



BRB Nos. 19-0102 BLA
and 19-0267 BLA

KITTY BACK)
(Widow and o/b/o JIMMY D. BACK))

Claimant-Respondent)

v.)

LOCUST GROVE, INCORPORATED)

and)

DATE ISSUED: 02/18/2020

KENTUCKY EMPLOYERS MUTUAL)
INSURANCE)

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 on Remand of Jennifer Gee,
Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville,
Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2014-BLA-05748, 2014-BLA-05749) of Administrative Law Judge Jennifer Gee, awarding benefits on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on July 27, 2012 and a survivor's claim¹ filed on April 9, 2013, and is before the Board for the second time.

In its previous decision on claimant's appeal of both claims, the Board vacated the administrative law judge's finding that claimant failed to establish that at least fifteen years of the miner's nineteen years of surface mining² occurred in conditions substantially similar to those in an underground mine. *Back v. Locust Grove, Inc.*, BRB Nos. 17-0432 BLA and 17-0433 BLA, slip. op. at 3-8 (June 27, 2018) (unpub.). The Board also vacated her finding that claimant did not establish a totally disabling respiratory or pulmonary impairment.³ *Id.*; see 20 C.F.R. §718.204(b)(2). Thus the Board vacated the denial of benefits in both claims and remanded for her to address whether claimant invoked the rebuttable presumption of total disability due to pneumoconiosis in the miner's claim, or death due to pneumoconiosis in the survivor's claim, pursuant to Section 411(c)(4) of the Act.⁴ 30 U.S.C. §921(c)(4) (2012). The Board also held she erred in finding claimant did not establish legal pneumoconiosis in both claims or death due to pneumoconiosis in the survivor's claim without the benefit of the Section 411(c)(4) presumption. *Back*, BRB Nos. 17-0432 BLA and 17-0433 BLA, slip. op. at 8-11.

¹ Claimant is the widow of the miner, who died on February 28, 2013. Director's Exhibit 92a. She is pursuing the miner's claim, as well as her survivor's claim.

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

³ The Board affirmed her finding that claimant did not establish total disability based on the pulmonary function or arterial blood gas studies or through evidence of cor pulmonale with right-sided congestive heart failure, but vacated her finding that claimant did not establish total disability based on the miner's treatment records. *Back v. Locust Grove, Inc.*, BRB Nos. 17-0432 BLA and 17-0433 BLA, slip. op. at 5-8 (June 27, 2018) (unpub.); see 20 C.F.R. §718.204(b)(2)(i)-(iv).

⁴ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis, or that his death was due to pneumoconiosis, where a claimant establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); see 20 C.F.R. §718.305.

In her Decision and Order on remand, which is the subject of this appeal, the administrative law judge found claimant established the miner's nineteen years of surface coal mine employment occurred in conditions substantially similar to those in an underground mine. She also found claimant established total disability, thus invoking the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1). Because she found employer did not rebut it, she awarded benefits in the miner's claim. She also found claimant satisfied the eligibility criteria for automatic entitlement to survivor's benefits under Section 422(l) of the Act and awarded benefits in the survivor's claim.⁵ 30 U.S.C. §932(l) (2012).

On appeal, employer argues the administrative law judge erred in finding claimant established at least fifteen years of qualifying coal mine employment and total disability. Employer also challenges the date for the commencement of benefits. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Miner's Claim

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge noted the parties stipulated the miner had nineteen years of surface coal mine employment. Decision and Order on Remand at 2. Pursuant to the Board's instructions, she considered the miner's employment history form on which he indicated he had been exposed to "dust, gases, or fumes" in all of his surface coal mine

⁵ Section 422(l) of the Act provides that the 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 the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012).

work. *Id.* at 6; Director’s Exhibit 4; *see Back*, BRB Nos. 17-0432 BLA and 17-0433 BLA, slip. op. at 3-8. She also considered claimant’s testimony that the miner was “covered in coal dust [and] rock dust” and often smelled like diesel when he came home from his coal mine employment. Decision and Order on Remand at 6; Hearing Transcript at 14. Further, the administrative law judge noted Dr. Collins, the miner’s treating physician, stated that the miner operated heavy equipment and “was exposed to massive amount of dust daily” and “worked around excessive dust.”⁶ Director’s Exhibit 103-18; *see* Decision and Order on Remand at 6.

Contrary to employer’s argument, the administrative law judge permissibly found this uncontradicted evidence credible and sufficient to establish that the miner was regularly exposed to coal mine dust in his nineteen years of employment in surface mines. *See Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (affirming finding of regular coal mine dust exposure based in part on miner’s statement that he was exposed to “dust, gases, or fumes,” widow’s testimony that miner’s clothes were covered in dust, and treating doctor’s notation that miner was exposed to extremely high levels of dust); *Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 664 (6th Cir. 2015) (holding “uncontested lay testimony” regarding dust conditions “easily supports a finding” of regular dust exposure); *Central Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 489-90 (6th Cir. 2014); Decision and Order on Remand at 6. Thus we affirm her finding that claimant established at least fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b)(1)(i); Decision and Order on Remand at 4-6.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents 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

⁶ Employer challenges the administrative law judge’s reliance on Dr. Collins’s statements, asserting the doctor was responding to leading questions and employer did not have the chance to depose the physician. Employer’s Brief at 7; Director’s Exhibit 103. To the extent employer raises an evidentiary challenge to the admissibility of Dr. Collins’s report, we note employer does so for the first time in this appeal, as it failed to raise this issue before the administrative law judge or the Board in the previous appeal. Further, employer indicated it did not object to any of the Director’s exhibits, including this report, when the administrative law judge admitted evidence at the hearing. Hearing Transcript at 8. Thus employer forfeited this argument and we decline to address it. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge 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).

Employer contends that the administrative law judge erred in finding the miner totally disabled. Employer's Brief at 8-11. We disagree. The administrative law judge reiterated that the pulmonary function testing and the arterial blood gas testing were insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(i)-(ii); Decision and Order on Remand at 2. 20 C.F.R. §718.204(b)(2)(i)-(ii); Decision and Order on Remand at 2. Pursuant to the Board's instructions, however, the administrative law judge considered the records from Dr. Collins's treatment of the miner. *Back*, BRB Nos. 17-0432 BLA and 17-0433 BLA, slip. op. at 7-8; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 6-8.

Dr. Collins admitted the miner into his clinic starting on January 10, 2013 after the miner experienced a fever and "increasing cough, congestion, [and] shortness of breath," along with "generalized soreness all over his body." Director's Exhibit 93 at 16-24. Following an examination, he concluded the miner was hypoxemic. *Id.* Dr. Collins diagnosed the miner with bilateral pneumonia and severe chronic obstructive pulmonary disease (COPD). *Id.* He noted the miner had a history of COPD, emphysema, chronic bronchitis, and pneumoconiosis. *Id.* He treated the miner with aggressive bronchodilator treatment and antibiotics, along with other medications. *Id.* Despite putting the miner on two liters of nasal oxygen, he noted the miner "continued to be very short of breath especially on exertion." *Id.*

Although Dr. Collins discharged the miner on January 21, 2013, he returned for additional treatment on February 6, 2013 due to acute exacerbation of his COPD and "moderate respiratory distress." Director's Exhibit 93 at 2-8. Dr. Collins noted the miner's cough, congestion, sputum production and shortness of breath" are "not resolving." *Id.* He also noted the miner had experienced increasing shortness of breath and dyspnea with exertion, and that his oxygen saturation measured at 88% on room air. *Id.* He discharged the miner on February 8, 2013 because he was in "stable condition," diagnosing acute exacerbation of COPD that was resolving. *Id.* However, he also indicated that when the miner "ambulated for 40 feet for respiratory therapy," his "O₂ saturation dropped to 79% and he became very, very short of breath." *Id.* Because the miner's "SpO₂ was 81% on room air resting," Dr. Collins concluded the miner "qualified" for home oxygen. *Id.*

The administrative law judge found Dr. Collins's treatment records⁷ established the miner required supplemental oxygen for his respiratory impairments as early as January 21, 2013. Decision and Order on Remand at 7-8. The administrative law judge then considered all the relevant evidence together and found that, although the miner "may not have been totally disabled at the time he was examined by Dr. Habre [in October 2012] and Dr. Dahhan" in November 2012, "by early 2013" the miner's pulmonary function testing supported total disability as reflected by the January 2, 2013 qualifying study.⁸ *Id.* at 7. Based on the miner's pulmonary function testing, the results of the January and February pulse oximetry testing contained in the treatment records, and the miner's need for supplemental oxygen for his respiratory condition, the administrative law judge found the miner totally disabled from his usual coal mine employment as a heavy equipment operator. *Id.* at 7-8. She also found claimant's lay testimony with respect to the miner's respiratory condition during this time consistent with the conclusion that the miner was totally disabled.⁹ *Id.*

Employer asserts that the treatment records from Dr. Collins relate to the miner's treatment for an acute rather than a chronic respiratory condition and therefore cannot support a finding of total disability. Employer's Brief at 8, 9-11. Thus employer asserts

⁷ The administrative law judge also noted that Dr. Alam treated the miner. Decision and Order on Remand at 7. Dr. Alam stated the miner "was on nebulizer treatment and oxygen" and his pulse oximetry on January 10, 2013 "was 93% on room air." *Id.*; Claimant's Exhibits 3, 6. She found Dr. Alam's records buttressed Dr. Collins's findings. Decision and Order on Remand at 8.

⁸ The record contains three pulmonary function studies. The October 2, 2012 pulmonary function study conducted by Dr. Habre and the November 1, 2012 study conducted by Dr. Dahhan were both non-qualifying for total disability. Director's Exhibits 18, 20.

⁹ As the administrative law judge noted, claimant "testified that before his death, [the miner] was having difficulty breathing, and had been smothering really badly for the last several years. He was on breathing treatments and medications, and was treated by Dr. Alam, and his family doctor, Dr. Ricky Collins." Decision and Order on Remand at 8, *citing* Director's Exhibit 102 at 11-12. Further, he "had problems with his lungs for a while, but it was severe in the last couple of years." *Id.* Claimant also testified at the hearing that the miner "was on breathing treatment and inhalers, and used an inhaler; he smothered 'bad.'" Decision and Order on Remand at 8, *quoting* Hearing Transcript at 15-17.

the administrative law judge erred in relying on the objective testing and the miner's need for supplemental oxygen set forth in these treatment records. *Id.* Employer's argument has no merit.

As discussed above, the administrative law judge correctly noted Dr. Collins treated the miner for "severe" COPD. Decision and Order on Remand at 7; Director's Exhibit 93 at 16-19. As COPD is a chronic condition, there is no merit to employer's argument the medical records from Dr. Collins relate only to an acute respiratory condition. Further, upon discharging the miner for treatment for his COPD, Dr. Collins indicated he was stable, but prescribed him home oxygen use as the miner's oxygen saturation "dropped to 79% and he became very, very short of breath" upon walking 40 feet. Director's Exhibit 93 at 2-8. Thus, contrary to employer's argument, the administrative law judge permissibly found the miner's pulse oximetry results and need for home oxygen supported the finding that the miner was totally disabled from his usual coal mine employment by a respiratory impairment.¹⁰ See *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 215-16 (6th Cir. 1996); see also *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); 20 C.F.R. §718.204(b)(2)(iv).

We also reject employer's argument that the administrative law judge "erred in that she did not consider all evidence, like and unlike, in reaching her conclusion of total disability."¹¹ Employer's Brief at 9. The administrative law judge rationally found that when the treatment records from Dr. Collins were considered in conjunction with all the relevant evidence, claimant established total disability because the January 2, 2013 pulmonary function study, taken at around the time of the miner's treatment with Dr. Collins, was qualifying for total disability.¹² See *Jericol Mining, Inc. v. Napier*, 301 F.3d

¹⁰ Employer also challenges the administrative law judge's reliance on Dr. Collins's treatment records by citing the quality standards for arterial blood gas testing at 20 C.F.R. §718.105(d). Employer's Brief at 9-10. The administrative law judge, however, did not base her total disability finding on arterial blood gas testing.

¹¹ Employer asserts the administrative law judge's total disability finding cannot be affirmed because she did not rely on the methods set out in the regulation at 20 C.F.R. §718.204(b)(2). Employer's Brief at 9. Contrary to employer's argument, the administrative law judge found total disability based on Dr. Collins's credible medical assessment, contained in the treatment records, of the miner's exertional limitations and the January 2, 2013 pulmonary function study. Decision and Order on Remand at 7-8.

¹² Because it is unchallenged on appeal, we affirm the administrative law judge's finding that the opinions of Drs. Habre and Dahhan are not credible on the issue of total

703, 713-14 (6th Cir. 2002); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order on Remand at 7-8.

Finally, we reject employer's assertion that the administrative law judge erred in relying in part on claimant's lay testimony to find total disability established. She correctly recognized that claimant's "lay testimony would not be sufficient, standing alone, to support a finding of total disability[.]" Decision and Order on Remand at 8; *see* 20 C.F.R. §718.305(b)(3), (4); *see also* 20 C.F.R. §718.204(d)(2), (3). She then rationally determined that when claimant's testimony is considered with the "consistent assessments of Dr. Collins and Dr. Alam of COPD and shortness of breath, and [the miner's] hospitalization for acute exacerbation of [COPD], as well as [the miner's] need for supplemental oxygen," it supports the conclusion that the miner was disabled from his job as a heavy equipment operator. Decision and Order on Remand at 8; *see Trent*, 11 BLR at 1-28.

Based on the foregoing, we affirm the administrative law judge's finding of total disability, 20 C.F.R. §718.204(b)(2), and her finding claimant invoked the Section 411(c)(4) presumption. Moreover, we affirm her finding employer failed to rebut the presumption as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We therefore affirm the award of benefits in the miner's claim.

The Survivor's Claim

The administrative law judge found claimant satisfied her burden to establish each element necessary to demonstrate entitlement under Section 422(l) of the Act: 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 on Remand at 13. Because we have affirmed the award of benefits in the miner's claim, we affirm her determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Commencement Date

The date for the commencement of benefits in the miner's claim is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989). If the date is not ascertainable from the record, benefits will commence the month the claim was filed, unless evidence establishes

disability because they did not "review the January 2, 2013 qualifying pulmonary function study or Dr. Collins's treatment records from 2013." Decision and Order on Remand at 7; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

We agree with employer that the administrative law judge did not adequately address the commencement date for benefits in the miner's claim. Employer's Brief at 12. She summarily found benefits should commence as of July 2012, the month in which the miner's claim was filed. Decision and Order on Remand at 13. She failed to address, however, whether the evidence establishes that the miner was not totally disabled due to pneumoconiosis at any time subsequent to the date the claim was filed. *See* 20 C.F.R. §725.503(b). She found the miner "may not have been totally disabled at the time he was examined by Dr. Habre and Dr. Dahhan" in 2012, but "by early 2013, shortly before his death, he had a totally disabling respiratory impairment." Decision and Order on Remand at 7. Because the administrative law judge did not adequately address this issue, we vacate her designation of July 2012 as the date for the commencement of benefits in the miner's claim and remand for further consideration of this issue. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge