U.S. Department of Labor

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

BRB Nos. 21-0330 BLA
and 21-0331 BLA

GLESSIE MULLINS (o/b/o and Widow of JERRY D. MULLINS) Claimant-Respondent v. PARAMONT COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 4/27/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2017-BLA-05123; 2017-BLA-05124) rendered on claims filed 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 August 28, 2014,[1] and a survivor's claim filed on September 8, 2016.

The ALJ credited the Miner with 17.23 years of employment in underground coal mines and surface coal mines in conditions substantially similar to those in underground mines and found Claimant[2] established the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305, 725.309.[4] He further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[5]

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[1] This is the Miner's second claim for benefits. On March 13, 1985, the district director denied the Miner's initial claim, filed on October 11, 1984, because he did not establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 46.

[2] Claimant is the widow of the Miner, who died on December 23, 2014, and she is pursuing the miner's claim on his behalf. MC Director's Exhibit 10. The Benefits Review Board consolidated Employer's appeals in the miner's and survivor's claims for purposes of decision only.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled 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. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] 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 he finds "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)(1); *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. §725.309(c)(3). Because the Miner's prior claim was denied for failure to establish any element of entitlement, Claimant had to submit evidence establishing at least one element of entitlement to obtain review of the merits of the Miner's current claim. *Id*.

[5] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits

On appeal, Employer argues the ALJ erred in calculating the length of the Miner's coal mine employment and in finding Claimant invoked the Section 411(c)(4) presumption. It further argues he erred in finding it did not rebut the presumption.[6] Claimant and the Director, Office of Workers' Compensation Programs, have not filed a response.

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.[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 (1965).

The Miner's Claim

Invocation of the Section 411(c)(4) Presumption - Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination on length of coal mine employment if it is based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Employer argues the ALJ erred in finding Claimant established at least fifteen years of coal mine employment. Employer's Brief at 4-9.

In calculating the length of the Miner's coal mine employment, the ALJ considered his Social Security Administration (SSA) earnings records, employment history forms, and an employment verification letter Employer submitted. Decision and Order at 7-9; Miner's

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without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[6] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner was totally disabled. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2). Consequently, Claimant has established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

[7] We 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); MC Director's Exhibits 2, 6, 23.

Claim (MC) Director's Exhibits 2, 6, 7, 23, 46 at 324. He found the Miner had 13.54 years of coal mine employment with various operators from 1968 to 1989, and an additional 3.69 years of employment with Employer for periods not included in his prior calculations, for a total of 17.23 years of coal mine employment. Decision and Order at 7-9.

Employer first argues the Miner can be credited with "at most 3.8 years" of coal mine employment with it, as its employment verification letter indicates he worked for Employer from September 13, 1972 to April 27, 1973, and from November 6, 1989 to December 2, 1992. Employer's Brief at 5. The ALJ credited the Miner with 3.69 years of coal mine employment with Employer based on its employment verification letter. Decision and Order at 7. Because the ALJ credited the Miner with less coal mine employment than Employer concedes its evidence establishes, Employer has not explained why the alleged error requires remand. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer next argues the ALJ erred in calculating the Miner's pre-1978 employment. Employer's Brief at 10-14. We disagree. Contrary to Employer's assertion, the ALJ permissibly credited the Miner with a full quarter of coal mine employment for each pre-1978 quarter in which the Miner's SSA earnings records indicate he earned at least $50.00 from coal mine operators. *See Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (crediting a miner with a full quarter of coal mine employment when the miner earned $50.00 or more during that time period is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant"); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); Decision and Order at 8. Using this method, the ALJ rationally credited the Miner with sixteen quarters totaling four years of pre-1978 coal mine employment. *Id*.

Finally, Employer argues the ALJ erred in calculating the Miner's post-1978 coal mine employment with operators other than Employer. It asserts the ALJ erred by failing to render a threshold finding that the Miner was engaged in coal mine employment for a period of one calendar year, and improperly credited him with a year of coal mine employment if the evidence established at least 125 working days in a given year. Employer's Brief at 8-9. We disagree.

The regulations define "year" as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the miner's employment lasted for a calendar year, "it must be presumed, in the absence of evidence

to the contrary, that the miner spent 125 working days in such employment[,]" and the miner is entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

The ALJ found the Miner's SSA earnings records "show that [the] Miner had earnings from numerous coal mine employers in every year from 1978 to 1982 and 1984 to 1989." Decision and Order at 8. He further found "no evidence in the record to suggest that Miner's coal mine employment was anything but continuous during those periods." *Id*. Based on these findings, the ALJ specifically concluded the record establishes the Miner had calendar year employment relationships with coal mine operators for each year from 1978 to 1982 and 1984 to 1989.[8] *Id*. Thus Employer's argument has no merit. Employer's Brief at 8-9. Consequently, we affirm this finding.

The ALJ next ascertained whether the Miner worked for at least 125 days during these years by dividing the Miner's yearly earnings as reported in his SSA earnings records by the coal mine industry's average earnings for 125 days of employment as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*.[9] Decision and Order at 8-9. For each year in which the Miner's earnings met or exceeded the Exhibit 610 average yearly earnings for 125 days of employment, the ALJ credited him with a full year of coal mine employment. 20 C.F.R. §725.101(a)(32)(i); Decision and Order at 9. For the years in which the Miner's earnings fell short of the Exhibit 610 average yearly earnings for 125 days of employment, the ALJ

[8] The ALJ credited the Miner with one year of coal mine employment in 1977 based on his four quarters of employment with Double M Coal Company. Decision and Order at 8; MC Director's Exhibit 7. The Miner's SSA earnings record shows Double M Coal Company continued to employ the Miner in 1978, thus evidencing a continued employment relationship. MC Director's Exhibit 6. And as the ALJ found, aside from $7.50 earned from a construction company in 1980, the Miner's SSA earnings records show only coal companies employed the Miner from 1978 to 1982 and 1984 to 1989. *Id*. Thus the record supports the ALJ's determination that the Miner had continuous coal mine employment during those years. Decision and Order at 9; MC Director's Exhibits 6, 7.

[9] The regulation provides that if the beginning and ending dates of a miner's employment cannot be ascertained, or the miner's employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing his yearly income by the average daily earnings of employees in the coal mining industry, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information, which includes the earnings for such employees who worked 125 days during a year, currently is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base."

credited him with a fractional year calculated by dividing his annual earnings by the Exhibit 610 average yearly earnings for 125 days of employment.[10] *Id*. In applying this formula, the ALJ credited the Miner with 9.54 years of coal mine employment for the years 1978 to 1982 and 1984 to 1989.[11] *Id*. Because Employer identifies no error in the ALJ's calculation, and his finding is based on a reasonable method of calculation supported by substantial evidence, we affirm it. *Muncy*, 25 BLR at 1-27. We thus affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i).

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,[12] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[13]

[10] Employer argues the ALJ erred in using the "yearly averages" from Exhibit 610 instead of the average daily wages. Employer's Brief at 6-7. Because using the daily wages would have resulted in the same calculations, Employer has not explained why the alleged error makes a difference to the outcome of this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[11] The ALJ found all of the Miner's employment constituted qualifying coal mine employment. Decision and Order at 10. Because this finding is not challenged, we affirm it. *See Skrack*, 6 BLR at 1-711.

[12] "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 that is 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).

[13] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 28.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have 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), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Dr. Fino's opinion to disprove legal pneumoconiosis. MC Employer's Exhibit 7. The ALJ found his opinion not adequately reasoned and thus insufficient to rebut the presumption. Decision and Order at 28-31.

Employer argues the ALJ applied the wrong legal standard to Dr. Fino's opinion. Employer's Brief at 18-19. We disagree. The ALJ correctly stated Employer can rebut the presumption of legal pneumoconiosis by establishing the Miner did "not have a lung disease 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" Decision and Order at 28; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. Moreover, he discredited Dr. Fino's opinion because he found it inadequately reasoned, not because it fails to meet a particular legal standard.[14] *Minich*, 25 BLR at 1-155 n.8; Decision and Order at 24-26.

Employer further argues the ALJ erred in discrediting Dr. Fino's opinion. Employer's Brief at 17-18. We again disagree. Dr. Fino opined the Miner had a severe restrictive lung disease due to idiopathic pulmonary fibrosis, a disease of the general population and unrelated to coal mine dust exposure. MC Employer's Exhibit 7 at 4, 7. He relied in part on a medical textbook titled *Pathology of Occupational Lung Disease*, which he acknowledged indicated coal mine dust inhalation can "modify" pulmonary fibrosis. *Id*. He concluded "this article clearly does not show a cause and effect association between coal workers' pneumoconiosis and idiopathic interstitial pulmonary fibrosis." *Id*. at 5. Further, he stated "there is no causal association between [the Miner's] coal dust exposure and his idiopathic pulmonary fibrosis." *Id*. at 7.

[14] To the extent Employer argues the ALJ erred in finding legal pneumoconiosis because Claimant did not submit a medical opinion supportive of a finding of the disease, its argument is unavailing. Employer's Brief at 17. Claimant invoked the Section 411(c)(4) presumption with evidence that the Miner was totally disabled and had at least fifteen years of qualifying coal mine employment; therefore, she is entitled to a presumption he had the disease and it is Employer's burden to disprove that fact. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

The ALJ found Dr. Fino's reference to the medical literature unpersuasive to support his position that the Miner's pulmonary fibrosis is not associated with coal mine dust exposure. Decision and Order at 29-30. He permissibly found "Dr. Fino does not explain how he came to that conclusion when the article plainly states that 'it is unknown' whether interstitial pulmonary fibrosis is related to coal dust inhalation." *Id*. at 30; *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). He also permissibly found that "[d]espite [Dr. Fino's] recognition that coal [mine] dust can modify the pulmonary fibrosis, [he] does not explain why such modification could not amount to a legal pneumoconiosis diagnosis, particularly because [the disease] can be any pulmonary or respiratory disease or impairment that is 'significantly related to, or substantially aggravated by,' coal dust exposure." Decision and Order at 29-30; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Dr. Fino opined "interstitial pulmonary fibrosis in coal miners has a relatively benign clinical course compared with that of the same condition in the general population." MC Employer's Exhibit 7 at 7. He further stated in those instances "[p]athologically, the pigmented (anthracotic) forms of fibrosis were more likely to be associated with severe pneumoconiosis." *Id*. He thus concluded "[i]f there is clear-cut evidence of classical pneumoconiosis either radiographically or pathologically associated with diffuse interstitial pulmonary fibrosis, then it is reasonable to assume that the two are connected." *Id*. The ALJ permissibly found that to the extent Dr. Fino relied on the absence of clinical pneumoconiosis on x-ray in opining the Miner did not have legal pneumoconiosis, his opinion is inconsistent with the regulations that provide legal pneumoconiosis may be present even in the absence of a positive x-ray reading for clinical pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009) (affirming the discrediting of a physician's opinion because the ALJ "fairly read" it as requiring radiographic evidence of clinical pneumoconiosis before he would diagnose legal pneumoconiosis); 20 C.F.R. §§718.202(a)(4), 718.202(b); Decision and Order at 29.

Because the ALJ acted within his discretion in discrediting Dr. Fino's opinion, the only opinion supportive of Employer's burden, we affirm his finding that Employer did not disprove legal pneumoconiosis.[15] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A);

[15] Because the ALJ provided a valid reason for discrediting Dr. Fino's opinion, we need not address Employer's remaining arguments regarding the weight he accorded to the

Decision and Order at 31. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 31-32. Contrary to Employer's argument, the ALJ permissibly discredited Dr. Fino's disability causation opinion because the doctor failed to diagnose legal pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 31-32; Employer's Brief at 18-19. Thus we affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits in the miner's claim.

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge as to the survivor's claim,[16] we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §923(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

doctor's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[16] Because we affirm the ALJ's finding that Claimant established the Miner was entitled to benefits at the time of his death and thus she was derivatively entitled to survivor's benefits, we need not address Employer's arguments that Claimant did not establish entitlement to survivor's benefits under Part 718. Employer's Brief at 19-20.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge