

U.S. Department of Labor

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



BRB Nos. 23-0499 BLA
and 23-0500 BLA

BELVIA SHORT)
(o/b/o and Widow of BOBBY SHORT))

Claimant-Respondent)

v.)

BENHAM COAL, INCORPORATED)

and)

DATE ISSUED: 06/28/2024

INTERNATIONAL)
HARVESTER/NAVISTAR)

Employer/Carrier-)
Petitioners)

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 in Miner's and
Survivor's Claims of Willow Eden Fort, Administrative Law Judge, United
States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
Employer.

Alice B. Catlin (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Willow Eden Fort's Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2021-BLA-05455 and 2022-BLA-05156) rendered 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 filed on July 30, 2019,¹ and a survivor's claim filed on July 2, 2021.²

The ALJ found the Miner had 10.83 years of underground coal mine employment³ and thus Claimant did not invoke the presumption of total disability or death due to pneumoconiosis at Section 411(c)(4) of the Act,⁴ 30 U.S.C. §921(c)(4) (2018).

¹ The Miner filed two prior claims. The record pertaining to the Miner's first claim was destroyed at a Federal Records Center. Miner's Claim (MC) Director's Exhibits 1; 55 at 1. The Miner withdrew his second claim. MC Director's Exhibit 2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). Because the record from the Miner's first claim was destroyed, the ALJ proceeded as if the Miner had not established any element of entitlement in his prior claim. Decision and Order at 3, 11.

² Claimant is the widow of the Miner, who died on May 27, 2021, while his claim was pending before the Office of Administrative Law Judges. Survivor's Claim (SC) Director's Exhibits 1; 4. She is pursuing the miner's claim on behalf of his estate and her survivor's claim.

³ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 10.83 years of underground coal mine employment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

⁴ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis or his death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment

Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established total disability and therefore a change in an applicable condition of entitlement.⁵ 20 C.F.R. §§718.204(b)(2), 725.309(c). She further found Claimant established the Miner had legal pneumoconiosis arising out of coal mine employment and that it was a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.201(a)(2), 718.202, 718.203, 718.204(c). Thus she awarded benefits in the miner's claim and found Claimant derivatively entitled to survivor's benefits under Section 422(I) of the Act.

On appeal, Employer argues the Federal Record Center's destruction of the Miner's prior claim record violated its due process rights and therefore liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund (the Trust Fund). On the merits, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.⁶ Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's due process argument.

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

and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

⁵ 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 they find 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. §735.309(c)(3). Because the ALJ assumed the Miner failed to establish any element of entitlement in his prior claim, Claimant had to establish at least one element of entitlement in order to obtain review of the merits of the current claim. *Id.*; Decision and Order at 11.

⁶ We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established a totally disabling respiratory or pulmonary impairment, and a change in an applicable condition of entitlement. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §§718.204(b)(2), 725.309(c); Decision and Order at 12.

with applicable law.⁷ 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).

Due Process

Employer argues its due process rights were violated because it did not have access to the Miner’s initial claim file after the Federal Records Center destroyed it. Employer’s Brief at 7-8. It maintains the Department of Labor (DOL) had the duty to preserve the record and its failure to do so deprived it of the opportunity to adequately evaluate whether Claimant established a change in an applicable condition of entitlement. *Id.* Thus, it asserts any liability for benefits must transfer to the Trust Fund. *Id.* We disagree.

In the absence of deliberate misconduct, “the mere failure to preserve evidence – evidence that may be helpful to one or the other party in some hypothetical future [Black Lung Act] proceeding – does not violate [a party’s right to due process].” *Energy W. Mining Corp. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator’s argument that due process is violated whenever the DOL loses or destroys evidence from a miner’s prior claim); *see also* Director’s Response Brief at 1. Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). As the United States Court of Appeals for the Tenth Circuit explained in *Oliver*, Employer must “demonstrate that the contents of [the] lost claim file were so vital to its case that it would be fundamentally unfair to make the company live with the outcome of this proceeding without access to those records.” *Oliver*, 555 F.3d at 1219. Employer has not met this burden.

Because the prior claim record was not available, the ALJ assumed the Miner’s claim was denied because he failed to establish any element of entitlement. The ALJ thus found Claimant established a change in an applicable condition of entitlement in the Miner’s subsequent claim by establishing total disability. Decision and Order at 11-12. She further found Claimant established each element of entitlement in the Miner’s subsequent claim based upon the evidence generated in connection with the current claim for benefits, thereby establishing a change in an applicable condition of entitlement,

⁷ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director’s Exhibit 16 at 4; Hearing Tr. at 16.

regardless of what specific element(s) of entitlement were not established in the Miner's prior claim. *See* 20 C.F.R. §725.309(c); Decision and Order at 11-21.

Because Employer has not identified any error in the ALJ's assumption that the Miner failed to establish any element of entitlement in his prior claim, nor explained how it was prejudiced by any alleged difficulty in determining the basis for the denial of the Miner's prior claim, we reject its due process argument. *See Oliver*, 555 F.3d at 1222-23. Employer has failed to show how the DOL's failure to preserve the record of the previous claim deprived Employer of its ability to adequately prepare its defense in this claim. Employer's Brief at 7-8. Thus, we reject Employer's assertion that benefits should transfer to the Trust Fund.

Entitlement under 20 C.F.R. Part 718 – Miner's Claim

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist a claimant in establishing these elements if certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis. To establish the disease, Claimant must demonstrate the Miner had 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). The Sixth Circuit has held a claimant satisfies this standard "by showing that [the miner's] disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the opinions of Drs. Shah, Dahhan, and Rosenberg. Decision and Order at 15-19. Dr. Shah opined the Miner had chronic obstructive pulmonary disease (COPD) in the form of emphysema and/or chronic bronchitis caused by his coal mine dust exposure and smoking. MC Director's Exhibit 16 at 7-8. Dr. Dahhan opined the Miner's obstructive impairment is due to lung cancer and smoking. MC Director's Exhibit 20 at 5-6; Employer's Exhibit 2 at 1-2. Dr. Rosenberg opined the Miner had disabling COPD in

the form of emphysema, which he attributed to smoking and not coal mine dust exposure. Employer's Exhibit 1 at 6.

The ALJ discredited Dr. Dahhan's opinion as it is based on statistical generalities, and she discredited Dr. Rosenberg's opinion as poorly reasoned and contrary to the regulations. *Id.* at 16-19. She credited Dr. Shah's opinion as reasoned and supported by the objective medical evidence, and thus found the medical opinion evidence supports a finding of legal pneumoconiosis. Decision and Order at 15-19.

Initially, we reject Employer's argument that the ALJ applied an incorrect standard when considering Drs. Dahhan's and Rosenberg's opinions on legal pneumoconiosis. Employer's Brief at 6. Contrary to Employer's argument, the ALJ did not assume "legal pneumoconiosis is present when a pulmonary impairment is due to any degree to coal mine dust exposure." *Id.* Rather, she applied the correct standard by requiring Claimant to establish the Miner had a "chronic lung disease or impairment and its sequelae arising out of coal mine employment," Decision and Order at 15, *quoting* 20 C.F.R. §718.201(a)(2). 20 C.F.R. §§718.201(b). Moreover, as discussed below, the ALJ discredited their opinions because they failed to adequately explain their conclusions that the Miner's obstructive impairment was unrelated to his coal mine dust exposure – not because they failed to meet a heightened legal standard. Decision and Order at 16-19.

Employer next argues the ALJ erred in discrediting Dr. Dahhan's opinion. Employer's Brief at 3, 5-6. We disagree.

Dr. Dahhan noted the Miner had a portion of his left lung removed and underwent recurring radiation therapy of his trachea due to cancer. He opined these procedures resulted in inflammation and narrowing of the Miner's large airways. MC Director's Exhibit 20 at 5-6; Employer's Exhibit 2 at 1-2. Further, he opined the Miner's smoking exacerbated this condition. Employer's Exhibit 2 at 1-2. While generally acknowledging that coal mine dust can cause an obstructive impairment, Dr. Dahhan opined the Miner's coal dust exposure in this case would account for only a "trivial amount" of his obstruction because "[t]he literature indicates that a coal miner will lose [five to nine] cc of his FEV1 [on pulmonary function testing] per year of coal dust exposure [which . . .] comes to less than 100cc loss." *Id.*

The ALJ permissibly discredited Dr. Dahhan's opinion for relying upon statistical generalities, rather than an individualized consideration of the Miner's condition. *See Young*, 947 F.3d at 408-09; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (statistical averaging can hide the effects of coal mine dust exposure in individual miners); Decision and Order at 17. Moreover, she rationally found Dr. Dahhan did not adequately explain his conclusion that there is "no

evidence” of legal pneumoconiosis in light of his earlier acknowledgement that coal mine dust caused at least some reduction in the Miner’s FEV1 values on pulmonary function testing. MC Director’s Exhibit 20 at 6 (emphasis added); *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 17.

Employer also argues the ALJ erred in discrediting Dr. Rosenberg’s opinion. Employer’s Brief at 3-7. Again, we disagree.

Dr. Rosenberg opined that when coal mine dust exposure causes an obstructive impairment, the impairment “will be displayed in the first few years after beginning work in the coal mines.” Employer’s Exhibit 1 at 13-14. Because “no documentation exists that [the Miner] sought medical attention for respiratory complaints” when he ended his coal mine employment, Dr. Rosenberg opined his COPD was not caused by coal mine dust exposure. *Id.* The ALJ permissibly discredited Dr. Rosenberg’s opinion because the regulations recognize that pneumoconiosis is “a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.” 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); 65 Fed. Reg. at 79,939 (coal mine dust exposure can cause COPD, which includes chronic bronchitis); Decision and Order at 19.

Additionally, Dr. Rosenberg opined the Miner’s pulmonary function testing demonstrates a markedly reduced FEV1/FVC ratio on pulmonary function testing which is inconsistent with coal dust-induced obstruction. Employer’s Exhibit 1 at 10. He explained that smoking “drives the FEV1 down much farther than the FVC” while “coal [mine] dust reduces the FEV1 and FVC in equal measure.” *Id.* at 7-10. The ALJ permissibly discredited his opinion because it is inconsistent with the medical studies the DOL credited in the preamble to the 2001 revised regulations, which establish that coal mine dust exposure may cause COPD with associated decrements in the FEV1 and FEV1/FVC ratio.⁸ *See Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491 (6th Cir. 2014);

⁸ Because the ALJ provided valid reasons for discrediting the opinions of Drs. Dahhan and Rosenberg on legal pneumoconiosis, we decline to address Employer’s remaining arguments concerning the ALJ’s weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer’s Brief at 6-7.

A&E Coal Co. v. Adams, 694 F.3d 798, 801-02 (6th Cir. 2012); 65 Fed. Reg. at 79,943; Decision and Order at 18.

Finally, Employer argues the ALJ erred in finding Dr. Shah's opinion reasoned and documented because she did not discuss whether the Miner's history of cancer or radiation therapy caused his impairment. Employer's Brief at 3-4. Contrary to Employer's contention, Dr. Shah specifically recognized the Miner had a history of lung cancer and a left upper lung lobectomy. MC Director's Exhibit 16 at 3. Further, she based her diagnosis of COPD on the Miner's pulmonary function study results, his history of exposure to coal mine dust and tobacco smoke, and his respiratory symptoms including progressive shortness of breath, wheezing, and productive cough. MC Director's Exhibit 16 at 7-8.

Dr. Shah stated both coal mine dust and smoking cause "the same abnormalities and the same type of emphysema[,]" and the effects of the two exposures cannot be distinguished from one another. MC Director's Exhibit 16 at 8. While she opined smoking contributed to the Miner's emphysema, she further opined that "coal mine dust exposure is responsible and has contributed to [his] measurable loss of lung function [and] thus [a] diagnosis of legal pneumoconiosis is established." *Id.* The ALJ permissibly credited Dr. Shah's opinion, noting it was consistent with the results of the pulmonary function studies the physician reviewed and consistent with the DOL's recognition that the effects of smoking and coal mine dust exposure can be additive.⁹ *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; 65 Fed. Reg. at 79,939-41; Decision and Order at 16.

Because it is supported by substantial evidence, we affirm the ALJ's conclusion that the medical opinion evidence supports a finding of legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); 20 C.F.R. §718.204(b)(2);

⁹ Employer further argues the ALJ selectively analyzed the medical opinions by "dismissing Dr. Dahhan's and Dr. Rosenberg's opinions for being based on generalities, but failing to apply the same analysis to Dr. Shah's opinion." Employer's Brief at 5. It asserts Dr. Shah's opinion that "the effects of smoking and coal mine dust are indistinguishable" is similarly general and she "pointed to nothing specific to the Miner." *Id.* As discussed above and contrary to Employer's argument, Dr. Shah did not reference generalized statistics but instead based her diagnosis on the Miner's individualized exposure histories and symptoms, and her medical opinion that while individual effects of smoking as opposed to coal mine dust exposure cannot be distinguished, coal mine dust nevertheless is "responsible" for and "contributed" to his loss of lung function. MC Director's Exhibit 16 at 8. Thus the ALJ permissibly credited Dr. Shah's legal pneumoconiosis opinion. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Decision and Order at 19. As Employer raises no further arguments, we also affirm her unchallenged finding that Claimant established the Miner's pneumoconiosis arose out of his coal mine employment and that he was totally disabled due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.203, 718.204(c); Decision and Order at 20-21. Thus we 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*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 22.

Accordingly, the ALJ's Decision and Order Awarding Benefits in Miner's and Survivor's Claims is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge