He indicated the Miner was unable to perform exercise blood gas testing but that a pulse oximetry test conducted during exercise showed a totally disabling respiratory impairment because the Miner's oxygen saturation fell from ninety-nine percent to seventy-two percent. *Id.* at 3-5. At his subsequent deposition, Dr. McSharry testified he believed the Miner's disabling oxygen impairment was due to his long-standing history of heart valve

was being treated for pneumonia, is probative. Employer's Brief at 3-5. It also asserts the ALJ failed to discuss the exertional requirements of the Miner's last coal mine job in crediting the qualifying exercise study above the non-qualifying resting studies to find total disability established at 20 C.F.R. §718.204(b)(2)(i). *Id.* Even if we agree with Employer's contentions of error, they do not alter the ALJ's permissible finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Claimant may establish total disability based on a reasoned medical opinion at 20 C.F.R. §718.204(b)(2)(iv) even if the evidence is insufficient, standing alone, to establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

problems and possibly damage to the nerves in his diaphragm as a result of heart surgery. MC Employer's Exhibit 1 at 23-26.

Dr. Fino reviewed Dr. Werchowski's medical report and supplemental letter, and the Miner's 2015 treatment records. MC Employer's Exhibit 2 at 1. Dr. Fino found "no evidence" of a pulmonary or respiratory disability, attributing the drop in the Miner's PO₂ with exertion on Dr. Werchowski's blood gas test to heart disease. *Id.* at 3-4. He also opined, based on Dr. Werchowski's pulmonary function testing results, that the Miner had no evidence of any respiratory impairment prior to his heart surgery. *Id.* He indicated he did not personally review Dr. McSharry's medical report but was aware of Dr. McSharry's diagnosis of a combined obstructive and restrictive defect post-surgery, which would be "consistent with [the Miner's] heart surgery." *Id.*

The ALJ credited Dr. Werchowski's opinion and found the Miner was totally disabled. Employer argues the ALJ did not apply the same degree of scrutiny in weighing the medical opinions of Drs. Werchowski and Fino.¹¹ Employer's Brief at 5. We disagree.

Contrary to Employer's contention, the ALJ examined the reasoning of each physician equally to determine if the opinion was adequately explained. He permissibly found Dr. Werchowski's opinion reasoned and documented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). The ALJ properly found Dr. Werchowski's opinion was based on the results of a qualifying blood gas study and that he further explained it in light of the other evidence in the record. Dr. Werchowski concluded that the Miner's oxygenation impairment was supported by Dr. McSharry's pulse oximetry testing that showed a drop in his oxygen saturation with exercise and the Miner's shortness of breath, wheezing, and coughing.¹² Decision and Order at 19-20; *see Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v.*

¹¹ Although Dr. McSharry opined the Miner was totally disabled, the ALJ gave his opinion lesser weight because he provided conflicting statements as to whether the Miner had a respiratory or cardiac impairment. Decision and Order at 21-22. We affirm the ALJ's determination as unchallenged. *See Skrack*, 6 BLR at 1-711.

¹² Although it is not necessary to our disposition of this case, we disagree with Employer's argument that the ALJ erred in finding Dr. Fino's opinion less credible because Employer did not provide him with a copy of Dr. McSharry's examination report, which Dr. Werchowski specifically reviewed and referenced in reaching his conclusions. Decision and Order at 21 n.12; Employer's Brief at 5-6; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (ALJ has discretion to determine if an opinion is adequately reasoned and documented).

Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989) (en banc). Based on the totality of Dr. Werchowski's examination findings, the blood gas impairment he identified, and the other evidence he considered in reaching his conclusion, we affirm the ALJ's permissible crediting of his opinion that the Miner was totally disabled. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000).

The ALJ also permissibly found Dr. Fino's opinion unpersuasive because he relied primarily on the non-qualifying pulmonary function studies to conclude the Miner did not have a respiratory impairment without adequately discussing the severity of the Miner's oxygen impairment on blood gas testing. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-1041 (6th Cir. 1993) (pulmonary function studies and blood gas studies measure different types of impairment); *see also Hicks*, 138 F.3d at 533; Decision and Order at 21. Dr. Fino addressed the oxygenation impairment, which Dr. Werchowski identified, only to attribute it to the Miner's heart disease. Thus, while he disagreed with Dr. Werchowski on its cause, he did not dispute its severity. MC Employer's Exhibit 2 at 1. That distinction is material: 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. §718.204(c) or in consideration of rebuttal of the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.204(a), (c); 718.305(d)(1); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

The ALJ has discretion to evaluate the medical evidence, draw inferences, and assess its probative value. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17 (4th Cir. 2012); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because Employer has not shown error in the ALJ's weighing of the medical opinions, we affirm the ALJ's findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. Decision and Order at 19-22, 29.

In light of our affirmance of the ALJ's findings that Claimant established seventeen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm her determination that Claimant invoked the Section 411(c)(4) presumption and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2); 725.309; Decision and Order at 7, 20-22. Moreover, because Employer does not challenge the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption, we affirm that determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26-28. 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) (2012); Decision and Order at 30-31. Employer raises no specific challenge to the survivor's claim, other than its assertion that the miner's claim was improperly awarded, which we rejected. We therefore affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge