U.S. Department of Labor

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

BRB No. 23-0283 BLA

SHIRLEY ANN THORNTON (Widow of BARRY LEE THORNTON) Claimant-Respondent v. ITMANN COAL COMPANY Employer-Petitioner 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 on Remand Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order on Remand Awarding Benefits (2020-BLA-05024) rendered on a survivor's claim

filed on August 11, 2017,[1] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.[2]

In her initial Decision and Order Awarding Survivor's Benefits, the ALJ found the Miner had 21.25 years of qualifying coal mine employment and was totally disabled by a respiratory or pulmonary impairment, and thus Claimant invoked the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

Upon consideration of Employer's appeal, the Board vacated the ALJ's finding that Claimant established total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i) because the ALJ did not adequately address the opinions of Drs. Rosenberg and Fino regarding the reliability of the May 8, 2012 pulmonary function study. *Thornton v. Itmann Coal Co.*, BRB No. 21-0300 BLA, slip op. at 3-6 (Jan. 23, 2023) (unpub.). The Board also vacated the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) because her weighing of the medical opinions relied on her findings at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 5. Consequently, the Board vacated the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption and remanded the case to the ALJ for further consideration.[4]

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[1] Claimant is the widow of the Miner, who died on March 21, 2014. Director's Exhibit 14. Because the Miner did not establish entitlement to benefits during his lifetime, Claimant is not eligible for derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018). Director's Exhibit 43 at 177. Claimant filed a prior claim on August 14, 2014, but withdrew it on February 16, 2017, and thus it is considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibits 2; 33 at 11.

[2] We incorporate the procedural history of this case as set forth in *Thornton v. Itmann Coal Co.*, BRB No. 21-0300 BLA (Jan. 23, 2023) (unpub.).

[3] In a survivor's claim, 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.

[4] The Board affirmed, as unchallenged on appeal, the ALJ's finding that Claimant established 21.25 years of qualifying coal mine employment and that Dr. Gallup's statements in his treatment records support a finding that the May 8, 2012 study is reliable

On remand, the ALJ rejected the rationales Drs. Rosenberg and Fino provided as to why the May 8, 2012 study is not reliable and concluded Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). She also found that Claimant established total disability when considering the medical opinions and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv). Thus, the ALJ concluded Claimant invoked the Section 411(c)(4) presumption. Further finding Employer did not rebut the presumption, the ALJ awarded benefits.

On appeal, Employer argues the ALJ erred in finding the Miner was totally disabled. Based on its contention that Claimant did not establish total disability and therefore is not entitled to the Section 411(c)(4) presumption, Employer argues the ALJ improperly placed the burden on it to establish the Miner's death was not due to pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file 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.[5] 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). 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). A claimant may establish total disability based on qualifying pulmonary function studies, arterial blood gas studies,[6] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart

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evidence of total disability. *Thornton*, BRB No. 21-0300 BLA, slip op. at 2 n.3; *see Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[5] 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); Hearing Transcript at 6; Director's Exhibits 5, 9.

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

failure, or medical opinions.[7] 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).

Pulmonary Function Studies

On remand, the ALJ acknowledged the Board directed her to more fully address the opinions of Employer's experts that Dr. Gallup's qualifying May 8, 2012 pulmonary function study,[8] conducted as part of the Miner's treatment, is not sufficiently reliable to support a finding of total disability. Decision and Order on Remand at 4-6; Director's Exhibit 15. Dr. Fino opined the study is invalid due to a "premature termination to exhalation and a lack of reproducibility in the expiratory tracings." Employer's Exhibit 3 at 2-3. He also opined there was a lack of abrupt onset to exhalation in the study and that the values represent at least the Miner's minimal lung function rather than his maximum function. *Id.* at 3. Dr. Rosenberg stated he was unable to assess the validity of the study because repetitive testing was not performed to assess variability among the trials.[9] Director's Exhibit 16; Employer's Exhibit 4 at 6.

The ALJ noted that she considered the study to be reliable because Dr. Gallup relied on it for treatment purposes. She also recognized that Dr. Gallup relied on the treatment note incorporating the test results to diagnose the Miner with a significant impairment related to chronic pulmonary disease. Decision and Order on Remand at 4-6. The ALJ gave little weight to Drs. Rosenberg's and Fino's opinions because they invalidated the study based on technical criteria that are not required of pulmonary function tests administered during treatment and failed to adequately explain why the criteria were necessary to establish reliability and how they determined the study did not satisfy those

[7] In her initial decision, the ALJ found Claimant did not establish total disability based on the blood gas study evidence and the lack of evidence the Miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 10, 21.

[8] The record contains two non-qualifying pulmonary function studies dated December 19, 1995, and September 16, 2003; the May 8, 2012 pulmonary function study is the only qualifying study of record. Director's Exhibits 1, 15.

[9] Both Drs. Fino and Rosenberg dated the study May 29, 2012, but it is clear from their recitation of the study's results that they were reviewing the May 8, 2012 study. Director's Exhibit 16; Employer's Exhibits 3 at 2-3; 4 at 6.

criteria. *Id*. at 5-6. Thus, the ALJ concluded the May 8, 2012 study was sufficiently reliable and that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 6.

Employer first asserts the May 8, 2012 pulmonary function study is not supportive of a finding that Claimant is totally disabled because the record lacks any medical opinion specifically attesting to its reliability. Employer's Brief at 4 (unpaginated). It argues the ALJ erred in finding the May 8, 2012 study reliable "solely because [it] was performed during the course of [Dr. Gallup's] treatment." *Id*. at 5 (unpaginated). However, in the previous appeal, the Board affirmed, as unchallenged, "the ALJ's finding that Dr. Gallup's statements support a finding that the May 8, 2012 pulmonary function study is reliable evidence." *Thornton*, BRB No. 21-0300 BLA, slip op. at 4. The ALJ merely reiterated on remand that she credited Dr. Gallup's use of the study for treatment purposes as evidence of its reliability and found his statements support a finding of total disability, which the Board has previously affirmed. As Employer has not shown that the Board's prior holding was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we reject Employer's argument. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984).

Regarding Employer's experts, we reject Employer's contention that the ALJ failed to adequately explain her credibility determinations. *See* Employer's Brief at 4-5 (unpaginated). The ALJ accurately observed the quality standards do not apply to the May 8, 2012 pulmonary function study because it was conducted as part of the Miner's treatment. *See J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment); Decision and Order on Remand at 5-6.

The ALJ also addressed the rationales Employer's experts provided for why the study was not reliable. The ALJ considered Dr. Fino's reasoning that the study was invalid based upon "premature termination to exhalation" and "a lack of an abrupt onset to exhalation," but permissibly found Dr. Fino failed to adequately explain how he reached those conclusions or why they made the study invalid. *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 6 (citing Appendix B to 20 C.F.R. Part 718); Employer's Exhibit 3 at 3. In addition, the ALJ noted that while Dr. Fino asserted the Miner's exhalation was terminated prematurely, the volume/time tracing showed the Miner exhaled for more than seven seconds consistent with 20 C.F.R. Part 718, Appendix B. Decision and Order on Remand at 6; Director's Exhibit 15 at 8; Employer's Exhibit 3.

The ALJ also permissibly found neither physician adequately explained why the lack of three tracings necessarily rendered the study unreliable or why they questioned the Miner's cooperation in performing the test. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 5-6; Employer's Exhibits 3 at 3-4; 4 at 6. Because the ALJ permissibly found Drs. Rosenberg's and Fino's opinions to be not well-reasoned, we affirm her discrediting of them. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable); Decision and Order on Remand at 5-6; Employer's Exhibits 3-4.

We consider Employer's arguments on appeal to be 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); Employer's Brief at 3-5 (unpaginated). Because the ALJ followed the Board's remand instructions and adequately explained the weight she accorded the conflicting evidence and her resolution of the conflict in the evidence, we affirm the ALJ's resulting permissible conclusion that the May 8, 2012 pulmonary function study is sufficiently reliable to support a determination that the Miner was totally disabled. *See* 20 C.F.R. §718.204(b)(2)(i); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) ("it is the province of the ALJ to evaluate the physicians' opinions"); Decision and Order on Remand at 6.

Medical Opinions and Weighing the Evidence as a Whole

The ALJ also reconsidered the medical opinion evidence as the Board instructed. Decision and Order on Remand at 6-8. The ALJ specifically noted that while Dr. Gallup did not explicitly address whether the Miner was able to return to his usual coal mine work, the physician indicated the Miner's chronic pulmonary disease caused a significant impairment. Decision and Order on Remand at 6 (citing Director's Exhibit 15). Considering the exertional requirements of the Miner's usual coal mine work, the ALJ inferred from Dr. Gallup's treatment records that the Miner was totally disabled.[10] Decision and Order on Remand at 7-8. Contrary to Employer's contention, we see no error in the ALJ's permissible determination.

[10] As the Miner is deceased and there is no specific evidence regarding the exertional requirements of his usual coal mine job as an electrician, the ALJ found it required the effort typical of an underground miner. Decision and Order on Remand at 7-8. We affirm that finding as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 7-8.

A physician need not phrase his or her opinion specifically in terms of "total disability" in order to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) (citing *Black Diamond Coal Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985)). Treatment records 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 last coal mine job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995); *Poole*, 897 F.2d at 894; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9-10 (1988). Here, the ALJ acted within her discretion in finding Dr. Gallup's opinion contained sufficient information from which to conclude that the Miner was totally disabled.[11]

We also affirm the ALJ's rejection of the opinions of Drs. Rosenberg and Fino that the Miner was not totally disabled based in part on their belief that the Miner's May 8, 2012 qualifying study was invalid.[12] Employer's Brief at 5-6 (unpaginated). The ALJ permissibly found their opinions contrary to her determination that the May 8, 2012 study was sufficiently reliable and supportive of a finding that the Miner was totally disabled. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order on Remand at 7; Employer's Exhibits 3, 4. The ALJ also permissibly found Dr. Rosenberg's opinion was not clear because he stated that the Miner was not disabled from a primary pulmonary issue related to past coal mine dust exposure, but did not explicitly state whether the Miner was totally disabled from a pulmonary or respiratory standpoint regardless of cause. *See 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) (relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or

[11] Employer argues the ALJ erred in crediting Dr. Gallup's opinion because it is based on the May 8, 2012 pulmonary function study, which Employer maintains is not reliable. Employer's Brief at 5-6 (unpaginated). Having affirmed the ALJ's reliance on that study, we reject Employer's contention.

[12] Dr. Fino reviewed the Miner's medical records, including the May 8, 2012 pulmonary function study, and opined there is no evidence the Miner had a pulmonary impairment. Employer's Exhibit 3 at 6. Dr. Rosenberg also reviewed the Miner's medical records and opined that the Miner was "not disabled from a pulmonary perspective in relationship to past coal mine dust exposure" and that, even if the results of his 2012 pulmonary function tests were valid and showed severe restriction, it was not related to coal mine dust exposure. Employer's Exhibit 4 at 6-7.

pulmonary impairment; the cause of that 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 at 20 C.F.R. §718.305); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989) (same); Decision and Order on Remand at 7; Employer's Exhibit 4.[13]

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order on Remand at 7-8. We thus affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis.

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

Because Claimant invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis in her survivor's claim, the burden shifted to Employer to establish that the Miner had neither legal nor clinical pneumoconiosis,[14] or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R.

[13] The ALJ provided at least one valid reason for discrediting the opinions of Drs. Rosenberg and Fino—that they based their opinions on their belief that the May 8, 2012 pulmonary function study is not reliable, contrary to her finding. Decision and Order on Remand at 7; Director's Exhibit 16; Employer's Exhibits 3, 4. Thus, we decline to address whether the ALJ permissibly discredited the opinions of Drs. Fino and Rosenberg because they did not reconcile "their opinions [that the Miner was not totally disabled] with the significant fact that in June 2013, approximately nine months prior to the Miner's death, he was prescribed oxygen . . . ." *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order on Remand at 7; Director's Exhibit 16; Employer's Exhibits 3, 4.

[14] "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 pneumoconiosis, *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).

§718.305(d)(2)(i), (ii). The ALJ found Employer did not establish rebuttal by either method. Decision and Order on Remand at 8-15.

Employer asserts that "[a]s the ALJ erred in finding total disability, she erred in applying the [Section 411(c)(4)] presumption, and the burden must rest upon Claimant to prove death causation." Employer's Brief at 6 (unpaginated). Having affirmed the ALJ's determination that Claimant invoked the presumption, we reject Employer's assertion. Thus, we decline Employer's request that we remand this case to the ALJ for consideration of whether Claimant established that the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b). Employer's Brief at 7 (unpaginated).

The ALJ properly placed the burden on Employer to establish either the Miner did not have pneumoconiosis or no part of his death was caused by pneumoconiosis. *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). As Employer raises no specific challenge to the ALJ's determination that it did not rebut the Section 411(c)(4) presumption based on the opinions of Drs. Fino and Rosenberg, we affirm the ALJ's conclusion. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 8-15; Employer's Exhibits 3, 4.

Accordingly, we affirm the ALJ's Decision and Order on Remand Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge