U.S. Department of Labor

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

BRB Nos. 23-0129 BLA
and 23-0130 BLA

SUZANNE FLOYD (Survivor and o/b/o of JOHN F. FLOYD) Claimant-Respondent v. HIGH POWER ENERGY 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: 06/10/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order Awarding Benefits and Removing Claim from Abeyance of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2018-BLA-06009) and Decision and Order Awarding Benefits and Removing Claim from Abeyance (2018-BLA-05785) 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 subsequent claim[1] filed on May 4, 2017, and a survivor's claim filed on May 13, 2022.[2]

The ALJ credited the Miner with at least twenty years of coal mine employment in conditions substantially similar to those in underground mines, and found he had a totally disabling respiratory or pulmonary impairment at the time of his death. She therefore found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c)[3] and invoked the rebuttable presumption of total disability due to

[1] The Miner filed prior claims on December 4, 2008 and April 11, 2013, which he withdrew. Miner's Claim (MC) Director's Exhibits 1; 3; 30 at 7. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306. The Miner filed a prior claim on August 4, 2010, that the district director denied on May 5, 2011, because he did not establish any element of entitlement. That claim became final on March 12, 2012, after the Miner withdrew his request for a formal hearing. MC Director's Exhibits 2 at 22; 30 at 7.

[2] Claimant is the widow of the Miner, who died on February 9, 2022. Survivor's Claim (SC) Director's Exhibit 3; Claimant's Exhibit 1. She is pursuing the miner's claim on his behalf, along with her own survivor's claim. SC Director's Exhibit 1. Employer's appeal in the miner's claim was assigned BRB No. 23-0129 BLA, and its appeal in the survivor's claim was assigned BRB No. 23-0130 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

[3] 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 she 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. 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 failed to 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 Miner's current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3; MC Director's Exhibit 2 at 22.

pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits in the miner's claim. In the survivor's claim,[5] the ALJ found Claimant is derivatively entitled to benefits under Section 422(*l*) of the Act.[6] 30 U.S.C. §932(*l*).

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus erred in finding she invoked the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it did not rebut the presumption. It further challenges the award of derivative benefits in the survivor's claim.[7] 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 ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance

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

[5] The Miner died while his claim was pending before the Office of Administrative Law Judges (OALJ). Decision and Order at 3. Upon his death, the ALJ cancelled the hearing and granted Claimant's request for a decision on the record. July 7, 2022 Order Granting Decision on the Record. In the meantime, the district director had awarded Claimant derivative benefits on July 5, 2022, and the case was transferred to the OALJ on July 28, 2022. SC Director's Exhibits 4, 12. Employer requested that the ALJ hold the survivor's claim in abeyance pending resolution of the miner's claim. The ALJ granted its request and later removed the claim from abeyance. Decision and Order Removing Claim from Abeyance at 2.

[6] Section 422(*l*) of the Act provides 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*).

[7] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least twenty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-8.

with applicable law.[8] 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 (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 at the time of his death. 20 C.F.R. §718.305(b)(1)(iii). Total disability is established if the Miner's pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 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 opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh the relevant evidence supporting a finding of total disability against the 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 medical opinion evidence and the evidence as a whole.[9] Decision and Order at 26.

The ALJ considered the medical opinions of Drs. Gaziano, Fino, and Basheda.[10] Decision and Order at 17-26. Dr. Gaziano opined the Miner was totally disabled based upon his moderately reduced diffusion capacity. MC Director's Exhibits 15 at 4; 18 at 1. Dr. Fino concluded the Miner had a very mild respiratory impairment that was not totally disabling. Employer's Exhibits 3 at 11; 11 at 17, 19-20. Dr. Basheda opined that he could not accurately assess the extent of the Miner's impairment because he was not taking appropriate respiratory medication, but the most recent pulmonary function study indicated a mild but non-disabling impairment. Employer's Exhibits 5 at 15-17; 10 at 16-17, 19, 27-

[8] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because 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); MC Director's Exhibit 8.

[9] The ALJ found the pulmonary function and arterial blood gas studies do not establish total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 16.

[10] Prior to evaluating the medical opinion evidence, the ALJ determined the Miner's usual coal mine work was as a heavy equipment operator and a fuel man which required heavy labor. Decision and Order at 8; MC Director's Exhibits 5, 9. We affirm this finding as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

28. The ALJ credited Dr. Gaziano's better documented and reasoned opinion over Employer's experts' opinions and concluded that the medical opinion evidence supports a finding of total disability. Decision and Order at 26.

Employer contends the ALJ erred in her analysis of the medical opinion evidence. Employer's Brief at 4-12. We disagree.

Contrary to Employer's arguments, the ALJ was not required to discredit Dr. Gaziano's opinion because he considered less evidence than Drs. Fino and Basheda. Employer's Brief at 5, 13-14. Rather, an ALJ may credit a physician who did not review all of a miner's medical records when that doctor's opinion is otherwise reasoned, documented, and based on an examination of the miner and objective test results. 20 C.F.R. §718.202(a)(4); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion).

Dr. Gaziano examined the Miner on June 15, 2017. MC Director's Exhibit 15. He identified the Miner's usual coal mine employment was as a heavy equipment operator and fuel man, which required him to climb on and off equipment, climb ladders, and drag heavy hoses. *Id*. at 1. He noted symptoms of a productive cough, shortness of breath, and orthopnea. *Id*. at 2. He found a mild irreversible obstructive impairment on pulmonary function testing, a normal resting blood gas study, and a moderately reduced diffusion capacity, which he opined would render the Miner unable to perform his usual coal mine work. *Id*. at 4. When asked to clarify his opinion, he explained that the Miner's diffusion capacity was moderately reduced, which is a Class 3 impairment under the American Medical Association (AMA) guidelines that would render the Miner unable to perform "medium" work such as that required by his usual coal mine employment. MC Director's Exhibit 18. Thus, the ALJ permissibly found Dr. Gaziano's opinion adequately documented and reasoned; the doctor explained the factors he considered, including the Miner's pulmonary function study, his diffusion capacity, the AMA guidelines, and the Miner's work history, and he explained how they support his diagnosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 1096 (4th Cir. 1993); Decision and Order at 25; *see also* MC Director's Exhibits 15 at 4; 18.

Nor are we persuaded by Employer's argument that the ALJ erred in crediting Dr. Gaziano's opinion that the Miner's diffusion capacity rendered him totally disabled, while finding unpersuasive Drs. Fino's and Basheda's opinions that the diffusion capacity test is not reliable. Employer's Brief at 7-14; Decision and Order at 25-26.

Dr. Fino opined that the diffusion capacity testing is unreliable because it is not reproducible from lab to lab. Employer's Exhibit 11 at 17-18. In support, he explained the results of Dr. Gaziano's study, 14.95 ml/mmHg/min, and Dr. Basheda's study, 14 ml/mmHg/min, are very different from Dr. Bellotte's earlier study values of 17.7 ml/mmHg/min. *Id*. The ALJ permissibly found this explanation entitled to less weight because Dr. Bellotte's prior examination of the Miner is not in the record and the only remaining studies are those of Drs. Gaziano and Basheda.[11] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Compton*, 211 F.3d at 211; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989) (en banc); Decision and Order at 25.

Dr. Basheda opined that there is disagreement among physicians about whether to use a patient's adjusted diffusion measurement or his diffusion capacity when corrected to assess alveolar volume. Employer's Exhibit 10 at 14-15. He further opined that doctors should not rely on a single diffusion study to diagnose total disability without evidence of an oxygenation impairment on blood gas studies. *Id*. at 23. However, as the ALJ noted, both Drs. Basheda and Gaziano used the AMA guidelines to determine whether the Miner was totally disabled, and both physicians explained those guidelines take into account diffusion capacity when determining the extent of an impairment. Decision and Order at 26; MC Directors' Exhibit 18 at 1; Employer's Exhibit 5 at 16.

Moreover, prior to opining that the studies are unreliable, both Drs. Fino and Basheda relied on the diffusion studies to reach their conclusions on total disability. Dr. Fino examined the Miner on January 8, 2018, at which time he conducted a pulmonary function study, including a diffusion study, that was invalid. Employer's Exhibit 3. However, he diagnosed the Miner with a mild non-disabling impairment based on Dr. Gaziano's diffusion study, which he characterized as valid. *Id*. at 10-11. Dr. Basheda examined the Miner on September 27, 2018, at which time he conducted a diffusion study which he characterized as "normal" when adjusted for alveolar volume. Employer's Exhibit 5 at 5. After reviewing Dr. Gaziano's study, he stated the diffusion capacity was moderately reduced but was normal when corrected for alveolar volume. *Id*. at 11.

Thus, the ALJ permissibly found Drs. Fino's and Basheda's opinions, that diffusion studies are unreliable for determining total disability, are internally inconsistent as they both initially conducted and relied upon the diffusion studies to make their diagnoses. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Lane v. Union*

[11] Dr. Fino also conducted testing that produced a diffusion capacity value of 10.34 ml/mmHg/min; however, because the testing was invalid, he stated "we are going to forget about my study." Employer's Exhibit 11 at 17.

Carbide Corp., 105 F.2d 166, 174 (4th Cir 1997); *Grizzle*, 994 F.2d at 1096; Decision and Order at 26; Employer's Exhibits 10 at 23; 11 at 17.

The ALJ also reasonably discredited Dr. Basheda's opinion because he opined the Miner was not totally disabled, but also opined he could not accurately assess his impairment because the Miner was no longer taking respiratory medications. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Grizzle*, 994 F.2d 1093, 1096; Decision and Order at 25; Employer's Exhibits 5 at 16-17; 10 at 19-20.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Underwood*, 105 F.3d at 949; *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Accordingly, as it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Gaziano's opinion is the most credible of record and establishes that the Miner had a totally disabled respiratory impairment based upon his diffusion capacity. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 26.

We further reject Employer's assertion that the ALJ irrationally found the pulmonary function studies and arterial blood gas studies establish total disability when weighing the evidence as a whole. Employer's Brief at 12. To the contrary, the ALJ accurately observed none of the Miner's pulmonary function or arterial blood gas studies are qualifying,[12] but permissibly found the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 15-16, 26. We thus affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption and established a change in a condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309(c); Decision and Order at 12, 26.

[12] A "qualifying" pulmonary function or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the respective tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(i), (ii).

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,[13] 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). The ALJ found Employer failed to establish rebuttal by either method.[14]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 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).

To rebut the presumption, Employer relies on the medical opinions of Drs. Fino and Basheda that the Miner did not have legal pneumoconiosis. Employer's Exhibits 3, 5, 10, 11. The ALJ found that neither opinion was adequately explained and accorded them little weight. Decision and Order at 30-33.

Dr. Fino opined that the Miner had a "very mild obstruction consistent with emphysema," which he "believe[d]" was due to smoking and not disabling, "even if coal mine dust played a role in this emphysema . . . ."[15] Employer's Exhibit 3 at 11. Contrary

[13] "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).

[14] The ALJ found Employer rebutted the presumption of clinical pneumoconiosis. Decision and Order at 30.

[15] At his deposition, when asked whether the Miner had "a chronic dust disease of the lung caused by, significantly related to or substantially aggravated by coal mine dust exposure," Dr. Fino reiterated his opinion that the Miner's objective testing is "above

to Employer's arguments, the ALJ permissibly accorded little weight to Dr. Fino's opinion that the Miner did not have legal pneumoconiosis, as he failed to adequately explain why the Miner's coal mine dust exposure did not contribute to or aggravate his emphysema. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14; Decision and Order at 31.

Nor are we persuaded by Employer's contention that the ALJ erred in discrediting Dr. Basheda's opinion. Employer's Brief at 17-18. Dr. Basheda opined the Miner had smoking induced chronic obstructive pulmonary disease with an asthmatic component that was unrelated to his coal mine employment, in part, because it was partially reversible with bronchodilators. Employer's Exhibits 5 at 16-17; 10 at 17. The ALJ permissibly rejected the physician's opinion because he failed to explain how the Miner's partial response to bronchodilators precluded coal mine dust exposure from contributing to the fixed component of his impairment. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 533; *Lane*, 105 F.2d at 174; *Grizzle*, 994 F.2d at 1096; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 32. The ALJ further permissibly found Dr. Basheda's opinion unpersuasive because he failed to address the additive nature of smoking and coal mine dust exposure or adequately explain why coal mine dust exposure could not have contributed to or aggravated the Miner's alleged smoking-related obstruction. *Owens*, 724 F.3d at 558; *Hicks*, 38 F.3d at 544; 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); Decision and Order at 32-33.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because the ALJ's credibility findings are supported by substantial evidence, we affirm her determination that Employer did not meet its burden of proof to establish the Miner did not suffer from legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 35. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established that "no part of the [Miner'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)(ii). The ALJ permissibly found Drs. Fino's and Basheda's opinions are entitled to little weight because neither physician diagnosed legal pneumoconiosis, contrary to the ALJ's finding that Employer

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disability levels" and Dr. Gaziano's reduced diffusing capacity measurement "is not disabling." Employer's Exhibit 11 at 21-22.

failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015). Consequently, we affirm the ALJ's determination that Employer failed to establish no part of the Miner's respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 36. We therefore affirm the 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 Removing Claim from Abeyance; Employer's Brief at 19-20.

Accordingly, the ALJ's Decision and Order Awarding Benefits and Decision and Order Awarding Benefits and Removing Claim from Abeyance are affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge