U.S. Department of Labor

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

BRB Nos. 21-0138 BLA
and 21-0139 BLA

BEULAH DYKES (Widow and o/b/o LOWELL A. DYKES) Claimant-Respondent v. CONSOLIDATION 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: 9/30/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer and its Carrier.

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

BOGGS, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry W. Price's Decision and Order Awarding Benefits (2018-BLA-05876 and 2019-BLA-05346) 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 claim filed on November 9, 2015, and a survivor's claim filed on September 4, 2018.

The ALJ credited the Miner with 16.58 years of qualifying coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant[1] invoked the presumption of total disability 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 in the Miner's claim. Because the Miner was determined to be entitled to benefits at the time of his death, the ALJ also concluded Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[3]

On appeal, Employer argues the ALJ erred in finding Claimant established more than fifteen years of qualifying coal mine employment and total disability, and therefore erred in finding Claimant invoked the Section 411(c)(4) presumption. It further argues he erred in finding it did not rebut the presumption. Finally, Employer asserts that because the Miner's claim was erroneously awarded, Claimant is not entitled to derivative benefits in the survivor's claim. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

[1] Claimant is the widow of the Miner, who died on July 12, 2018. Decision and Order at 3; Survivor's Claim Director's Exhibit 9. She is pursuing both his claim and her survivor's claim. *Id*.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability 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. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] 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*) (2012).

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).

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

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of computation and is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In determining the length of the Miner's coal mine employment, the ALJ stated he "reviewed all pertinent documents in evidence"[5] and summarily concluded that the documentary evidence established 16.58 years of coal mine employment.[6] Decision and Order at 5.

We agree with Employer that, because the ALJ did not explain his method of calculation, his conclusion with respect to the length of coal mine employment does not

[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 Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim (MC) Director's Exhibit 7, 9; Survivor's Claim (SC) Director's Exhibit 5-6.

[5] Relevant to the length of coal mine employment, the record contains the Miner's application for benefits, the CM-911a Employment History Form, a CM-913 Description of Coal Mine Work and Other Employment, a November 18, 2015 Memorandum of a phone call between a claims examiner and Claimant, an employment questionnaire form, and the Miner's Social Security Earnings Record. Miner's Claim (MC) Director's Exhibits 2-5, 7-9.

[6] We affirm, as unchallenged on appeal, the ALJ's rejection of Claimant's stipulation to 14.83 years of coal mine employment by her lay representative. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4 n.8, 5 n.11,

satisfy the Administrative Procedure Act (APA).[7] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Based on the foregoing error, we must vacate the ALJ's length of coal mine employment finding. Decision and Order at 5. Because we vacate the ALJ's finding that Claimant established at least fifteen years of coal mine employment, we must also vacate his finding that Claimant invoked the Section 411(c)(4) presumption in the Miner's claim and the award of benefits in that claim. We must therefore vacate his determination that Claimant is entitled to derivative benefits. 30 U.S.C. §932(*l*); Decision and Order at 30.

On remand, the ALJ must determine the length of the Miner's coal mine employment, using a reasonable method of calculation.[8] *See Shepherd v. Incoal, Inc*., 915 F.3d 392, 407 (6th Cir. 2019); *Muncy*, 25 BLR at 1-27. If the ALJ finds at least fifteen years of coal mine employment established on remand, he must determine how much of the Miner's coal mine employment occurred in underground mines or in surface mines in conditions substantially similar to those in an underground mine.[9] 20 C.F.R. §718.305.

[7] The APA requires every adjudicatory decision to include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[8] In doing so the ALJ must first determine whether the evidence establishes the beginning and ending dates of the Miner's coal mine employment "by any credible evidence." 20 C.F.R. §725.101(a)(32); *Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016). Where the beginning and ending dates of a miner's employment cannot be determined, an ALJ may divide the miner's yearly reported income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS) and/or use another reasonable method of calculation. 20 C.F.R. §725.101(a)(32)(iii); *see* Exhibit 610 of the Black Lung Benefits Act Procedure Manual. A copy of the BLS table must be made a part of the record if an ALJ uses this method to establish the length of a miner's coal mine employment. 20 C.F.R. §725.101(a)(32)(iii); *Osborne*, 25 BLR at 1-204 n.12.

[9] The miner indicated he worked in prep plants from 1973 to 1975, and worked in underground mines from January 1975 to November 1989. MC Director's Exhibits 3, 7. The ALJ found the Miner "mainly" worked in underground mines, and that he had "more than fifteen years of underground coal mine employment." Decision and Order at 5, 27.

Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must also establish that the Miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(iii). A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See 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 the Miner was totally disabled based on the pulmonary function study evidence, the medical opinion evidence, and the evidence as a whole.[10] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 20-27.

The ALJ considered two pulmonary function studies conducted on January 19, 2016 and January 5, 2017.[11] Decision and Order at 22-24; Miner's Claim (MC) Director's Exhibits 13, 21. The ALJ found that both studies produced qualifying[12] values before and after the administration of bronchodilators and were valid. Decision and Order at 20-24; MC Director's Exhibits 13, 21. Consequently, he found the pulmonary function study evidence established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 24.

[10] The ALJ found that the blood gas study evidence does not establish total respiratory disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iii); Decision and Order at 24.

[11] The ALJ also noted the existence of three pulmonary function studies from the Miner's treatment records, conducted on August 31, 2017, October 25, 2017, and December 19, 2017. Decision and Order at 23-24. However, he declined to consider them at 20 C.F.R. §718.204(b)(2)(i), and instead considered them as a part of the treatment records as a whole. *Id*. As Employer does not challenge this determination, it is affirmed. *Skrack*, 6 BLR at 1-711.

[12] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Employer initially contends the ALJ erred in finding the January 19, 2016 pulmonary function study valid. Employer's Brief at 11-17. We disagree.

Dr. Forehand administered the January 19, 2016 study as part of the Department of Labor-sponsored pulmonary evaluation. MC Director's Exhibit 13. The technician who conducted the test noted the Miner put forth "good effort." MC Director's Exhibit 13 at 12. Similarly, Dr. Forehand noted good cooperation and a good ability to understand instructions and follow directions. *Id.* at 13. Dr. Gaziano reviewed the study and indicated the "[v]ents are acceptable." Decision and Order at 22; MC Director's Exhibit 15. Dr. Dahhan also opined the tracings showed a valid test.[13] MC Director's Exhibit 21. Drs. Rosenberg and Fino opined the study is invalid due to inadequate effort and excess variability. MC Employer's Exhibits 2, 26, 27.

Initially, we affirm as unchallenged, the ALJ's crediting of Dr. Dahhan's opinion that the January 19, 2016 pulmonary function study is valid. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23. Nor do we see any error in the ALJ's crediting of the opinions of Drs. Forehand and Gaziano along with the observations of the technician who conducted the study. Decision and Order at 22-23. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Contrary to Employer's arguments, the ALJ reasonably inferred that Dr. Forehand, the administering physician, observed the January 19, 2016 pulmonary function study. *See Napier*, 301 F.3d at 712-14; *Banks*, 690 F.3d at 482-83; Employer's Brief at 10 (unpaginated). Employer identifies no reason to assume that Dr. Forehand's personal notations of good cooperation and understanding were simply a restatement of the technician's notation of good effort, when the physician agreed that the "information furnished is correct" and his signature "attests to the accuracy of the results provided." *Id.* at 12.

Nor did the ALJ find Dr. Gaziano's "checkmark validation was dispositive," in contravention of case law. Employer's Brief at 12-13 (unpaginated). Rather, the ALJ permissibly found the opinions of Drs. Forehand, Dahhan, and Gaziano, as well as the

[13] Drs. Dahhan and Fino also opined the January 19, 2016 study did not reflect totally disabling values based upon the Miner's age of seventy-seven, as the table values at 20 C.F.R. Part 718, Appendix B, do not go beyond seventy-one years of age. MC Director's Exhibits 21; MC Employer's Exhibit 2, 26. We affirm, as unchallenged on appeal, the ALJ's decision to use the values for a miner of seventy-one years of age. *Skrack*, 6 BLR at 1-711; Decision and Order at 21-23.

observation of the technician, more persuasive than the opinions of Drs. Rosenberg and Fino. *See Napier*, 301 F.3d at 712-14; *Banks*, 690 F.3d at 482-83; *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (ALJ may rely on the opinion of the physician who administered a ventilatory study over those who reviewed the results); *Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-149 (1990) (ALJ must provide a rationale to credit consultant's opinion over physician or technician who observed the test). Because it is supported by substantial evidence, we affirm the ALJ's determination that the January 19, 2016 pulmonary function study is valid. *Napier*, 301 F.3d at 712-14; *Banks*, 690 F.3d at 482-83; Decision and Order at 23.

Employer also argues the ALJ erred in failing to explain his determination that the January 5, 2017 pulmonary function study is valid. Employer's Brief at 17-18 (unpaginated); Decision and Order at 24. Specifically, while Dr. Dahhan and the technician who conducted the test reported the Miner's "good" cooperation and comprehension, Dr. Fino reviewed the tracings and opined the study was invalid due to plateauing and submaximal effort. MC Director's Exhibit 21; MC Employer's Exhibit 2 at 2. Although the ALJ stated that he "considered the validation opinions as to all the studies, and weighed those assessments as contrary probative evidence," he failed to explain the weight he accorded to the opinions. *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 24.

Regardless, as the only other pulmonary function study is valid and qualifying, any error in the ALJ's determination that the qualifying January 5, 2017 pulmonary function study is valid is harmless regarding whether the evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the ALJ's determination that the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 24. However, as discussed below, the ALJ erred in his determination that the medical opinion evidence establishes total disability. To the extent the experts relied on the January 5, 2017 pulmonary function study to make determinations of total disability, the validity of that test is relevant to the weighing of their opinions and the ALJ erred in failing to consider this evidence. *See Wojtowicz*, 12 BLR at 1-165. Consequently, on remand, the ALJ must still determine if the study is valid prior to determining if the medical opinion evidence establishes total disability. *Id.*

The record contains the medical opinions of Drs. Forehand, Dahhan, and Baker that the Miner was totally disabled, and the contrary opinion of Dr. Fino. MC Director's Exhibits 13, 20, 21, 22, 23; MC Employer's Exhibits 1-2, 27. The ALJ found the opinions of Drs. Forehand and Dahhan established total disability, as they were documented and reasoned. Decision and Order at 24-27.

However, we agree with Employer that the ALJ's findings cannot be affirmed as he failed to consider Dr. Fino's contrary opinion, and therefore his findings do not comply with the requirements of the APA. *See Wojtowicz*, 12 BLR at 1-165; Employer's Brief at 17-19 (unpaginated). We therefore vacate his determination that the medical opinion evidence establishes total disability, and that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 25-27. We therefore vacate the ALJ's determination that Claimant has invoked the Section 411(c)(4) presumption.[14] 20 C.F.R. §718.305.

On remand, the ALJ should first determine if the January 5, 2017 pulmonary function study is valid and reliable for establishing total disability. He must then reconsider the medical opinions in light of the objective testing, the physicians' understanding of the exertional requirements of Claimant's usual coal mine employment,[15] the physicians' qualifications, the explanations given for their findings, the documentation underlying their judgements, and the sophistication of, and bases for, their diagnoses, and provide an explanation as to his determinations, including how he resolves conflicts among the opinions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165.

Should the ALJ find that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether Claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

Remand Instructions

On remand, the ALJ must first determine if the Miner had at least fifteen years of qualifying coal mine employment. If so, the ALJ must determine if the evidence establishes total disability. 20 C.F.R. §718.204(b)(2). If Claimant establishes at least fifteen years of qualifying coal mine employment and total disability, she will have invoked the Section 411(c)(4) presumption in the Miner's claim. 20 C.F.R. §718.305. The burden will then shift to Employer to establish the Miner had neither legal nor clinical

[14] We decline to address, as premature, Employer's arguments that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Employer's Brief at 19-24 (unpaginated).

[15] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner's usual coal mine employment required medium to heavy labor. *Skrack*, 6 BLR at 1-711; Decision and Order at 5 n.9.

pneumoconiosis, or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

If Claimant cannot establish at least fifteen years of coal mine employment, then the ALJ must consider if she has established the elements of entitlement under 20 C.F.R. Part 718 by a preponderance of the evidence. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). However, if Claimant fails to establish total disability on remand, benefits are precluded in the Miner's claim. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

If the ALJ awards benefits in the Miner's claim, Claimant is automatically entitled to survivor's benefits under Section 422(*l*). 30 U.S.C. §932(*l*). If the ALJ denies benefits in the miner's claim, he must consider Claimant's entitlement in the survivor's claim. If she establishes fifteen years of qualifying coal mine employment and total disability based on the evidence in her claim, then she will invoke the Section 411(c)(4) presumption of death due to pneumoconiosis in the survivor's claim. 20 C.F.R. §718.305. Employer must then establish the Miner had neither legal nor clinical pneumoconiosis, or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i),(ii). If Claimant establishes less than fifteen years of qualifying coal mine employment, the ALJ must deny benefits as the record contains no evidence linking the Miner's death to pneumoconiosis. 20 C.F.R. §718.205.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority opinion with the exception of its decision to remand the claim for the ALJ to reconsider whether the Miner was totally disabled. In particular, I

disagree that the ALJ must reconsider whether Dr. Fino's opinion establishes that the Miner was not totally disabled.

As the ALJ accurately found, Dr. Fino initially opined "there is no evidence of disability" because "all of [the Miner's pulmonary function] studies are invalid." Employer's Exhibit 2 at 7; Decision and Order at 16. The ALJ further accurately noted that Dr. Fino testified the Miner had "some obstructive lung disease," but he couldn't determine the "extent" of the disease "because of the lack of acceptable pulmonary function studies," and he "couldn't tell you whether it was disabling or not" due to the lack of valid objective tests. Employer's Exhibit 27 at 11-12; Decision and Order at 17.

Having affirmed the ALJ's rejection of Dr. Fino's opinion that the qualifying January 19, 2016 pulmonary function study is invalid, and having further affirmed the ALJ's conclusion that the pulmonary function studies as a whole support total disability, there is no basis for the Board to instruct the ALJ to reconsider whether Dr. Fino's opinion weighs against a finding of total disability. Not only did Dr. Fino state he could not determine whether the Miner was totally disabled, the very foundation for that opinion – there are no valid pulmonary function studies – was rejected by the ALJ and this Board. Thus, his unsupported, inaccurate non-opinion cannot rationally be credited as probative evidence undermining Dr. Forehand's and Dr. Dahhan's diagnoses of total disability. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *see also Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 668-69 (6th Cir. 2015).

As the ALJ permissibly found the opinions of Drs. Forehand and Dahhan are well-reasoned and documented – and based upon the Miner's medical and social histories, physical examination, review of symptoms and complaints, and valid objective tests (including the uncontradicted qualifying January 19, 2016 pulmonary function study) – I would affirm his overall finding that the Miner was totally disabled. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 25-27.

GREG J. BUZZARD
Administrative Appeals Judge