U.S. Department of Labor

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

BRB No. 23-0329 BLA

STEPHANIE AROTIN (o/b/o DONALD C. LOWMASTER, deceased)	)	
Claimant-Petitioner	)	
v.	)	
TANOMA MINING COMPANY, INCORPORATED	)	
and	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 07/22/2024
Employer/Carrier-Respondents	)	
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 Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Sean B. Epstein (Thomas, Thomas & Hafer, LLP), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order on Remand Denying Benefits (2019-BLA-05756) rendered 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 February 12, 2018,[2] and is before the Benefits Review Board for the second time.

In her initial Decision and Order Denying Benefits dated December 15, 2020, the ALJ credited the Miner with 28.15 years of underground coal mine employment but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found the Miner could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), or establish entitlement to benefits under 20 C.F.R. Part 718. She therefore denied benefits.

In response to Claimant's appeal, the Board affirmed the ALJ's findings that the Miner worked for 28.15 years in underground coal mine employment, the pulmonary function and arterial blood gas studies do not support a finding of total disability, and there

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[1] The Miner died on December 14, 2021, and his wife died on December 10, 2021, while his claim, filed on February 12, 2018, was pending. *Lowmaster v. Tanoma Mining Co., Inc.*, BRB No. 21-0143 BLA (Jan. 14, 2022) (Order). By Order dated January 14, 2022, the Board updated the caption to reflect the Miner is now deceased and advised the parties that service of all future correspondence will be made on Stephanie Arotin. *Id.* In its prior Decision and Order, the Board also advised the parties that Ms. Arotin is pursuing this claim on behalf of the Miner's children and is now considered the Claimant in this case. *Arotin v. Tanoma Mining Co., Inc.*, BRB No. 21-0143 BLA, slip op. at 2 n.1 (Apr. 27, 2022) (unpub.).

[2] The Miner filed a prior claim on April 16, 2012, but withdrew it. Director's Exhibit 35 at 5. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306.

[3] 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. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

is no evidence of cor pulmonale with right-sided congestive heart failure. *Arotin v. Tanoma Mining Co.*, BRB No. 21-0143 BLA, slip op. at 2 n.4, 4 n.7 (Apr. 27, 2022) (unpub.); 20 C.F.R. §718.204(b)(2)(i)-(iii). However, the Board vacated the ALJ's finding that the medical opinions do not support a finding of total disability. *Arotin*, BRB No. 21-0143 BLA, slip op. at 4-7; *see* 20 C.F.R. §718.204(b)(2)(iv). It thus vacated the denial of benefits and remanded the case for further consideration. *Arotin*, BRB No. 21-0143 BLA, slip op. at 7-8.

On remand, the ALJ again found the medical opinions do not establish total disability. 20 C.F.R. §718.204(b)(2). Thus, she reinstated her previous determinations that Claimant cannot invoke the Section 411(c)(4) presumption or establish entitlement to benefits under 20 C.F.R. Part 718. She therefore again denied benefits.

On appeal, Claimant argues the ALJ erred in finding the medical opinion evidence does not establish total disability. Employer and its Carrier respond in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The 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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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. 20 C.F.R. §718.305(b)(1)(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.[5] 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

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 32.

[5] The Board previously affirmed the ALJ's determination that the Miner's usual coal mine work as a section foreman required heavy labor. *Arotin*, BRB No. 21-0143 BLA, slip op. at 3 n.6.

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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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).

Medical Opinions

Claimant argues the ALJ erred in finding the medical opinion evidence does not establish the Miner was totally disabled. Claimant's Brief at 7-9. Claimant's argument has merit.

In her initial decision, the ALJ considered the medical opinions of Drs. Pickerill, Basheda, and Fino. Decision and Order at 17-19. She determined that Drs. Pickerill and Basheda opined the Miner was totally disabled from a respiratory or pulmonary impairment while Dr. Fino opined he was not. *Id.* She found Dr. Fino's opinion reasoned and documented, and thus entitled to "full weight." *Id.* at 18-19. She found Drs. Basheda's and Pickerill's opinions unpersuasive and entitled to "little weight." *Id.* at 17-18. Thus, she found the medical opinions do not support a finding of total disability. *Id.* at 19.

The Board affirmed the ALJ's discrediting of Dr. Basheda's total disability diagnosis because it was based on invalid pulmonary function testing. *Arotin*, BRB No. 21-0143 BLA, slip op. at 4-5. However, the Board vacated the ALJ's weighing of Drs. Fino's and Pickerill's opinions. *Arotin*, BRB No. 21-0143 BLA, slip op. at 5-8. First, the Board held she mischaracterized Dr. Fino's opinion as excluding a diagnosis of total disability. Contrary to the ALJ's finding, the doctor opined the Miner was totally disabled based on a restrictive lung impairment demonstrated by reduced FVC and FEV_1 values on pulmonary function testing and on abnormal arterial blood gas testing. *Id.* at 5-6.

Second, the Board held the ALJ erred in discrediting Dr. Pickerill's total disability diagnosis. While the ALJ discredited his opinion for relying on pulmonary function testing that produced non-qualifying values[6] for total disability, the regulations provide that a physician may diagnose total disability even though the objective studies are non-qualifying. *Arotin*, BRB No. 21-0143 BLA, slip op. at 7. Further, the Board held the ALJ erred in discrediting Dr. Pickerill's opinion because he did not explain why the Miner's May 2, 2018 non-qualifying pulmonary function study that he relied on to diagnose total

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

disability was "abnormal." *Id.* Finally, the Board held the ALJ erred in requiring Dr. Pickerill to further explain why the qualifying arterial blood gas study associated with his examination of the Miner supported his opinion that the Miner was totally disabled because the regulations provide that a valid, qualifying study constitutes affirmative evidence of total disability. *Id.* Thus, the Board remanded the case for the ALJ to reconsider the opinions of Drs. Fino and Pickerill. *Id.* at 8.

On remand, the ALJ again found the medical opinion evidence insufficient to establish total disability. Decision and Order on Remand at 6-7. She reexamined Dr. Fino's opinion that the Miner was totally disabled based on a restrictive lung impairment, noting Dr. Fino initially opined the Miner had no pulmonary disability. *Id.* at 7. In addition, she summarized his subsequent testimony in which he agreed the Miner has a totally disabling pulmonary impairment, but the impairment was due to his heart condition and causes other than pneumoconiosis. *Id.* Based on Dr. Fino's report and deposition testimony, the ALJ found the physician relied on "the same information" to opine "both that [the Miner] has no pulmonary disability and that [the Miner] is totally disabled[.]" *Id.* Thus, although the ALJ acknowledged the Board's holding that Dr. Fino's opinion constitutes a diagnosis of total disability, she nevertheless found his opinion "somewhat equivocal" on the issue and thus gave it some, but "reduced," weight. *Id.*

Contrary to the ALJ's analysis that Dr. Fino equivocated as to whether the Miner was totally disabled, the Board previously held and explained why Dr. Fino's opinion constitutes a diagnosis of total disability.[7] *Arotin*, BRB No. 21-0143 BLA, slip op. at 7. In his July 1, 2020 report, Dr. Fino opined the Miner was not disabled based on his finding that the November 2018 and June 2020 pulmonary function studies are invalid and the January 2014 and October 2014 pulmonary function studies are valid but non-qualifying. Employer's Exhibit 2. In his deposition, however, Dr. Fino relied on Dr. Pickerill's examination and abnormal test results from May 2018, which Dr. Fino "didn't include" in his earlier report, as the primary bases for his opinion that the Miner was "disabled from a pulmonary standpoint." Employer's Exhibit 3 at 10, 30-31. Thus, contrary to the ALJ's

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[7] A lower court must give full effect to an appellate court's mandate, both express and implied, without altering or amending the mandate. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Hall v. Director*, 12 BLR 1-80, 1-82 (1988) ("a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it").

determination, Dr. Fino did not rely "on the same information" and was not equivocal in making his diagnosis.[8] Decision and Order on Remand at 7.

Despite the ALJ's error, it is not necessary to remand this case for further consideration of the total disability issue. While factual determinations are the province of the ALJ, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversing denial, with directions to award benefits without further administrative proceedings); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (denial of benefits reversed where "only one factual conclusion is possible"); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same).

As discussed, the Board previously held Dr. Fino's opinion constitutes a total disability diagnosis. *Arotin*, BRB No. 21-0143 BLA, slip op. at 6; Employer's Exhibit 3 at 31. On remand, the ALJ found Dr. Fino's opinion adequately reasoned and entitled to at least some weight. The reasons she provided for giving it "slightly reduced" weight were erroneous, i.e., that Dr. Fino was equivocal on total disability and based his diagnosis "on the same information" as his earlier non-disability opinion. Decision and Order on Remand at 7. Remanding for the ALJ to correct that error would only bolster the weight she could accord his opinion. Further, there are no other medical opinions that undermine Dr. Fino's total disability diagnosis, as both Dr. Basheda and Dr. Pickerill also diagnosed the Miner as totally disabled.[9] 20 C.F.R. §718.204(b)(2)(iv). Thus, we hold Dr. Fino's uncontradicted, credited opinion satisfies Claimant's burden to establish total disability by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*],

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[8] While the ALJ appears to take issue with Dr. Fino attributing the Miner's restrictive lung impairment and abnormal arterial blood gas testing to extrinsic causes, that aspect of his opinion is not relevant to the inquiry at 20 C.F.R. §718.204(b)(2), which is whether the Miner had a totally disabling respiratory or pulmonary impairment. The cause of the Miner's impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *Arotin,* BRB No. 21-0143 BLA, slip op. at 7, *citing Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). Thus, regardless of whether the ALJ were to credit or discredit Dr. Fino's opinion on the cause of the Miner's disability, Dr. Fino nevertheless unequivocally opined, based on Dr. Pickerill's objective test results, that the Miner was disabled.

[9] We need not address the ALJ's weighing of Dr. Pickerill's opinion because it is consistent with Dr. Fino's credited total disability opinion. 20 C.F.R. §718.204(b)(2)(iv); *see* Decision and Order on Remand at 6-7.

512 U.S. 267, 277-78 (1994); *Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 137 n.9 (1997) (preponderance of the evidence standard is satisfied when "the existence of a fact is more probable than its nonexistence") (citations omitted).

We therefore reverse the ALJ's finding that Claimant failed to establish total disability based on the medical opinion evidence and evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); *see Rafferty*, 9 BLR at 1-232. Because we reverse the ALJ's finding that Claimant failed to establish total disability, Claimant has invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Therefore, the burden shifts to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[10] or that "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).

As the ALJ did not address whether Employer rebutted the Section 411(c)(4) presumption, we remand the case for further consideration of this issue.

Remand Instructions

On remand, the ALJ is instructed to consider whether Employer established rebuttal of the Section 411(c)(4) presumption. Specifically, the ALJ must begin her analysis by considering whether Employer has disproved the existence of legal pneumoconiosis by establishing the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[11] 20

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[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). The definition includes "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).

[11] On remand, the ALJ must reconsider the doctors' rationales for excluding a diagnosis of legal pneumoconiosis, with the burden on Employer to disprove the disease by a preponderance of the evidence. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the *employer* has come forward with affirmative proof that the [miner] does *not* have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment") (emphasis in original).

C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). In addition, she must determine whether Employer has disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *see Minich*, 25 BLR at 1-159.

The ALJ must consider all relevant evidence and set forth her findings in detail, including the underlying rationale for her decision, as the Administrative Procedure Act requires.[12] 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). In weighing the medical opinion evidence, the ALJ should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Balsavage*, 295 F.3d at 396-97; *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986).

If the ALJ finds Employer has disproved the existence of both legal and clinical pneumoconiosis, Employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i) and the ALJ need not reach the issue of disability causation. However, if Employer fails to disprove the existence of either legal or clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), the ALJ must determine whether Employer has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible evidence that "no part of [the Miner's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 1-159. If Employer is unable to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), (ii), Claimant has established entitlement to benefits.

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

Accordingly, the ALJ's Decision and Order on Remand Denying Benefits is reversed in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge