U.S. Department of Labor

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

BRB Nos. 22-0305 BLA
and 22-0315 BLA

DIANNA J. PERDUE (o/b/o and Widow of SAMUEL R. PERDUE Claimant-Respondent v. PINE RIDGE 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: 02/24/2023 DECISION and ORDER

Appeal of the Decisions and Orders Awarding Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for Claimant.

H. Brett Stonecipher (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; 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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decisions and Orders Awarding Benefits (2017-BLA-05632 and 2019-BLA-05774) 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 subsequent miner's claim filed on November 6, 2014,[1] and a survivor's claim filed on January 11, 2019.[2]

The ALJ found Pine Ridge Coal Company (Pine Ridge),[3] self-insured through Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He accepted the parties' stipulation that the Miner had twenty-nine 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). Thus he found Claimant established a change in an applicable condition of entitlement,[4] 20 C.F.R. §725.309, and

[1] This is the Miner's second claim for benefits. On November 9, 2004, the district director denied his first claim, filed on February 23, 2004, because he failed to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. He took no further action until filing the current claim. MC Director's Exhibit 3.

[2] The Miner died on December 13, 2018, while his claim was pending before the ALJ. Survivor's Claim (SC) Director's Exhibit 7. Claimant, the Miner's widow, is pursuing his claim on his behalf, as well as her own survivor's claim. SC Director's Exhibit 8.

[3] In its brief, Employer refers to itself as Eastern Associated Coal or Heritage. Employer's Brief at 19, 28, 31 (unpaginated). This appears to be an error, as the district director and ALJ identified Pine Ridge Coal Company as the responsible operator. MC Decision and Order at 24; MC Director's Exhibit 32; SC Director's Exhibit 9.

[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 he 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.*

invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[5] The ALJ further found 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 concluded Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6]

On appeal, Employer argues Peabody Energy is not the responsible carrier and liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund (the Trust Fund). On the merits, Employer asserts the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption in the miner's claim.[7]

Claimant responds in support of the awards and argues the ALJ erred in finding the Miner did not have complicated pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's determination that Employer is liable for the payment of benefits.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence, and in

---

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 did not establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of the current claim. *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); MC Decision and Order at 28-29.

[5] Section 411(c)(4) of the Act provides a rebuttable presumption that a 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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

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

[7] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established twenty-nine years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

accordance with applicable law.[8] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 361-62 (1965).

Responsible Insurance Carrier

Employer does not challenge Pine Ridge's designation as the responsible operator and that it was self-insured by Peabody Energy on the last day Pine Ridge employed the Miner; thus, we affirm these findings. 20 C.F.R. §§725.494(e), 725.495, 726.203(a); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); MC Decision and Order at 24. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Trust Fund. Employer's Brief at 19 (unpaginated).

Patriot was initially another Peabody Energy subsidiary. MC Director's Exhibit 31. In 2007, after the Miner ceased his coal mine employment with Pine Ridge, Peabody Energy transferred a number of its subsidiaries, including Pine Ridge, to Patriot. MC Director's Exhibits 4, 33. That same year, Patriot was spun off as an independent company. MC Director's Exhibit 31. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id.* Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Pine Ridge, Patriot later went bankrupt and can no longer provide for those benefits. Employer's Brief at 28 (unpaginated); Director's Reply at 2; Exhibit B to Director's Post-Hearing Brief. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Pine Ridge when Peabody Energy owned and provided self-insurance to that company.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated as the self-insured carrier in this claim, and thus the Trust Fund is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 19-43 (unpaginated). It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) before transferring liability to Peabody Energy, the Department of Labor (DOL) must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (2) the DOL released Peabody Energy from liability; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 4.

Director is equitably estopped from imposing liability on the company; and (5) the ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) is misplaced.[9] It maintains that a separation agreement—a private contract between Peabody Energy and Patriot—released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus, we affirm the ALJ's determination that Pine Ridge and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work.[10] *See* 20 C.F.R. §718.204(b)(1). A miner 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 total disability based on the blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, medical opinions, and

[9] Employer summarily states that "the denial of discovery and the failure of the Department to maintain proper records has led to a violation of Peabody's right to due process." Employer's Brief at 19 (unpaginated). Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

[10] The ALJ found the Miner's usual coal mine employment working as a shuttle car operator required heavy labor. Decision and Order at 4-5. We affirm this finding as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

the evidence as a whole.[11] 20 C.F.R. §718.204(b)(2)(ii)-(iv); Decision and Order at 33-38. Employer argues the ALJ erred in finding the blood gas studies and medical opinion evidence establish total disability.[12] 20 C.F.R. §718.204(b)(2)(ii), (iv); Employer's Brief at 15-18 (unpaginated).

Arterial Blood Gas Studies

The ALJ considered the results of four blood gas studies. Decision and Order at 9, 33. The May 12, 2004 study produced non-qualifying values[13] at rest and qualifying values during exercise, while the January 7, 2015 study produced qualifying values at rest and during exercise.[14] MC Director's Exhibits 1, 13. The September 14, 2016 and August 9,

[11] The ALJ found the pulmonary function studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 33.

[12] Employer also generally challenges the ALJ's finding Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iii), arguing that "the ALJ did not consider the totality of the evidence and other possible issues that were related to the heart condition, [the Miner's] ongoing issues with sepsis and not a pulmonary disability." Employer's Brief at 16 (unpaginated). Because Employer does not identify any specific error in the ALJ's finding, we affirm it. *See* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

[13] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[14] To the extent Employer argues the qualifying January 7, 2015 blood gas study is invalid, we disagree. Employer's Brief at 18 (unpaginated). Dr. Zaldivar opined the Miner may have been experiencing septic shock which causes hypoxemia at the time of the study. Employer's Exhibit 13 at 34. The ALJ permissibly found Dr. Zaldivar's opinion unpersuasive because the Miner was not hospitalized for septic shock until several weeks after the study was conducted. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); Decision and Order at 37; Claimant's Exhibit 14; Employer's Exhibits 8 at 18, 10. Moreover, Dr. Zaldivar stated he did not know whether the Miner had septic shock at the time and that he did not have any records of it. Employer's Exhibit 13 at 34.

2017 studies produced non-qualifying values at rest and did not include exercise testing. Employer's Exhibits 2, 4.

The ALJ permissibly gave less weight to the May 12, 2004 study because the studies from 2015 to 2017 are more probative of his condition at the time of his death. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); MC Decision and Order at 33. He further permissibly gave more weight to the exercise studies than the resting studies, and therefore found the blood gas study evidence establishes total disability because the qualifying January 7, 2015 exercise test is not contradicted by any other exercise blood gas studies. *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (exercise blood gas study may be given more weight than resting blood gas studies); MC Decision and Order at 33.

Employer argues the ALJ erred by "failing to properly afford greater weight to the most recent studies" from 2016 and 2017 that produced non-qualifying results at rest. Employer's Brief at 15 (unpaginated). Employer's argument amounts to 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). We therefore affirm the ALJ's finding that the blood gas evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinion Evidence

Employer next asserts the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 18 (unpaginated).

The ALJ considered the medical opinions of Drs. Rasmussen, Cohen, Rosenberg, and Green that the Miner was totally disabled based, in part, on the hypoxemia seen on his blood gas study results, and Dr. Zaldivar's opinion that the Miner was not totally disabled because his objective testing was not qualifying. MC Decision and Order at 36-37; MC Director's Exhibit 13; Claimant's Exhibits 1, 11; Employer's Exhibits 2, 12, 13. He found the opinions of Drs. Rasmussen, Cohen, Rosenberg, and Green reasoned and documented, but discredited Dr. Zaldivar's opinion that the blood gas studies do not show disability. MC Decision and Order at 37. Thus, he found the medical opinions establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the ALJ's weighing of the blood gas studies "taints his analysis" of the medical opinion evidence because "he awarded weight to physicians that found [the blood gas studies] establish disability, and discredited physicians who relied on the most recent studies." Employer's Brief at 18 (unpaginated). Because we affirm the ALJ's finding the blood gas study evidence establishes total disability, we discern no error in the ALJ's crediting of physicians who opined the blood gas studies show disability. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Lane v. Union*

Carbide Corp., 105 F.3d 166, 172 (4th Cir. 1997); MC Decision and Order at 36-37. Further, contrary to Employer's contention, the ALJ did not discredit Dr. Zaldivar for relying on the most recent studies. Rather, he permissibly found Dr. Zaldivar's opinion unpersuasive because he relied on the resting blood gas studies which the ALJ found are less probative than the exercise study. *Id.*

We therefore affirm the ALJ's finding that the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); MC Decision and Order at 37. Furthermore, we affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; MC Decision and Order at 37. Consequently, we affirm the ALJ's finding Claimant invoked the Section 411(c)(4) presumption.[15] 20 C.F.R. §718.305(b)(1). We therefore affirm the award of benefits.[16]

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award of benefits in 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); *Skrack*, 6 BLR at 1-711; SC Decision and Order at 3.

[15] Employer generally argues the ALJ erred in finding it did not rebut the presumption because he "discredited the operator's physicians who relied on the most recent [blood gas] studies and the ALJ relied on [blood gas] studies which were performed when the [Miner] was not well." Employer's Brief at 18 (unpaginated). We reject Employer's contentions for the same reasons discussed above. Because Employer does not raise any additional arguments regarding rebuttal, we affirm the ALJ's finding the Employer failed to rebut the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711.

[16] Because we affirm the award of benefits, we need not address Claimant's argument the ALJ erred in finding she did not establish complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Response Brief at 11-14.

Accordingly, the ALJ's Decisions and Orders Awarding Benefits are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge