U.S. Department of Labor

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

BRB Nos. 23-0430 BLA
and 23-0431 BLA

WANDA ALLEN (o/b/o and Widow of JODY ALLEN) Claimant-Respondent v. PEABODY WESTERN COAL COMPANY and PEABODY ENERGY CORPORATION Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/27/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Awarding Benefits (2018-BLA-05281 and 2020-BLA-05805) rendered 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 January 4, 2016, and a survivor's claim filed on July 10, 2019.[1]

The ALJ noted the parties' stipulation that the Miner had forty-one years of surface coal mine employment and found Claimant established more than fifteen years of qualifying coal mine employment. 20 C.F.R. §718.204(b)(2). She further found that Claimant established the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death and thus invoked the presumption that he was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] Additionally, the ALJ determined that Employer failed to rebut the presumption and therefore awarded benefits in the miner's claim. In the survivor's claim, the ALJ found that Claimant is derivatively entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[3]

[1] Claimant is the widow of the Miner, who died on May 9, 2019. Survivor's Claim (SC) Director's Exhibit 6. Claimant is pursuing the miner's claim on her husband's behalf and her own survivor's claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that the Miner was totally disabled due to pneumoconiosis if Claimant establishes the Miner 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); 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

Employer appeals, arguing the ALJ erred in finding the Miner was totally disabled and therefore that Claimant invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), filed a brief urging the Benefits Review Board to reject Employer's arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's decision if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(2), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Miner's Claim - 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)(i)-(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. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[6] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[7] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting

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having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[4] We affirm, as unchallenged on appeal, the ALJ's crediting of the Miner with more than fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19-20; Employer's Brief at 11.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, as the Miner performed his coal mine employment in Arizona. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Miner's Claim (MC) Director's Exhibit 3.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The ALJ found that Claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(i) and (iii) because the sole pulmonary function study of record is non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart

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 determined Claimant established the Miner was totally disabled based on the blood gas study evidence, medical opinions, and the evidence as a whole.

Arterial Blood Gas Studies

The record contains one blood gas study obtained by Dr. Sood on February 9, 2016, as part of the Department of Labor's (DOL's) complete pulmonary evaluation of Claimant. MC Director's Exhibit 12 at 25. The resting test produced a PCO2 value of 35 and a PO2 value of 54, while the exercise test produced a PCO2 of 34 and a PO2 of 65. *Id*. The ALJ observed that the study was conducted in Raton, New Mexico and took judicial notice of Raton's altitude of 6,680 feet above sea level. Decision and Order at 2, 15 n.14; MC Director's Exhibit 12 at 25. Relying on the table values at 20 C.F.R. Part 718, Appendix C, for blood gas testing performed over 6,000 feet above sea level, the ALJ found the study was qualifying at rest and non-qualifying with exercise.[8] Decision and Order at 12.

Employer submitted the opinions of Drs. Tuteur and Rosenberg who opined that comparing the Miner's PO2 and PCO2 values from Dr. Sood's blood gas study to the DOL blood gas tables was not a reliable indicator of whether the Miner had a blood gas impairment because the DOL tables do not account for the altitude and barometric pressure at the specific elevation of 6,680 feet above sea level. Employer's Exhibits 7 at 4; 9 at 10-14; 10 at 21; 11 at 1-2. They opined the Miner was not totally disabled when considering a different measurement, the A-a gradient, which they maintain accounts more specifically

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failure of record. Decision and Order at 11, 20-21; MC Director's Exhibit 12 at 11. The ALJ also found Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act because there was no evidence in the record that the Miner had complicated pneumoconiosis. Decision and Order at 3-4.

[8] Appendix C sets forth table values in determining whether total disability is established at 20 C.F.R. §718.204(b)(2)(ii) based on three ranges of altitudes: 1) up to 2,999 feet above sea level; 2) from 3,000 to 5,999 feet above sea level; and 3) 6,000 feet or more above sea level. 20 C.F.R. Part 718, Appendix C; *see Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1204 (10th Cir. 2019). The table provides that for testing performed more than 6,000 feet above sea level, a blood gas study that produces a PCO2 of 35 mmHg qualifies for disability if the corresponding PO2 level is 55 mmHg or less, and a blood gas study that produces a PCO2 of 34 mmHg qualifies for disability if the corresponding PO2 level is 56 mmHg. *See* Decision and Order at 12 n.11.

for barometric pressure and altitude. Employer's Exhibits 7 at 3, 5; 9 at 11-13; 10 at 14-19, 26-27; 11 at 1-2.

The ALJ gave no weight to the opinions of Drs. Tuteur and Rosenberg because he found their approach inconsistent with the regulations. Decision and Order at 21-22. Thus, the ALJ found that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*. at 21.

Employer generally argues DOL's use of a three-tiered system when accounting for the effects of altitude on blood oxygen tension is arbitrary. Employer's Brief at 12-18. It also contends the ALJ improperly interpreted the regulations as requiring that she "blindly follow the tables in [A]ppendix C." *Id*. at 16. Thus, Employer contends the ALJ erred in rejecting the opinions of its medical experts regarding use of the A-a gradient. *Id*. at 16-17. We disagree.

In revising Appendix C of 20 C.F.R. Part 718, the DOL recognized in the preamble to the revised regulations that altitude affects blood gas levels, but that "the relationship between the lowering of arterial oxygen tension and altitude is complex because . . . the human body has compensatory mechanisms." 45 Fed. Reg. 13,678, 13,712 (Feb. 29, 1980). The DOL also recognized that there is no "straight-forward linear lowering of arterial blood oxygen tension as the oxygen pressure in the atmosphere decreases with altitude." *Id*. Thus, the DOL created the three altitude tables, concluding it is "an acceptable and valid compromise, which takes into account the effect of altitude without becoming overly complicated." *Id*. The DOL declined to use the A-a gradient as a measure of disability because it was laborious, difficult to administer, and few laboratories were equipped to perform it. *Id*. at 13,683. Instead, the DOL found that because "the arterial blood oxygen tension measures the overall ability of the lung to properly provide oxygen for body metabolism," it "thus provides a more useful measurement in order to determine the overall ability of the individual to function." *Id*. Given DOL's statements in the preamble, we reject Employer's contention that the Appendix C tables are arbitrary.

Further, the United States Courts of Appeals for the Fourth and the Tenth Circuits and the Board have held that an ALJ may permissibly reject medical opinions that rely on the A-a gradient rather than the Appendix C tables in assessing whether blood gas study evidence establishes a miner's respiratory disability.[9] *See Cannelton Indus., Inc. v.*

[9] Employer contends there is no reason to treat blood gas studies differently from pulmonary function studies for which an ALJ must consider alternative evidence "like the Knudson equations" in determining whether pulmonary function studies yield qualifying values for total disability in miners over age 71. Employer's Brief at 17 (citing *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 47-48 (2008)). Employer's analogy fails

Director, OWCP [*Frye*], 93 Fed. App'x 551, 560 (4th Cir. 2004) (upholding the ALJ's discrediting of a medical opinion that contradicts Appendix C); *Big Horn Coal Co. v. OWCP* [*Alley*], 897 F.2d 1052, 1055-56 (10th Cir. 1990) (ALJ is not required to accept a medical opinion that is contrary to the altitude adjusted Appendix C tables); *Pack v. Eastern Assoc. Coal Co*., BRB No. 21-0255 BLA, slip op. at 7 & n.15 (Mar. 8, 2023) (unpub.); *Stallard v. Westmoreland Coal Co.*, BRB Nos. 15-0374 BLA, 15-0375 BLA, slip op. at 6 (Aug. 23, 2016) (unpub.).

In this case, the ALJ considered the reasoning of Drs. Tuteur and Rosenberg advocating for reliance on the A-a gradient measurement but acted within her discretion in finding their views were inconsistent with the regulations. *See Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127 (9th Cir. 2014) (ALJ may discredit medical opinions inconsistent with the premises underlying the regulations); *Alley*, 897 F.2d at 1055-56; *Frye*, 93 Fed. App'x at 560; Decision and Order at 21; Employer's Exhibits 7-11. We therefore affirm her decision to apply the Appendix C tables in considering Dr. Sood's blood gas study and her conclusion that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinions and Evidence as a Whole

The ALJ credited Dr. Sood's opinion that the Miner was totally disabled over the contrary opinions of Drs. Rosenberg and Fino. Decision and Order at 22. Employer asserts that to the extent the ALJ improperly credited the qualifying resting blood gas study, she erred in weighing the medical opinion evidence. Employer's Brief at 19-22. Having rejected Employer's contention, we see no error in the ALJ's determination that Dr. Sood's opinion is reasoned and documented based on his own examination of the Miner and the qualifying blood gas study he obtained. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Decision and Order at 20-23; MC Director's Exhibits 12, 15.

Further, the ALJ permissibly assigned less weight to the opinions of Drs. Tuteur and Rosenberg that the Miner was not totally disabled as contrary to her finding that the resting blood gas study is qualifying based on the applicable Appendix C table values. *See Opp*,

since the Appendix C tables identify qualifying values at any altitude for a blood gas study, while no qualifying values are specified in the Appendix B table for pulmonary function studies conducted on miners over the age of 71. *See* 20 C.F.R. Part 718, Appendices B and C; Employer's Brief at 16-18.

746 F.3d at 1127; *Alley*, 897 F.2d at 1055-56; *Frye*, 93 Fed. App'x at 560; Decision and Order at 22; Employer's Exhibits 7-11.

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the Miner was totally disabled based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv). *See* 20 C.F.R. §718.204(b); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 22-23. We further affirm her finding that Claimant established total disability based on the evidence as a whole and thus invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(iii).

As Employer raises no specific arguments at rebuttal, we affirm the ALJ's findings that while Employer disproved clinical pneumoconiosis, it failed to affirmatively establish the Miner did not have legal pneumoconiosis,[10] or that "no part of the [M]iner's 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); *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1142-43 (9th Cir. 2021); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Decision and Order at 23-29. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), (ii), and her award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we 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); Decision and Order at 30.

[10] "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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "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).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in Miner's Claim and Survivor's Claim.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge