



BRB No. 23-0243 BLA

CAROLE F. HUGHES )  
(Widow of RAYMOND H. HUGHES) )

Claimant-Respondent )

v. )

GREENWICH COLLIERIES COMPANY )

DATE ISSUED: 06/28/2024

Employer-Petitioner )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Ralph J. Trofino, Johnstown, Pennsylvania, for Employer.

BEFORE: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2019-BLA-05674) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

This case involves a survivor's claim filed on June 22, 2018, and is before the Benefits Review Board for the second time.

In his initial Decision and Order Awarding Benefits, the ALJ found Claimant<sup>1</sup> established the Miner had 18.25 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act,<sup>2</sup> 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

Employer appealed, and the Board affirmed the ALJ's finding that the Miner had 18.25 years of underground coal mine employment. *Hughes v. Greenwich Collieries Co.*, BRB No. 21-0349 BLA, slip op. at 2 n.3 (Dec. 8, 2022) (unpub.). However, the Board vacated his total disability finding because the ALJ improperly shifted the burden of proof to Employer when considering the medical opinion evidence and erroneously found total disability established based solely on Claimant's lay testimony. *Id.* at 4, 6; *see* 20 C.F.R. §§718.204(b)(2)(iv), 718.305(b)(4). Thus, the Board vacated the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits.<sup>3</sup> *Hughes*, BRB No. 21-0349 BLA, slip op. at 6.

In his Decision and Order Awarding Benefits on Remand, the subject of this appeal, the ALJ again found Claimant established total disability. 20 C.F.R. §718.204(b)(2). Thus,

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<sup>1</sup> Claimant is the widow of the Miner, who died on March 27, 2018. Director's Exhibit 12. The Miner never successfully established entitlement to benefits during his lifetime. Director's Exhibits 1-3. Thus, Claimant is not entitled to benefits under Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner determined to be 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).

<sup>2</sup> 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.

<sup>3</sup> The Board noted Employer did not contest the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption and instructed the ALJ that, if he finds total disability established on remand, he may reinstate the award of benefits. *Hughes v. Greenwich Collieries Co.*, BRB No. 21-0349 BLA, slip op. at 7 (Dec. 8, 2022) (unpub.), *citing* *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

he found Claimant invoked the Section 411(c)(4) presumption and reinstated the award of benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and therefore invoked the Section 411(c)(4) presumption. Claimant responds in support of the award. 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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

### **Invocation of 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. 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 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 Dr. Swedarsky's reasoned and documented medical opinion considered in conjunction with Claimant's lay testimony.<sup>5</sup> 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 10-11.

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<sup>4</sup> 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 9.

<sup>5</sup> The ALJ found Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas studies, or evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order on Remand at 4-8.

Employer argues the ALJ erred in making this finding.<sup>6</sup> Employer’s Brief at 7-10. We disagree.

First, substantial evidence supports the ALJ’s finding that Dr. Swedarsky diagnosed the Miner with a respiratory impairment at the time of his death. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004) (substantial evidence is such relevant evidence a reasonable mind might accept as adequate to support a conclusion); Decision and Order on Remand at 10.

Dr. Swedarsky discussed the Miner’s medical history and treatment for lung cancer based on his review of the Miner’s medical records and autopsy results. Employer’s Exhibit 2. He noted that Dr. Boutros examined the Miner on July 7, 2014, as he was experiencing chronic exertional dyspnea and had a history of chronic obstructive pulmonary disease (COPD). *Id.* at 8. In addition, he noted that although the Miner’s pulmonary function tests “were unremarkable” that day, and Dr. Boutros suspected a possible cardiac etiology for his chronic dyspnea, Dr. Boutros nevertheless wanted the Miner to undergo a computed tomography (CT) scan to exclude interstitial lung disease. *Id.*

According to Dr. Swedarsky, the Miner’s July 18, 2014 chest x-ray demonstrated a three centimeter “mass in the right hilar region highly suspicious for a pulmonary malignancy . . . .” Employer’s Exhibit 2 at 8-9. A CT scan verified the presence of the mass and a biopsy established it is “consistent with primary adenocarcinoma<sup>7</sup> of the lung.” *Id.* On November 4, 2014, the Miner underwent “thoracoscopy, right posterior lateral thoracotomy and bilobectomy of the right upper and middle lung lobes” to remove the mass. *Id.*

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<sup>6</sup> The ALJ determined the Miner’s treatment records “do not address whether the Miner was totally disabled at the time of his death and thus the treatment records are not probative as to the issue of total disability.” Decision and Order on Remand at 10. He also weighed Dr. Wick’s opinion that the Miner was not totally disabled and found it inadequately reasoned. *Id.* Finally, he found Dr. Goldblatt did not render an opinion on the issue of total disability and thus his opinion is also not probative on the issue. *Id.* We affirm these findings as unchallenged. *Skrack*, 6 BLR at 1-711.

<sup>7</sup> Dr. Swedarsky testified adenocarcinoma is a type of lung cancer. Employer’s Exhibit 25 at 27-28. He stated the Miner had stage three adenocarcinoma. *Id.* at 29-30. Further, he testified adenocarcinoma performs what is referred to as “alveolar spread,” explaining it “spread[s] from one lung to the other, and seed[s] itself into the air spaces and . . . sit[s] there and [grows].” *Id.* at 37.

Dr. Swedarsky also stated a December 29, 2014 pulmonary function test, taken after the Miner's lung operation, demonstrated a moderate reduction in diffusing capacity of the lungs for carbon monoxide. Employer's Exhibit 2 at 10. Further, he indicated the Miner underwent post-operative chemotherapy and, three weeks after its completion, complained of shortness of breath. *Id.*

During his deposition, Dr. Swedarsky explained that radiation therapy "fries the tissue" in the lungs and causes "extensive hilum fibrosis," and the damage cannot be contained. Employer's Exhibit 25 at 31-32. He specified that, on October 5, 2015, the Miner's lung capacity "was at the lower end of normal and the diffusion capacity was mildly decreased most likely explained by the fact that [he] had undergone right upper lobe and right middle lobe resections," and cardiac disease was most likely the cause of his shortness of breath. Employer's Exhibit 2 at 11.

Subsequently, after the Miner was further examined and additional testing was performed, two additional masses were identified in his left lung. Employer's Exhibit 2 at 12-13. A wedge biopsy established the masses were consistent with adenocarcinoma. *Id.* On March 3, 2018, the Miner visited the emergency room at Chan Soon-Shiong Medical Center with worsening shortness of breath. *Id.* at 14. A CT scan revealed the Miner had developed "diffuse ground glass changes in the left lung with a small left-sided pneumothorax and pleural effusion." *Id.* The right lung also contained two nodules measuring six and four millimeters respectively. *Id.* Dr. Swedarsky highlighted that the Miner's treating doctors had concluded the "interval development of diffuse ground glass opacities in the left lung" was due either to "infectious or secondary to lymphangitic carcinomatosis." *Id.* The Miner died on March 28, 2018. *Id.*

Based on his review of the autopsy slides, Dr. Swedarsky concluded that at the time of the Miner's death he had "[r]adiation induced pulmonary and pleural fibrosis," "[b]lack pigment deposits consistent with mild anthracosis," "[r]ecurrent and metastatic adenocarcinoma of the lung," and "[m]ild emphysema." Employer's Exhibit 2 at 29. At his deposition, Dr. Swedarsky stated he agreed with several medical examiners that the Miner's "mild reduction in pulmonary function, especially his expiratory reserve volume[,] was secondary to obesity, rather than an intrinsic lung . . . defect." Employer's Exhibit 25 at 25. He testified the Miner had adenocarcinoma at the time of his death and died as a result of that condition and bronchial pneumonia. *Id.* at 39, 52. Further, he concluded there was "no objective evidence of impaired respiratory function prior to [the Miner's] October 2014 diagnosis of adenocarcinoma of the lung" and "[a]ny reduction in lung function after that diagnosis can be attributed to his right lung upper and middle lobectomies, radiation therapy for recurrent malignancy and left lung wedge biopsies." *Id.* at 42.

Based on this evidence, the ALJ permissibly found that Dr. Swedarsky's opinion is reasoned and documented and establishes the "Miner did suffer a respiratory impairment after his October 2014 diagnosis of adenocarcinoma of the lung."<sup>8</sup> Decision and Order on

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<sup>8</sup> Employer argues the ALJ erred in finding that the Miner had a respiratory impairment because, although Dr. Swedarsky recognized the Miner experienced "changes in his pulmonary function" following his November 4, 2014 surgery until his death on March 27, 2018, Dr. Swedarsky followed that statement by saying:

[B]ut Dr. Zeiden nor the doctors at Lungs at Work, who examined the Miner, couldn't find anything debilitating and at Lungs at Work didn't really come out and say this man is debilitated either. So I don't think there's any objective evidence of respiratory impairment related to his coal mine employment.

Employer's Exhibit 25 at 47; *see* Employer's Brief at 9-10. We are not persuaded. Dr. Swedarsky's characterization that neither Dr. Zeiden nor the doctors at Lungs at Work affirmatively diagnosed total disability does not undermine the ALJ's finding that the Miner had a disabling respiratory impairment at the time of his death. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162-63 (3d Cir. 1986); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The ALJ considered the relevant evidence, including Dr. Swedarsky's opinion, and permissibly found the Miner had a respiratory impairment at the time of his death. *See Kertesz*, 788 F.2d at 163; Decision and Order Remand at 10. We consider Employer's argument with respect to Dr. Swedarsky's opinion to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Moreover, although Dr. Swedarsky stated that there is no "objective clinical evidence of respiratory impairment related to [the Miner's] coal mine employment," Employer's Exhibit 25 at 47, we reject Employer's argument that this undermines the ALJ's total disability finding. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death; the cause of that impairment (i.e., whether it is related to the Miner's coal mine employment) 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. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023).

Remand at 10; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986).

Finding the Miner had a respiratory impairment at the time of his death based on Dr. Swedarsky's opinion, the ALJ further found the Miner was totally disabled by that respiratory impairment after considering Claimant's testimony in conjunction with Dr. Swedarsky's opinion. Substantial evidence supports the ALJ's finding. *See Soubik*, 366 F.3d at 233.

Specifically, Claimant testified the Miner started having breathing difficulty in the 1990s which subsequently worsened. Hearing Tr. at 16. She stated that, as a result of the Miner's breathing trouble, he had difficulty walking and going up and down steps. *Id.* Further, she noted his primary care physician prescribed bronchodilators for him due to his breathing problems, and he had difficulty breathing at home when it was warm and humid, until they installed central air conditioning. *Id.* at 17-18. In addition, she testified the Miner had surgery in February 2018 to treat a collapsed lung. *Id.* at 18.

The ALJ reiterated that the Miner's usual coal mine employment as a beltman required heavy labor, as the Board had affirmed that finding. *Hughes*, BRB No. 21-0349 BLA, slip op. at 4-5 n.8; Decision and Order on Remand at 8; Dec. 15, 2020 Decision and Order at 5. In his original decision, the ALJ indicated that the Miner's work "included handling heavy belt structures ([forty to fifty] pounds), bags of rock dust ([fifty] pounds), and shovels of coal ([fifteen to twenty] pounds)." Dec. 15, 2020 Decision and Order at 5, *citing* Director's Exhibit 8. In light of the exertional requirements of the Miner's usual coal mine employment, Claimant's testimony with respect to the Miner's breathing difficulty and the effect it had on him, and Dr. Swedarsky's diagnosis of a respiratory impairment the Miner had at the time of his death, the ALJ permissibly found the evidence of record establishes the Miner was totally disabled at the time of his death. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 16.

Employer argues the ALJ erred in determining Dr. Swedarsky's opinion supports a finding of total disability because it is inconsistent with the ALJ's prior consideration of the doctor's opinion in his original decision. Employer's Brief at 7-8. The Board, however, specifically vacated "the ALJ's finding regarding the medical opinion evidence on the issue of total disability" because, "while he summarized the physicians' opinions . . . , he failed to explain whether this evidence supported a finding that Claimant was totally disabled from a respiratory impairment at the time of his death." *Hughes*, 21-0349 BLA, slip op. at 4. It thus remanded the claim for him to reconsider, among other things, Dr. Swedarsky's opinion. *Id.* at 6, 8. Accordingly, contrary to Employer's argument, the ALJ acted in accordance with the Board's instructions. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) ("[d]eviation from the court's remand order in the subsequent administrative

proceedings is itself legal error”); *Hall v. Director, OWCP*, 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”).

Employer also argues the ALJ erred in determining Dr. Swedarsky’s opinion supports a finding of total disability because the doctor did not specifically opine the Miner was totally disabled. Employer’s Brief at 8-9. Contrary to Employer’s argument, however, a physician need not phrase his or her opinion specifically in terms of “total disability” to support a finding of total disability.<sup>9</sup> See *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990), citing *Black Diamond Coal Co. v. Benefits Review Board [Raines]*, 758 F.2d 1532, 1534 (11th Cir. 1985). Medical opinions may support a finding of total disability if they provide sufficient information from which the ALJ can reasonably infer a miner was unable to do his usual coal mine job. See *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Poole*, 897 F.2d at 894; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

Thus, we affirm the ALJ’s findings that Claimant established total disability based on the evidence as a whole, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198, and therefore invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order on Remand at 10-11. We therefore affirm the award of benefits.<sup>10</sup>

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<sup>9</sup> Employer argues Dr. Swedarsky’s testimony also undermines a finding of total disability because he generally stated a person “can have [their] entire lung removed and . . . lead a fairly normal life . . . without significant respiratory impairment.” Employer’s Brief at 9, quoting Employer’s Exhibit 25 at 66-67. However, it is the ALJ’s function to weigh the evidence, draw appropriate inferences, and determine credibility. See *Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The Board cannot substitute its inferences for those of the ALJ. *Anderson*, 12 BLR at 1-113. Because the ALJ’s consideration of Dr. Swedarsky’s opinion is supported by substantial evidence, we reject Employer’s argument.

<sup>10</sup> As discussed, the Board instructed the ALJ to reinstate the award of benefits if he found Claimant invoked the Section 411(c)(4) presumption because Employer did not contest his finding that it failed to rebut the presumption. *Hughes*, BRB No. 21-0349 BLA, slip op. at 7.



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

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge