U.S. Department of Labor

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

BRB No. 24-0025 BLA

PEGGY RAMEY (Widow of BOBBY RAMEY) Claimant-Petitioner v. CLINCHFIELD COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	**NOT-PUBLISHED** DATE ISSUED: 10/29/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Dierdra M. Howard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Cameron Blair (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Kendra Prince (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Dierdra M. Howard's Decision and Order Denying Benefits (2022-BLA-05323) 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 request for modification of a survivor's claim filed on April 27, 2016.

In a May 19, 2020 Decision and Order Denying Benefits in a Survivor's Claim, ALJ Larry S. Merck found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), but also found Employer successfully rebutted the presumption by showing that no part of the Miner's death was caused by pneumoconiosis. Thus he denied benefits. On April 5, 2021, Claimant timely requested modification of the denial. Director's Exhibit on Mod. 7. Because Claimant did not submit any new evidence, the district director transferred the case to the Office of Administrative Law Judges (OALJ), which assigned it to ALJ Howard (the ALJ). Director's Exhibit on Mod. 11.

The ALJ accepted the parties' stipulation that the Miner had thirty-two years of qualifying coal mine employment and found Claimant established the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(i). She thus found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. 30 U.S.C. §921(c)(4). However, she too found Employer successfully rebutted the presumption by establishing that no part of the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). Further, the ALJ found Claimant did not establish the existence of complicated pneumoconiosis and consequently could not invoke the Section 411(c)(3) presumption of death due to pneumoconiosis, 30 U.S.C. §921(c)(3) (2018); *see* 20 C.F.R. §718.304. She therefore found Claimant did not establish a mistake in a determination of fact and denied benefits. 20 C.F.R. §725.310.

On appeal, Claimant argues the ALJ erred in finding she did not establish complicated pneumoconiosis. Alternatively, she argues the ALJ erred in finding Employer successfully rebutted the Section 411(c)(4) presumption by establishing that no part of the Miner's death was caused by pneumoconiosis. Employer responds in support of the denial

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[1] Claimant is the widow of the Miner, who died February 18, 2016. Director's Exhibit 12.

[2] 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); 20 C.F.R. §718.305.

of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

The Benefits Review 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.[3] 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).

Modification

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *See* 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). An ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits. *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). A party need not submit new evidence, as the ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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,[4] or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20

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[3] 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); June 12, 2019 Hearing Tr. at 18.

[4] "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).

C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer did not rebut clinical or legal pneumoconiosis, but successfully rebutted the presumption of death due to pneumoconiosis. Decision and Order at 17-20.

Claimant argues the ALJ erred in weighing the medical opinion evidence regarding death due to pneumoconiosis. Claimant's Brief at 15-19.

The ALJ considered Dr. Fino's opinion that the Miner's death was due to recurrent pneumonia and sepsis, not pneumoconiosis. Decision and Order at 19; Employer's Exhibits 1; 9. She found Dr. Fino's opinion sufficient to rebut the presumption, and therefore found Employer rebutted the presumption of death due to pneumoconiosis. Decision and Order at 19-20.

Claimant asserts the ALJ erred in weighing Dr. Fino's opinion and in finding Employer rebutted the presumption. Claimant's Brief at 15-19. We agree.

Dr. Fino diagnosed the Miner with chronic obstructive pulmonary disease (COPD) due entirely to smoking and opined he had clinical pneumoconiosis but not legal pneumoconiosis. Employer's Exhibits 1 at 5; 9 at 2. He opined the Miner's death "had nothing to do with COPD[,]" as the Miner "died as a result of recurrent pneumonia which caused severe sepsis." Employer's Exhibits 1 at 5; 9 at 1. Furthermore, he opined that even if the Miner had legal pneumoconiosis there is "no objective evidence to suggest that it would have caused, contributed to, or hastened his death." *Id.*

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that where a physician erroneously fails to diagnose pneumoconiosis, his opinion as to the cause of the miner's disability or death "is not worthy of much, if any, weight." *Grigg v. Dir., Office of Workers' Comp. Programs*, 28 F.3d 416, 419 (4th Cir. 1994); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995). The court has instructed that an ALJ "may not credit" such a medical opinion unless there are "specific and persuasive reasons" for finding that the doctor's judgment on causation "does not rest upon" the misdiagnosis as to the disease. *Toler*, 43 F.3d at 116; *see Epling*, 783 F.3d at 505. Even then, the doctor's opinion "could carry little weight, at the most." *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002). This is so regardless of whether Claimant establishes pneumoconiosis by affirmative evidence or by operation of the Section 411(c)(4) presumption. *Toler*, 43 F.3d at 116.

The ALJ found Dr. Fino's opinion credible because the Miner's "final medical reports, autopsy report and death certificate" all state he died of pneumonia and sepsis. Decision and Order at 19. As Claimant argues, the ALJ erred in failing to consider the extent to which Dr. Fino's death causation opinion was predicated on his erroneous opinion

that the Miner did not have legal pneumoconiosis. Nor did she render a finding that "specific and persuasive reasons" exist for giving Dr. Fino's opinion even "little weight." *See Scott*, 289 F.3d at 269; *Epling*, 783 F.3d at 504-05; *Toler*, 43 F.3d at 116; Claimant's Brief at 17-18.

Despite the ALJ's error, it is not necessary to remand this case for further consideration. While factual determinations are the province of the ALJ, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversing denial, with directions to award benefits without further administrative proceedings); *Scott*, 289 F.3d at 269-70 (denial of benefits reversed where "only one factual conclusion is possible"). Based on the ALJ's own findings, Dr. Fino's opinion is insufficient to meet Employer's burden.

First, because the ALJ found that Dr. Fino erroneously failed to diagnose legal pneumoconiosis, his opinion that the Miner's death is unrelated to legal pneumoconiosis may not be credited absent specific and persuasive reasons for giving it, at most, little weight. *Scott*, 289 F.3d at 269. The ALJ found, however, that Dr. Fino did not explain how he determined that the Miner's legal pneumoconiosis played no part in his recurrent pneumonia and its complications. Specifically, she determined "Dr. Fino's statement that there was no objective evidence to suggest that if Mr. Ramey had legal pneumoconiosis, it would have caused, contributed to or hastened [his] death, lacks proper support." Decision and Order at 13-14. Thus, based on the ALJ's own findings, Dr. Fino's opinion was "conclusory" as to whether the Miner had legal pneumoconiosis and unsupported as to whether "no part" of his death was caused by legal pneumoconiosis. *Id.*; Employer's Exhibits 1 at 5; 9 at 1.

Because the ALJ found Dr. Fino's opinion conclusory and not supported, it does not constitute substantial evidence sufficient to meet Employer's burden to rebut the presumption of death due to pneumoconiosis. *See Epling*, 783 F.3d at 504-05; *Toler*, 43 F.3d at 116 (requiring "specific and persuasive reasons" for crediting a causation opinion where the physician erroneously fails to diagnose pneumoconiosis); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir. 1997) (substantial evidence is such that a reasonable mind could accept as adequate to support a conclusion).

The only other evidence supportive of Employer's burden on rebuttal is the opinion of Dr. Vey, which suffers from similar deficiencies to those in Dr. Fino's opinion.[5]

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[5] The ALJ did not consider the medical opinions of Drs. Vey and Cool concerning death causation. Decision and Order at 19-20. However, Dr. Cool's opinion that the

Employer's Exhibits 7; 8. Although Dr. Vey accurately diagnosed clinical pneumoconiosis, he erroneously failed to diagnose legal pneumoconiosis, opining instead that the existence of smoking as a "plausible explanation alone" for the Miner's COPD "does not mandate" a finding that the COPD weas related to coal dust exposure. Employer's Exhibits 7 at 7, 9; 8 at 13. The ALJ did not consider the effect of that misdiagnosis on Dr. Vey's death causation opinion; nor did she identify any "specific and persuasive" reasons that would have allowed her to give his opinion even little weight.[6] *Scott*, 289 F.3d at 269. Furthermore, while Dr. Vey explained why he believed the Miner's upper-gastrointestinal problems caused his death, like Dr. Fino he did not affirmatively explain how he concluded that the Miner's death "was entirely unrelated to his coal mine employment," Employer's Exhibits 7 at 9; 8 at 13, even if gastrointestinal complications were a primary or more immediate cause. Thus his opinion is also insufficient to carry Employer's burden on rebuttal. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is whether Employer has provided affirmative evidence to prove miner's death was not due to pneumoconiosis); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 135 (4th Cir. 2015) (party opposing entitlement must "rule out any connection" between a miner's pneumoconiosis and his death); *Epling*, 783 F.3d at 504-05; *Toler*, 43 F.3d at 116.

We therefore reverse the ALJ's finding that Employer rebutted the presumption of death causation, as the record does not contain substantial evidence sufficient to carry Employer's burden. 20 C.F.R. §718.305(d)(2)(ii); *see Scott*, 289 F.3d at 270; *Lane*, 105 F.2d at 174. Because we reverse the ALJ's finding that Employer rebutted the presumption of death due to pneumoconiosis, Claimant has established a mistake in a determination of fact, 20 C.F.R. §725.310, and is entitled to benefits.[7]

Miner's pneumoconiosis contributed to his death does not support Employer's burden on rebuttal. Claimant's Exhibit 1 at 13, 16, 19-21.

[6] In one part of her analysis, the ALJ gave Dr. Vey's opinion "great weight." Decision and Order at 12. Based on the context of that analysis, it appears the ALJ was crediting Dr. Vey on the separate question of whether the Miner had complicated versus simple clinical pneumoconiosis. However, even if she intended to also give his opinion great weight on death causation, the ALJ erred for the reasons identified in this decision.

[7] Because Claimant has established entitlement to benefits under Section 411(c)(4), we decline to address her argument that she established entitlement to benefits under Section 411(c)(3). Claimant's Brief at 11-15. For the same reason, Claimant's Motion for Oral Argument on the issue of complicated pneumoconiosis is denied. 20 C.F.R. §802.306.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and reversed in part, and this case is remanded for entry of an award of benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge