U.S. Department of Labor

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

BRB No. 22-0246 BLA

JUDY A. KIRKWOOD (Widow of DOUGLAS R. KIRKWOOD) Claimant-Respondent v. ISLAND CREEK COAL COMPANY and CONSOL ENERGY, INCORPORATED Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/24/2023 DECISION and ORDER

Appeal of the Decision and Order Granting Survivor's Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Thomas E. Springer III (Springer Law Firm PLLC), Madisonville, Kentucky, for Claimant.

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

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Granting Survivor's Benefits (2020-BLA-05702) rendered on a survivor's claim filed on July 3, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that the Miner had at least sixteen years of underground coal mine employment and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it did not rebut the presumption.[3] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, declined to file a 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.[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).

[1] Claimant is the surviving spouse of the Miner, Douglas A. Kirkwood, who died on January 12, 2006. Director's Exhibits 3, 10, 11.

[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 sixteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[4] 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.

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 C.F.R. §718.305(b)(1)(iii). Total disability is established if the Miner's 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 the relevant evidence supporting a finding of 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 correctly observed the record contains no pulmonary function or arterial blood gas studies, and there is no evidence that the Miner suffered from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. § 718.204(b)(2)(i)-(iii); Decision and Order at 8-9. He further found that, although "none of the physicians of record directly stated that the Miner was disabled from performing his prior coal mine employment," the testimonial evidence and the Miner's treatment records establish that the Miner was totally disabled from performing his last coal mining job or comparable work prior to his death.[5] Decision and Order at 21-22; *see* 20 C.F.R. §718.204(b)(2)(iv).

The ALJ considered the medical opinions of Drs. Amundson, Goodman, and Basheda. Decision and Order at 12-21. Dr. Amundson indicated he was the Miner's treating physician but he had no personal memory of the Miner and was unable to locate his records related to the Miner's care, despite a diligent search. Director's Exhibit 16 at 1; Employer's Exhibit 2 at 10-11. Based on the Miner's death certificate, however, he opined the Miner had a disabling respiratory impairment prior to his death.[6] Employer's

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See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 7.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner's usual coal mine work as a shuttle car operator, cutting machine operator, and shooter required performing at least light exertional work on a sustained basis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 20.

[6] Thus, the ALJ's statement that "none of the physicians of record directly stated the miner was disabled" is incorrect. Decision and Order at 21; Employer's Exhibit 2 at 17-18. Any error was harmless, however, as the ALJ nevertheless found Claimant established

Exhibit 2 at 17-18. Dr. Goodman diagnosed "severe chronic obstructive pulmonary disease" (COPD), observed the Miner required supplemental oxygen, and indicated he had a severe impairment and "respiratory incapacity," but did not expressly opine as to whether the Miner was able to perform the requirements of his last coal mining job. Employer's Exhibit 3 at 5-6. Dr. Basheda diagnosed COPD and pulmonary cachexia, observed the Miner was prescribed oxygen therapy, and indicated he suffered a decline in his pulmonary functioning prior to his death, but concluded there is insufficient objective evidence to opine on whether the Miner had a disabling respiratory impairment prior to his death. Employer's Exhibits 4 at 7-10; 5 at 32-33.

The ALJ also considered the Miner's treatment records from Dr. Taylor and the testimony of Claimant and Ms. Sisk, the Miner's daughter. Decision and Order at 20-21. As the ALJ observed, Dr. Taylor was the Miner's treating pulmonologist from October 2003 through October 2005. Decision and Order at 21; Director's Exhibit 14. Dr. Taylor diagnosed advanced COPD with persistent chronic bronchitis and pulmonary cachexia and indicated the Miner required supplemental oxygen as well as the use of a wheelchair. Director's Exhibit 14 at 5, 7-10, 11. Claimant testified the Miner had difficulty breathing such that he required supplemental oxygen for at least three years prior to his death and became out of breath rising from the sofa and walking to the door. Hearing Tr. at 17-18, 24-25. Ms. Sisk testified she took care of the Miner in the final years of his life and that "[h]e went from walking with the oxygen to a wheelchair to bedridden over a course of three years." *Id.* at 28.

The ALJ found Claimant's testimony as to the Miner's physical limitations could not be credited because she would be eligible for benefits if the claim were approved. Decision and Order at 20 (citing 20 C.F.R. §718.204(d)(3)). However, he gave the Miner's daughter's testimony probative weight. *Id.* at 21. Weighing the medical opinions, treatment records, and testimony together, the ALJ determined that, due to the Miner's severe respiratory impairment—which required supplemental oxygen and use of a wheelchair due to his inability to walk on his own—he could not perform the duties of his prior coal mining work. *Id.* Thus, he found Claimant established the existence of a totally disabling impairment prior to the Miner's death. *Id.*; *see* 20 C.F.R. §718.204(b)(2).

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total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21; Employer's Exhibit 2 at 17-18.

Employer asserts the ALJ erred in finding Claimant established total disability because the record does not contain qualifying objective studies or medical opinions stating the Miner was disabled.[7] Employer's Brief at 6-8. We disagree.

Contrary to Employer's contention, even if total disability cannot be established by pulmonary function or arterial blood gas tests, it "may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents" him from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). A physician thus need not phrase his or her opinion specifically in terms of "total disability" in order to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman 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)). Further, treatment records may support a finding of total disability if they provide sufficient information from which the ALJ can reasonably infer a miner was unable to do his last coal mine job. *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).

Dr. Taylor treated the Miner for advanced COPD, bronchitis, and pulmonary cachexia at the Madisonville Trover Clinic. Director's Exhibit 14 at 1-15. He documented that the Miner was on supplemental oxygen; he used "a wheelchair with oxygen." *Id.* at 7-13. Dr. Basheda likewise noted the Miner was prescribed oxygen and explained this suggested the Miner's oxygen saturation was at eighty-eight percent or lower while at rest, walking, or during sleep, meaning he likely met the standards for total disability "for some time." Employer's Exhibit 5 at 20. He further noted the Miner had pulmonary cachexia, which he explained was weight loss caused by severe COPD. *Id.* at 28. The ALJ stated this evidence "overwhelmingly establishes" the Miner "required supplemental oxygen for a low oxygenation rate and required the use of a wheelchair." Decision and Order at 21. He rationally found "physical limitations due to breathing difficulties establish [the] Miner

[7] Employer also indicates it "was not clear" why lay testimony from the Miner's widow and daughter was relevant to total disability. Employer's Brief at 9. Error, if any, in considering the lay testimony was harmless, however, because the ALJ declined to credit Claimant's testimony related to the Miner's impairment, and Ms. Sisk's testimony merely corroborates Dr. Taylor's treatment records. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 20-21; Hearing Tr. at 28.

was unable to perform any of his prior coal mine work or similar exertional duties."[8] *Id.*; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

The ALJ has discretion to weigh the medical evidence and draw his own inferences therefrom. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-77 (6th Cir. 2013); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Napier*, 301 F.3d at 713-14. The Board is not empowered to 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). Because the ALJ fully considered and described the relevant evidence and drew reasonable inferences from the Miner's treatment records, his decision comports with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A) (requiring a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented"); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We thus affirm the ALJ's finding that the Miner was totally disabled at the time of his death, as substantial evidence supports it. 20 C.F.R. §718.204(b)(2)(iv); *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (Substantial evidence is defined as relevant evidence that a reasonable mind could accept as adequate to support a conclusion.). As Employer raises no further challenges, we affirm the ALJ's finding that the evidence as a whole establishes total disability and that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(iii).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[9] or "no part

[8] We further reject Employer's argument that the ALJ erred in finding Claimant established total disability because "the impairment must be a chronic pulmonary disease and not an acute exacerbation." Employer's Brief at 8. Employer cites no evidence to support its inference that the Miner's respiratory impairment was totally disabling only during periods of acute exacerbation. Although Dr. Taylor's treatment records identify periods of acute exacerbation, his records further document the Miner required oxygen and the use of a wheelchair outside of periods of acute exacerbation. *See* Director's Exhibit 14 at 7.

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment

of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[10]

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish that Claimant does not have any of the diseases "recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

At the hearing, Employer objected to the consideration of Drs. Myers's and Anderson's readings of the February 6 and October 1, 1989 x-rays on the grounds that, because the original x-rays were destroyed, it did not have an opportunity to have its own experts review the original x-rays and because Drs. Myers and Anderson are deceased they are unavailable for cross-examination. Hearing Tr. At 11-12. The ALJ overruled Employer's objection and thus admitted and considered Drs. Meyer's and Anderson's readings. Decision and Order at 23-26. Employer contends this was error. Employer's Brief at 10-14. We disagree.

An ALJ is granted broad discretion in resolving procedural and evidentiary issues. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). A party seeking to overturn an ALJ's resolution of an evidentiary issue must prove that the ALJ's action was an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co*., 24 BLR 1-109, 1-113 (2009) (citing *Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-17 n.1 (2007) (en banc recon.), *aff'g* 23 BLR 1-98 (2006)). Employer has not met this burden.

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significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e*., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[10] The ALJ found Employer failed to establish that the Miner did not have clinical pneumoconiosis and that consideration of rebuttal of legal pneumoconiosis was thus "moot." Decision and Order at 26.

X-rays that comply with the Act's regulatory quality standards are admissible as evidence of the presence or absence of pneumoconiosis. 20 C.F.R. §§718.101(b), 718.102. The regulations state in relevant part that "[w]here the chest X-ray of a deceased miner has been lost or destroyed, or is otherwise unavailable, a report of the chest X-ray submitted by any party may be considered in connection with the claim." 20 C.F.R. §718.102(g). In this case, the Miner died in 2006, and Employer noted at the hearing that the original February 6, 1989 and October 1, 1989 scans were unavailable as they had been destroyed.[11] Hearing Tr. at 7, 11-12; Director's Exhibits 13, 15. Based on the plain language of the regulation, Employer has not shown the ALJ abused his discretion in admitting the x-ray readings by Drs. Myers and Anderson.[12] 20 C.F.R. §718.102(g); *see Harris*, 23 BLR at 1-108; Director's Exhibits 13, 15.

Further, in the absence of deliberate misconduct, "the mere failure to preserve evidence . . . that may be helpful to one or the other party in some hypothetical future proceeding [ ] does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim). Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim, an assertion Employer does not make. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). Employer further concedes it had the opportunity to offer evidence from its experts "question[ing] the diagnostic value of these [x-ray] interpretations"—but it identifies no error in the ALJ's rationale for finding Drs. Basheda's and Goodman's opinions insufficient to rebut the presence of clinical pneumoconiosis. Employer's Brief at 11. Employer has thus not been deprived due process of law.[13] *See Holdman*, 202 F.3d at 883-84; *Blake*, 24 BLR at 1-113.

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[11] Employer's counsel indicated he attempted to obtain the x-rays from the facility that performed them, but that the facility reported that they had been destroyed. Hearing Tr. at 7.

[12] Employer does not allege the February 6, 1989 or October 1, 1989 x-ray reports fail to satisfy the quality standards at 20 C.F.R. §718.102. Employer's Brief at 10-14. Further, the record reflects Drs. Myers and Anderson interpreted these x-rays in accordance with the ILO classification system and stated their qualifications in the reports. Director's Exhibits 13; 15.

[13] Employer further contends the ALJ erred by not explaining what weight was given to the x-ray reports contained in the Miner's treatment records. Employer's Brief at 12-14. The treatment record x-rays do not reference the presence or absence of clinical

Finally, it is Employer's burden to "affirmatively prove[ ] the absence of pneumoconiosis . . . ." *Morrison*, 644 F.3d at 480. Employer has not shown how, if the x-ray reports were struck from the record as it requests, the results could be different.[14] *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"). Nor has it argued that it was otherwise prevented from developing evidence to rebut the presumption as a general matter. Because Employer does not assert any additional error, we affirm the ALJ's finding that Employer failed to disprove clinical pneumoconiosis. We therefore affirm his finding that Employer did not rebut the presumption by establishing the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Death Causation

The ALJ next considered whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 26-28. Employer again relies on the opinions of Drs. Basheda and Goodman, both of whom opined the Miner died from COPD caused by smoking tobacco and unrelated to coal mine dust exposure. Employer's Exhibits 3 at 5-6; 5 at 22-23. The ALJ permissibly discredited their causation opinions because they failed to explain why pneumoconiosis did not contribute to or exacerbate the Miner's respiratory impairments along with smoking.[15] *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 27-28. Further, contrary to

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pneumoconiosis and thus do not support Employer's burden to affirmatively disprove clinical pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013); 20 C.F.R. §718.305(d)(1)(i). Although Employer asserts Drs. Basheda and Goodman relied on the treatment record x-rays in formulating their opinions, Dr. Basheda opined only that he questioned the diagnosis of clinical pneumoconiosis as it was unclear that the physicians reading the x-rays were B readers, and Dr. Goodman opined the Miner did have clinical pneumoconiosis. Employer's Exhibits 3 at 5; 4 at 10; 5 at 12-13, 21.

[14] We note that the remaining treatment reports do not specifically address the existence of pneumoconiosis. Director's Exhibit 14.

[15] Contrary to Employer's argument, the ALJ reasonably accorded no probative weight to Dr. Taylor's opinion because the physician did not attribute the Miner's obstructive lung disease to any particular cause. Employer's Brief at 14; Decision and Order at 26-27; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Employer's contention, the ALJ did not "apply[ ] the preamble as a rule of law" to discredit Dr. Goodman's opinion; he found Dr. Goodman's opinion inadequately explained for several reasons and in so doing permissibly consulted the preamble as a statement of credible medical research findings accepted by the Department of Labor. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Crisp*, 866 F.2d at 185; 65 Fed. Reg. 79920, 79937-44 (Dec. 20, 2020); Employer's Brief at 14-15; Decision and Order at 27.

Ultimately, Employer's arguments are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because the ALJ acted within his discretion in discrediting Drs. Goodman's and Basheda's opinions, the only opinions supportive of Employer's burden, we affirm his finding that Employer did not rebut the Section 411(c)(4) presumption that the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, we affirm the ALJ's Decision and Order Granting Survivor's Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge