U.S. Department of Labor

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

BRB No. 23-0341 BLA

BILLIE NIDA (Widow of GLEN NIDA) Claimant-Respondent v. BI MOR COAL INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/23/2024 DECISION and ORDER

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

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2021-BLA-05416) rendered on a survivor's claim[1] filed October 16, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established the Miner had 15.16 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of death 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.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. It also argues he erred in finding it failed to rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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, 361-62 (1965).

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[1] Claimant is the widow of the Miner, who died on September 24, 2017. Director's Exhibit 11.

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

[3] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had 15.16 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.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14-15.

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 at the time of his death. 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. *See* 20 C.F.R. §718.204(b)(1). 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 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). The ALJ found Claimant established total disability based on the medical opinions and the evidence as a whole.[5] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16.

Before weighing the medical opinions, the ALJ determined the exertional requirements of the Miner's usual coal mine employment. Decision and Order at 5. A miner's usual coal mine employment is the most recent job they performed regularly and over a substantial period of time. *See Pifer* v. *Florence Mining* Co., 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

The ALJ found the Miner's usual coal mine employment was a working supervisor, which involved at least moderate exertion. Decision and Order at 5. Employer questions that determination. Employer's Brief at 5. We do not find Employer's argument persuasive.

The ALJ observed that, in his state claim for benefits, the Miner testified, and several of his employers signed statements, that he worked as a laborer or foreman, as well as a fire boss, foreman, section boss, supervisor, or superintendent in underground mines. Decision and Order at 5, *citing* Director's Exhibit 9 at 98, 100-07. He further noted Claimant's testimony that the Miner told her he had worked as a foreman and operated the continuous miner, he worked in thirty-six-inch coal, and he "[c]rawled around on his hands and knees all day." *Id.*, *citing* Hearing Tr. at 12, 14. The ALJ thus permissibly concluded the Miner's usual coal mine employment was a working supervisor, which required him to

[5] The ALJ found the pulmonary function studies do not establish total disability, and there are no arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 15.

engage in at least moderate exertion. *See Milburn Colliery Co v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Shortridge*, 4 BLR at 1-539; *Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209, 1-1213 (1984) (ALJ is responsible for determining the nature of the miner's usual coal mine work and its physical requirements); Decision and Order at 5.

The ALJ then considered Dr. Green's medical opinion that the Miner was totally disabled based on his September 1, 2017 pulmonary function study and the exertional requirements of his usual coal mine employment. Decision and Order at 16; Claimant's Exhibit 1 at 7. The ALJ found Dr. Green's opinion is documented and reasoned and supports a finding of total disability. Decision and Order at 16.

Employer argues the ALJ erred by accepting Dr. Green's opinion the Miner was totally disabled because Dr. Green does not describe the exertional requirements for the Miner's last year of coal mine employment.[6]

Dr. Green noted the Miner worked as a fire boss, laborer, superintendent, and supervisor working in underground coal mines, and he likely had to fill in and do other duties as a supervisor. Claimant's Exhibit 1 at 2, 8. He opined the Miner's September 26, 1988 pulmonary function study was "essentially normal" but the September 1, 2017 pulmonary function study showed "significant deterioration which would qualify him as totally disabled from a pulmonary capacity standpoint." *Id.* at 4-5, 7. He further opined the September 1, 2017 study demonstrated a significant degree of lung restriction with a moderate decrease in total lung capacity and air trapping. *Id.* at 3, 5. Finally, he opined the Miner's moderate restriction, decrease in lung capacity, and air trapping would prevent him from performing his previous coal mine employment which required him to "walk and carry at least [twenty] pounds of fire bossing equipment and possibly more weight, and working underground doing labor." *Id.* at 7.

It is well established total disability can be demonstrated with a reasoned medical opinion even in the absence of qualifying pulmonary function or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); *see Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

[6] We note that Employer did not file a brief below or otherwise argue Dr. Green's opinion is not reasoned. Thus, it appears Employer forfeited this argument. *See Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ). However, because Employer's argument is couched in terms of error by the ALJ, in an abundance of caution, we address it.

Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott*, 60 F.3d at 1141; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

The ALJ found Dr. Green's opinion reasoned and documented, as the physician "demonstrated an understanding of [the] Miner's relevant histories, and comprehensively reviewed all of the available testing and medical records to reach his conclusions." Decision and Order at 16. He observed that, while the record does not clearly support Dr. Green's statement the Miner last worked as a fire boss, his understanding of Claimant's exertional requirements is consistent with the ALJ's finding that the Miner's usual coal mine employment as a working supervisor required at least a moderate level of exertion. *Id.* Thus, contrary to Employer's contention, the ALJ permissibly determined Dr. Green's opinion establishes the Miner would not be able to perform a moderate level of exertion and supports a finding of total disability. *See Hicks*, 138 F.3d at 528; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Scott*, 60 F.3d at 1141; Decision and Order at 16.

We therefore affirm the ALJ's finding that Claimant established total disability based upon the medical opinion evidence and in consideration of the evidence as a whole,[7] and thus invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2)(iv), 718.305(b); Decision and Order at 16-17.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[8] or that "no

[7] The ALJ also considered Claimant's testimony that the Miner could hardly walk from room to room in their house without being short of breath and used a motorized cart to get around stores because of his breathing. Decision and Order at 16; Hearing Tr. at 12-13. Although the ALJ found Claimant's lay testimony cannot establish total disability on its own because there is relevant medical evidence in the record, he noted her testimony supports Dr. Green's reasoned opinion. 20 C.F.R. §718.305(b)(4); Decision and Order at 16.

[8] "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

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).

The ALJ found Employer failed to establish rebuttal by either method. Decision and Order at 24, 27. Employer concedes the Miner had pneumoconiosis, Employer's Brief at 6; thus we affirm the ALJ's determination it failed to rebut the presumption that the Miner had pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i); Decision and Order at 24.

Employer's only remaining contention is that because the ALJ erred in finding the Miner totally disabled, he erred in finding Claimant invoked the Section 411(c)(4) presumption and, therefore, in requiring Employer to rebut it.[9] Employer's Brief at 6-7. Because we have affirmed the ALJ's finding that Claimant established total disability, we reject Employer's argument.

As Employer raises no further argument, we affirm the ALJ's finding it did not rebut the Section 411(c)(4) presumption, 20 C.F.R. §718.305(d), and the award of benefits.

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).

[9] To the extent Employer argues the ALJ erred in weighing Dr. Green's opinion on the cause of the Miner's death, Employer's Brief at 7, we disagree. Because Dr. Green opined pneumoconiosis contributed to or hastened the Miner's death, the ALJ properly found his opinion does not aid Employer in rebutting the presumption. Decision and Order at 26-27; Claimant's Exhibit 1 at 10.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge