U.S. Department of Labor

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

BRB No. 24-0090 BLA

JEAN E. PENLEY (Widow of ISAAC G. PENLEY) Claimant-Petitioner v. ISLAND CREEK COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))))))))))))))))	**NOT-PUBLISHED** DATE ISSUED: 11/13/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Decision and Order Denying Benefits on Reconsideration of Heather Leslie, Administrative Law Judge, United States Department of Labor.

Jean E. Penley, Honaker, Virginia.

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman 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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Heather Leslie's Decision and Order Denying Benefits and Decision and Order Denying Benefits on Reconsideration (2021-BLA-05747) rendered on a survivor's claim[2] filed on June 14, 2019,[3] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In her initial decision, the ALJ found the Miner did not have complicated pneumoconiosis, and thus Claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The ALJ credited the Miner with twenty years of underground coal mine employment, based on Employer's concession, but found Claimant did not establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). Thus, the ALJ concluded Claimant did not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] The ALJ further found that because Claimant failed to establish

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[1] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the ALJ's decision, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] Claimant is the widow of the Miner, who died on January 16, 2012. Director's Exhibits 2, 32. Because the Miner never established entitlement to benefits during his lifetime, Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018), is not applicable in this case. When applicable, that provision provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits.

[3] The ALJ misstated that this claim was filed by the Miner on August 27, 2019. The record reflects that this case involves a survivor's claim filed on June 14, 2019. *See* 20 C.F.R. §725.303(a)(1) ("A claim shall be considered filed on the day it is received by the office in which it is first filed."); Decision and Order on Reconsideration at 2; Director's Exhibit 2.

[4] 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.

total disability, she did not establish entitlement pursuant to 20 C.F.R. Part 718 and denied benefits.

Claimant filed an appeal with the Board. While the appeal was pending, Employer filed a timely Motion for Reconsideration with the ALJ seeking to "remedy the harmless references made to Dr. Hippensteel's narrative medical opinion, which was not designated as evidence to be considered" and to then reinstate the denial of benefits. The Director, Office of Workers' Compensation Programs (Director), filed a motion to dismiss Claimant's appeal, and the Board dismissed Claimant's appeal as premature. *See* 20 C.F.R. §802.206(f); *Penley v. Island Creek Coal Co.*, BRB No. 23-0505 BLA (Nov. 28, 2023) (Order) (unpub.).

On November 20, 2023, the ALJ issued a Decision and Order Denying Benefits on Reconsideration, again finding Claimant failed to establish the Miner was totally disabled, removing references to Dr. Hippensteel's narrative medical opinion, and denying benefits.

Claimant appeals, generally challenging the denial of benefits. Employer has not filed a response. The Director responds, urging the Board to vacate the ALJ's denial of benefits.

In an appeal a claimant files without representation, the Board considers whether the Decisions and Orders below are supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are 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).

At the outset, we note the ALJ mistakenly treated this claim as a miner's claim when it is a survivor's claim, and thus she did not conduct the proper inquiry. In a survivor's claim, a claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A claimant may establish death causation through invocation of the statutory presumptions at Section 411(c)(3) or Section 411(c)(4).[6] When no presumption is invoked, the claimant

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[5] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4.

[6] The ALJ accurately found there is no evidence of complicated pneumoconiosis in the record. Decision and Order on Reconsideration at 6. Therefore, Claimant is unable to

bears the burden of establishing that pneumoconiosis caused, or was a substantially contributing cause or factor leading to, the miner's death. 20 C.F.R. §718.205(b)(1), (2).

The ALJ denied benefits after concluding that Claimant did not establish total disability or invoke the Section 411(c)(3) or (4) presumptions. The ALJ failed, however, to consider if Claimant could establish the Miner had pneumoconiosis[7] arising out of coal mine employment and that his death was due to pneumoconiosis under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a). As the ALJ did not determine whether Claimant established the requisite elements of entitlement in a survivor's claim, we vacate her denial of benefits. *See Trumbo*, 17 BLR at 1-87-88. In the interest of judicial economy, we address the Director's challenges to the ALJ's total disability findings as they pertain to whether Claimant can invoke the Section 411(c)(4) presumption.

Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents 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 or arterial blood gas studies,[8] 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

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invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304.

[7] "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).

[8] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

evidence against all relevant 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

The ALJ considered two pulmonary function studies dated July 19, 2001, and April 8, 2009.[9] Decision and Order on Reconsideration at 7-9; Employer's Exhibit 2; Director's Exhibit 34. Dr. Hippensteel's July 19, 2001 study produced non-qualifying results pre- and post-bronchodilator. Employer's Exhibit 2. Dr. Smiddy's April 8, 2009 study produced qualifying results; a bronchodilator was not administered. Director's Exhibit 34.

When weighing pulmonary function studies that are conducted in anticipation of litigation, the ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). The quality standards do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101(b), 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (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). However, an ALJ must determine if the results are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,927-28 (Dec. 20, 2000).

In considering the April 8, 2009 study, the ALJ noted that Dr. Smiddy observed the Miner was "unable to meet reproducibility standards by ATS [American Thoracic Society] guidelines." Decision and Order on Reconsideration at 8-9 (quoting Director's Exhibit 34 at 22). Further, the ALJ observed that the Miner performed the study while he was

[9] Because the studies reported two different heights for the Miner, sixty-eight and seventy inches, the ALJ permissibly calculated an average height of sixty-nine inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order on Reconsideration at 7. She then properly used the closest greater table height of 69.3 inches set forth at Appendix B of 20 C.F.R. Part 718 for determining whether the studies are qualifying. *See Carpenter v. GMS Mine & Repair Maint. Inc.*, 26 BLR 1-33, 1-38-39 (2023); Decision and Order on Reconsideration at 7.

recovering from a myocardial infarction.[10] *Id.* at 9 (citing Employer's Exhibit 7 at 14). The ALJ determined that the April 8, 2009 results were "in question" based on the Miner's illness but concluded that even if she weighed the April 8, 2009 study in favor of establishing total disability, the results of the studies overall would still be in equipoise and therefore insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 9.

The ALJ erred by not determining if the April 8, 2009 study, which was conducted as a part of the Miner's treatment, was sufficiently reliable to support a finding of total disability. 65 Fed. Reg. at 79,927-28; Decision and Order on Reconsideration at 8-9. Additionally, the ALJ did not adequately explain how she determined the results of studies conducted eight years apart were in "equipoise" as to whether the Miner was totally disabled at the time of his death. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53, 255-56 (4th Cir. 2016) (ALJ must conduct an appropriate analysis of the evidence to support her conclusion and render necessary credibility findings); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order on Reconsideration at 8-9. The ALJ has a duty to resolve any conflicts in the evidence and explain her basis for doing so. *Addison*, 831 F.3d at 256-57. While a claimant fails to meet her burden of proof when the evidence is equally balanced, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 279-81 (1994), the ALJ must nevertheless explain her rationale for reaching that conclusion. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. U.S. Dep't of Lab.*, 601 F.3d 1013, 1024 (10th Cir. 2010) ("Merely stating that the evidence is 'evenly balanced, and should receive equal weight,' without further explanation, is not sufficient.") (citations omitted); *Wojtowicz*, 12 BLR at 1-165. We therefore vacate the ALJ's determination that Claimant did not establish the Miner was totally disabled based on the pulmonary function study results at 20 C.F.R. §718.204(b)(2)(i).

Arterial Blood Gas Studies

The ALJ correctly found the July 19, 2001 resting arterial blood gas study is non-qualifying. We therefore affirm her finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).[11] Decision and Order on Reconsideration at 9-10; Employer's Exhibit 3.

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[10] Dr. Spagnolo stated the Miner was "acutely ill with his second myocardial infarction and he was unable to perform the test." He opined the test should not be used to determine whether the Miner was disabled. Employer's Exhibit 7 at 15.

[11] The ALJ observed that only resting values were obtained and there was no indication whether the Miner gave "good effort." Decision and Order on Reconsideration

Medical Opinions and the Miner's Treatment Records

The ALJ considered the opinions of Drs. Fino, Meyer, Spagnolo, and Mitchell and the Miner's treatment records. Decision and Order on Reconsideration at 11-18. As the ALJ noted, Dr. Fino reviewed the Miner's medical records and summarized the objective testing but "[did] not give an opinion or conclusion on disability." *Id.* at 12; Employer's Exhibit 4 at 7-8. Dr. Meyer prepared a radiological report that included readings of two x-rays, but he did not provide a medical opinion on total disability. Employer's Exhibits 5, 6.

Dr. Spagnolo reviewed the Miner's medical records and noted his last coal mine employment required heavy labor. Employer's Exhibit 7 at 3-12, 14. He also noted the Miner's clinical symptoms and medical history, including chronic asthma, shortness of breath with exertion, a productive cough, and intermittent wheezing. *Id.* at 14-16. Reviewing the Miner's objective testing administered on July 19, 2001, he indicated the pulmonary function study showed a moderate obstructive defect[12] while the blood gas study results were normal. *Id.* at 15. He concluded the Miner had the "lung capacity to perform his last coal mine employment." *Id.* The ALJ found Dr. Spagnolo's opinion was entitled to "full probative weight" because it was well-reasoned and documented and was the "only medical opinion that directly address[ed] [the] Miner's disability." Decision and Order on Reconsideration at 13-15.

Dr. Mitchell was the Miner's primary care physician, reviewed the Miner's medical records, provided a medical opinion, and testified at a deposition. Director's Exhibits 38, 40. The ALJ found that while Dr. Mitchell briefly addressed "impairment associated with simple coal workers' pneumoconiosis," he did so in general terms. Decision and Order on Reconsideration at 15. She accorded Dr. Mitchell's opinion "some, but not full probative weight" because he did not give a "clear answer" on whether the Miner was disabled due to pneumoconiosis at the time of his death and it was "unclear" whether he understood the exertional duties of the Miner's coal mine employment. *Id.* at 15-16

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at 10. However, the regulations do not require consideration of effort or cooperation with respect to blood gas testing; rather, the regulations require only that the studies "specify values at rest and, if performed, during exercise." 20 C.F.R. §718.105(c)(6); 20 C.F.R. Part 718, Appendix C; *see* Director's Brief at 12-13.

[12] Dr. Spagnolo opined the April 8, 2009 qualifying pulmonary function study should not be considered in determining whether the Miner was disabled because it was taken while the Miner was "acutely ill" with his second myocardial infarction and thus he was unable to adequately perform the test. Employer's Exhibit 7 at 15.

The ALJ also considered the Miner's treatment and hospitalization records from 2010 through 2012, and his death certificate. Director's Exhibits 32, 35, 38, 40, 41. The ALJ determined the Miner's treatment records do not support a finding of disability because they do not contain a specific statement that the Miner was "totally disabled due to pneumoconiosis at the time of his death." Decision and Order on Reconsideration at 16-18. Thus, the ALJ found Claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 18.

Initially, we agree with the Director that the ALJ conflated the issues of total disability and causation. Director's Brief at 7-9. As set forth above, in considering the opinions of Drs. Mitchell and Spagnolo and the Miner's treatment records, the ALJ focused on whether the evidence established the Miner was totally disabled *due to pneumoconiosis* at the time of his death. Decision and Order on Reconsideration at 12-18. The proper inquiry under 20 C.F.R. §718.204(b)(2) is whether Claimant has established that the Miner suffered from a totally disabling respiratory or pulmonary impairment at the time of his death, not whether pneumoconiosis caused the impairment.

The Director also correctly points out the ALJ failed to make a finding regarding the Miner's usual coal mine work or the exertional requirements of such work, which is necessary to an analysis of total disability. Specifically, the ALJ did not compare the physicians' assessments of the Miner's respiratory impairment or physical limitations with his usual coal mine work to determine whether he was totally disabled at the time of his death. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in a doctor's report are sufficient to establish total disability); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may infer total disability by comparing the severity of an impairment and related physical limitations that a physician diagnoses with the exertional requirements of the miner's usual coal mine work); *see also 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); Director's Brief at 9-11.

The ALJ also failed to consider whether the Miner's treatment records show the Miner had respiratory limitations that support a finding he was totally disabled at the time of his death. *See Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4. Further, a physician need not phrase his or her opinion specifically in terms of "total disability" to support a finding of total disability. *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)); *see also Scott*, 60 F.3d at 1141.

As the ALJ applied the wrong legal standard and did not conduct the proper analysis at 20 C.F.R. §718.204(b)(2)(iv), we vacate her determination that Claimant did not establish the Miner was totally disabled at 20 C.F.R. §718.204(b)(2)(iv) based on the medical opinions and the Miner's treatment records. We further vacate the ALJ's conclusion that the evidence overall does not support a finding of total disability and that Claimant did not invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2); Decision and Order on Reconsideration at 12-18.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant can establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death and thereby invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. The ALJ must reconsider whether Claimant established the Miner was totally disabled based on the pulmonary function study evidence, considered in isolation. 20 C.F.R. §718.204(b)(2)(i). In addition, the ALJ must determine the exertional requirements of the Miner's usual coal mine employment. She must then reevaluate whether the medical opinion evidence and the Miner's treatment records, including information relating to the Miner's respiratory impairment and physical limitations, establishes the Miner was totally disabled. *See Lane*, 105 F.3d at 172; *Eagle*, 943 F.2d at 512 n.4.

If the ALJ determines the preponderance of the evidence in a particular evidentiary category supports finding total disability, she must weigh all the relevant evidence together to determine whether the Miner was totally disabled at the time of his death. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, she will have invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. 20 C.F.R. §718.305(b)(1)(iii). The ALJ must then consider whether Employer has rebutted the presumption by establishing the Miner had neither legal nor clinical pneumoconiosis, or "no 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).[13]

If the Section 411(c)(4) presumption is not invoked, the ALJ must determine if Claimant has met her burden to establish the Miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis under 20 C.F.R. Part 718 without the benefit of the presumption. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo*, 17 BLR at 1-87-88.

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[13] On remand, the ALJ should calculate the length of the Miner's smoking history as it relates to issue of legal pneumoconiosis. *See* Director's Brief at 13.

In reaching her conclusions on remand, the ALJ must explain the bases for her credibility determinations, findings of fact, and conclusions of law as the Administrative Procedure Act requires.[14] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

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[14] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and Decision and Order Denying Benefits on Reconsideration, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge