U.S. Department of Labor

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

BRB No. 21-0601 BLA

ELIZABETH L. LAWSON (Widow of NATHAN B. LAWSON) Claimant-Respondent v. LAKE COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/10/2023 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits on Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits on Modification (Decision and Order on Modification) (2019-BLA-05958) 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 fourth request for modification of a survivor's claim[1] filed on December 2, 2014.

In a Proposed Decision and Order – Denial of Benefits dated October 2, 2015, the district director found Claimant failed to establish the Miner had pneumoconiosis and his death was due to pneumoconiosis. Director's Exhibit 41. Claimant filed a timely request for modification of that denial on December 2, 2015. Director's Exhibit 50. On May 13, 2016, the district director denied Claimant's request for modification based on her failure to establish a mistake in a determination of fact. Director's Exhibit 52. Claimant filed a second request for modification on June 12, 2017, along with additional treatment records. Director's Exhibits 59, 61-64. On October 18, 2017, the district director denied Claimant's request for modification based on her failure to establish the Miner had a disabling respiratory impairment. Director's Exhibit 66. Claimant filed a third request for modification on November 1, 2018, and did not submit additional evidence.[2] Director's

[1] Claimant is the widow of the Miner, who died on November 3, 2010. Director's Exhibit 11. The Miner never filed a claim for benefits. Director's Exhibit 20 at 9. Because the Miner was not awarded benefits on a claim filed prior to his death, Claimant is not entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(l) (2018), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

[2] ALJ Joseph E. Kane stated the district director's October 18, 2017 denial became effective on November 18, 2017 because "no action was taken by the parties within the [30-day] prescribed time period" pursuant to 20 C.F.R. §725.419(d). Decision and Order on Modification at 4. He thus found Claimant filed a timely request for modification on November 1, 2018. *Id.*

Exhibit 70. On February 20, 2019, the district director denied that request for modification because Claimant failed to establish a mistake in determination of fact. Director's Exhibit 73. Claimant requested a hearing, and the district director forwarded the case to the Office of Administrative Law Judges (OALJ).[3] Director's Exhibit 80.

In his Decision and Order on Modification, the subject of the current appeal, ALJ Kane (the ALJ) found Claimant established the Miner had at least twenty years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption, Claimant established modification based on a mistake in a determination of fact, *see* 20 C.F.R. §725.310, and granting modification would render justice under the Act. Thus he awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to ALJs render his appointment unconstitutional. On the merits of entitlement, Employer contends

[3] The case was originally assigned to ALJ Peter B. Silvain, Jr., who conducted the February 10, 2020 hearing. Notice of Assignment, Notice of Hearing, and Pre-Hearing Order; Hearing Tr. Due to ALJ Silvain's unavailability, the case was reassigned to ALJ Kane (the ALJ). May 12, 2021 Order Regarding Reassignment.

[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.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. Finally, it argues the ALJ erred in finding it did not rebut the presumption.[6]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response arguing Employer forfeited its Appointments Clause challenge by failing to raise it before the ALJ and urging the Benefits Review Board to reject its constitutional challenges to the ALJ's appointment and removal protections. Employer filed reply briefs to the Director's and Claimant's response briefs, reiterating its contentions.

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).

Appointments Clause

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 11-17; Employer's Reply to Director Brief at 11-13; Employer's Reply to Claimant Brief at 1-3 (unpaginated). It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017, but maintains ratification was

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least twenty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Tr. at 17-18.

[8] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

insufficient to cure the constitutional defect in the ALJ's prior appointment.[9] Employer's Brief at 13-17; Employer's Reply to Director Brief at 11-13; Employer's Reply to Claimant Brief at 1-3 (unpaginated).

We agree with the Director's argument that Employer forfeited its Appointments Clause challenge by failing to raise it when the case was before the ALJ.[10] Director's Response at 3-4. Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 207 (4th Cir. 2022).

Lucia was decided almost two years before the hearing in this case and three years before the ALJ issued his Decision and Order. Employer, however, failed to raise its argument while the case was before the ALJ. *See* Hearing Tr. at 8-9, 20-21; Employer's Brief to the ALJ. Had Employer timely raised the argument before the ALJ, he could have addressed it and, if appropriate, taken steps to have the case assigned for a new hearing before a different ALJ. *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 11 (2019). Instead, Employer waited to raise the issue until after the ALJ issued an adverse decision.

Employer identifies no basis for excusing its forfeiture of the issue beyond stating it was not required to raise it to the ALJ, which we have rejected. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the

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[9] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Kane.

[10] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. , 138 S. Ct. 13, 17 n.1 (2017) (quoting *United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))).

risk of sandbagging); *Davis*, 987 F.3d at 588 (holding the employer failed to identify any exception that would allow the court to "excuse [its] noncompliance" with black lung issue exhaustion regulations); *Kiyuna*, 53 BRBS at 11 (citing *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (upholding the ALJ's determination that the Appointments Clause argument is an "as-applied" challenge that the ALJ can address and thus can be waived or forfeited)); *see* Employer's Reply to Director Brief at 1-11. Because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its forfeited argument. *See Davis*, 937 F.3d at 591-92; *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna*, 53 BRBS at 11. Consequently, we reject its argument that this case should be remanded to the OALJ for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 16-21; Employer's Reply to Director Brief at 13-16; Employer's Reply to Claimant Brief at 3-4 (unpaginated). It generally argues the removal provisions for ALJs in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 18-21; Employer's Reply at 12-13; Employer's Reply to Claimant Brief at 2-3 (unpaginated). In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the holding of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 19-21; Employer's Reply to Director Brief at 13-16; Employer's Reply to Claimant Brief at 3-4 (unpaginated).

As the Director argues, however, the removal argument is subject to issue preservation requirements and Employer likewise forfeited this issue by not raising it before the ALJ. *Davis*, 987 F.3d at 588; *see also Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion). Because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to further entertain its arguments. *See Davis*, 987 F.3d at 588; *Jones Bros.*, 898 F.3d at 677. Regardless, had Employer preserved its argument, we would reject it for the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022).

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 grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Moreover, a party need not submit new evidence because an 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).

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, 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). Total disability is established if the Miner's pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, 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 evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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).

Employer contends the ALJ erred in finding Claimant established the Miner was totally disabled at the time of his death based on his weighing of the Miner's treatment records and the medical opinions, and in consideration of the evidence as a whole.[11] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-14; Employer's Brief at 23-26.

Medical Opinions

Before weighing the medical opinions, the ALJ considered evidence relevant to the exertional requirements of the Miner's usual coal mine work.[12] Decision and Order at 6.

[11] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 6-8.

[12] The ALJ noted Claimant testified the Miner last worked as a mining foreman. Decision and Order on Modification at 6; Director's Exhibit 20 (Claimant's Deposition at 10); Hearing Tr. at 14. He also noted Claimant indicated on the Description of Coal Mine

He found the Miner's usual coal mine work as a mining foreman required "medium manual labor." Decision and Order at 6; *see* 20 C.F.R. §718.204(b)(1)(i). Employer does not challenge this finding; thus we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ considered two medical opinions – a June 17, 2016 letter from Dr. Gooch (the Miner's treating physician) and a June 30, 2020 report from Dr. Jarboe – as well as the Miner's treatment records from Mountain Comprehensive Health Corporation from July 24, 2000 to June 18, 2001[13] and Appalachian Regional Healthcare from February 25, 2008 until the Miner's death on November 3, 2010.[14] Decision and Order on Modification

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Work and Other Employment form that "the physical activity required by the Miner's last job as a mining foreman 'varied" and involved (1) the use of tools, machines or equipment, (2) technical knowledge or special skills, and (3) supervisory responsibilities." Decision and Order on Modification at 6; Director's Exhibit 4 at 2. Further, the ALJ noted the *Dictionary of Occupational Titles* classified "jobs similar to that of mining foreman . . . as 'medium exertion' positions," which are "defined as '[e]xerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects." Decision and Order on Modification at 6 (quoting *Dictionary of Occupational Titles* (4th Ed., Rev. 1991)).

[13] Dr. Alam's treatment notes from approximately nine or ten years before the Miner's death indicate that his pulmonary function and arterial blood gas studies and x-rays were normal at that time. Director's Exhibit 15 at 7, 10, 16. He noted, however, the Miner had chronic obstructive pulmonary disease (COPD), "chronic recurrent bronchitis with severe chronic dyspeptic syndrome," and the "possibility of recurrent mild aspiration because of [his] underlying Parkinson's disease." *Id.* at 1, 7.

[14] The Miner had several visits and admissions to Appalachian Regional Healthcare in the year before his death on November 3, 2010. Director's Exhibit 63 at 3-122. On June 4, 2010, he was brought to the emergency room for "short[ness] of breath" and admitted for "possible aspiration pneumonia" and a kidney infection. Director's Exhibit 63 at 93-95. He received inpatient treatment until June 18, 2010. *Id.* at 96-120. On July 24, 2010, he was admitted again for "shortness of breath and pulmonary congestion" and stayed until his discharge on July 26, 2010. *Id.* at 71-75. He was brought to the emergency room again on July 27, 2010 for shortness of breath with a history of COPD. *Id.* at 84-92. On August 22, 2010, he was admitted for fever and stayed until he was discharged on August 31, 2010; Dr. Khater noted a diagnosis of hypoxia while Dr. Gooch noted COPD with hypoxia. *Id.* at 58-70. Additionally, he was admitted on September 6, 2010 "because of hypotension and shortness of breath" and stayed until he was discharged on September 14, 2010. *Id.* at 42-57. On October 2, 2010, he was admitted again for "[r]espiratory distress, wheezing

at 8-14; *see* Director's Exhibits 15, 62, 63, 64; Employer's Exhibit 1. He found Dr. Gooch's three-sentence letter entitled to no weight because it did not discuss whether the Miner was totally disabled at the time of his death.[15] Decision and Order at 12-14; Director's Exhibit 62. He also found Dr. Jarboe's opinion that the Miner was totally disabled "poorly" reasoned and entitled to "little" weight because the doctor "fail[ed] to address the Miner's pulmonary or respiratory capacity to work" and failed to "demonstrate an understanding of the exertional requirements of [his] usual coal mine work." Decision and Order at 13-14; Employer's Exhibit 1 at 10. The ALJ found, however, that the Miner's treatment records, including assessments therein from Drs. Alam, Gooch, and Khater regarding his oxygen dependency and symptoms of shortness of breath, respiratory distress, and hypoxia support a finding of total disability. Decision and Order at 8-12; Director's Exhibits 15, 63. He thus found Claimant established the Miner was totally disabled at the time of his death based on his treatment records.

Employer argues the ALJ erred because no "objective testing" or "expert shared the ALJ's 'certainty' that [the Miner's] terminal conditions were disabling." Employer's Brief at 23-24. We disagree.

Contrary to Employer's assertion, even if total disability cannot be established by pulmonary function or arterial blood tests, it "may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents" him from performing his usual coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (explaining a

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and rhonchi." *Id.* at 26-28. In his discharge summary dated October 8, 2010, Dr. Gooch diagnosed the Miner with respiratory distress secondary to congestive heart failure and systolic dysfunction, history of hypoxia with recurrent aspiration pneumoconiosis and bronchitis, advanced Parkinson's disease with dementia and dysphagia, and acute kidney injury on chronic kidney disease. *Id.* at 29. He further noted the Miner's "oxygen saturation was 82% on 50% Ventimask" in the emergency room, and there was "audible rhonchi in his upper lobes." *Id.* On October 19, 2010, the Miner was admitted again for shortness of breath and worsening renal failure, and he was treated for his underlying history of pneumoconiosis, COPD, and deteriorating respiratory and renal functions until his death on November 3, 2010. *Id.* at 3-4.

[15] We affirm, as unchallenged, the ALJ's weighing of Dr. Gooch's opinion. *Skrack*, 6 BLR at 1-711.

claimant can establish total disability despite non-qualifying objective tests). A physician thus 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 Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985)). Further, 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 Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Poole*, 897 F.2d at 894; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

Dr. Alam treated the Miner for chronic obstructive pulmonary disease (COPD) and Parkinson's disease at Mountain Comprehensive Health Corporation. Director's Exhibit 15 at 1-25. Similarly, Drs. Khater and Gooch treated the Miner for COPD and Parkinson's disease at Appalachian Regional Healthcare. Director's Exhibit 63 at 2-136. Drs. Khater and Gooch each noted the Miner had symptoms of shortness of breath, hypoxia, wheezing and rhonchi, and opined he was in respiratory distress. Director's Exhibit 63 at 3, 7, 26, 27, 29, 47, 67, 71, 74, 93, 109, 130, 135. Further, Dr. Khater opined the Miner had worsening lung function. *Id*. at 109.

The ALJ stated "the statements and objective tests in [the Miner's] treatment records contain sufficient information . . . [for him] to reasonably infer that the Miner would have been unable to do his usual coal mine job, which required medium manual labor." Decision and Order on Modification at 11. He noted "[t]he Miner's treatment records document his respiratory distress and hypoxia, which ultimately required supplemental oxygen." *Id*. Further, he noted the Miner "was hospitalized at least eight times during the last year of his life for shortness of breath, breathing difficulties, and respiratory distress." *Id*. He rationally found the treating physicians' assessments of the Miner's oxygen dependency[16]

[16] The Miner was administered supplemental oxygen on admissions to the hospital in 2009. Director's Exhibit 63 at 130, 135. In 2010, Dr. Khater noted the Miner was on two liters of oxygen that had been administered via nasal cannula for the entire duration of his hospital stay from June 4, 2010 to June 18, 2010, and his oxygen saturation level was always over 90% with the supplemental oxygen. *Id.* at 93-120. The Miner went to the hospital on August 22, 2010 for an elevated temperature and difficulty breathing. *Id.* at 58-60. During his stay on August 23, 2010, Dr. Khater noted the Miner's respiratory rate was twenty-four and he was "barely saturating 90%" with a 31% Fraction of Inspired Oxygen (FIO_2). *Id.* at 63-64. By the end of his stay, the Miner's FIO_2 was increased to 100% and Dr. Khater diagnosed him with hypoxia. *Id.* at 67-68. The Miner was again put on supplemental oxygen that was increased to three liters for his stay from September 6, 2010 to September 14, 2010. *Id.* at 45-57. When the Miner was admitted to the hospital on October 2, 2010 for respiratory distress, wheezing, and rhonchi, his oxygen "saturation

and COPD, as well as his symptoms of shortness of breath, wheezing, and hypoxia, "would have prevented him from '[e]xerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects' as required for the medium exertion work of a mining foreman." *Id*. at 11-12; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

We also reject Employer's argument that the ALJ erred in considering evidence outside of the record to find the Miner was totally disabled. Employer's Brief at 24. Contrary to Employer's argument, the ALJ relied on the treatment records from the year preceding the Miner's death that describe his numerous respiratory and pulmonary issues. Decision and Order on Modification at 8-12; Director's Exhibits 15, 63. He noted the treatment records included a pulmonary function study, arterial blood gas studies,[17] x-rays, and oxygen saturation readings with and without supplemental oxygen. Decision and Order on Modification at 7-12, 15-16.

We further reject Employer's argument that the ALJ erred in relying on the Miner's non-respiratory conditions when determining he was totally disabled. Employer's Brief at 24. The ALJ found the treatment records documented the Miner's "symptoms of shortness of breath, cough, dyspnea, weakness and fatigue, respiratory distress, smothering, wheezing, and rhonchi" and his diagnoses of "respiratory distress, hypoxia, coal workers' pneumoconiosis, [COPD], severe pulmonary fibrosis, recurrent aspiration pneumonia, bronchitis, and congestive heart failure." Decision and Order at 8-12; Director's Exhibits 15, 63. Contrary to Employer's argument, the ALJ did not find the Miner was totally disabled due to his non-respiratory conditions such as Parkinson's disease, congestive heart

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was 82% on 50% Ventimask." *Id.* at 26. The Miner's supplemental oxygen was increased to four liters during his stay from October 4, 2010 to October 8, 2010. *Id.* at 29-30. For the Miner's final hospital stay, he was on three liters of supplemental oxygen. *Id.* at 2-25. Dr. Khater expressed concern regarding the Miner's increasing dependence and requirement for supplemental oxygen, noting "his oxygen requirement went up to 31%." *Id.* at 7, 11.

[17] The ALJ noted all the arterial blood gas studies produced non-qualifying values and were conducted while the Miner was either suffering from an acute illness or was on supplemental oxygen. Decision and Order at 7-8 (citing 20 C.F.R. Part 718, Appendix C). He found the Miner's treating physicians relied on these arterial blood gas studies and other objective tests administered during his treatment. Decision and Order on Modification at 8-12.

failure, and kidney disease, but rather due to the observations and accounts of the Miner's treating physicians that he had "shortness of breath, wheezing, hypoxia, oxygen dependency, and [COPD]," which would have inhibited him from performing his usual coal mine work requirement of "medium manual labor." Decision and Order at 11-12; Employer's Brief at 25. Consequently, we see no error in the ALJ's finding that the Miner's treatment records support a finding of total disability. Decision and Order at 11-12; Employer's Brief at 23-25; Employer's Reply Brief to Claimant at 6 (unpaginated).

Additionally, we reject Employer's argument that the ALJ erred in weighing Dr. Jarboe's opinion. Dr. Jarboe opined the Miner was totally disabled prior to his death due to "conditions of the general population" that were unrelated to "the inhalation of coal mine dust." Employer's Exhibit 1 at 8. The ALJ noted "Dr. Jarboe failed to indicate what he understood to be the Miner's last coal mine job as well as its accompanying exertional requirements." Decision and Order at 13. He thus permissibly found Dr. Jarboe's opinion entitled to "less" weight because the doctor "did not demonstrate an understanding of the exertional requirements of the Miner's usual coal mine work."[18] *See Cornett*, 227 F.3d at 587; *see also Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (physician who asserts a miner is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991).

The ALJ has discretion to weigh the medical evidence and draw his own inferences therefrom. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-77 (6th Cir. 2013); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Napier*, 301 F.3d at 713-14. The Board is not empowered to reweigh the evidence or substitute its inferences for those of the ALJ. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ fully considered and accurately characterized the relevant evidence and drew reasonable inferences from the Miner's treatment records, his decision comports with the APA. 5 U.S.C. §557(c)(3)(A) (requiring a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented"); *see Wojtowicz*, 12 BLR at 1-165. We thus affirm the ALJ's finding that the Miner was totally disabled at the time of his death, as substantial evidence supports it. 20 C.F.R. §718.204(b)(2)(iv); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (Substantial evidence is defined as relevant evidence that a reasonable mind could accept as adequate to support a conclusion.). As Employer raises no further

[18] Because the ALJ provided a valid reason for discrediting Dr. Jarboe's opinion, we need not address Employer's additional arguments regarding the weight the ALJ assigned his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 25-26.

challenges, we affirm the ALJ's finding that the evidence as a whole establishes total disability, and therefore Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(iii).

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

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[19] or that "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). The ALJ found Employer did not establish rebuttal by either method.

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)(2)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, holds this standard requires Employer to show the Miner's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

The ALJ considered the medical opinions of Drs. Gooch and Jarboe, and the Miner's treatment records. He stated "Dr. Gooch found that the Miner had legal pneumoconiosis, while Dr. Jarboe did not." Decision and Order on Modification at 18. He found neither Dr. Gooch's opinion nor the treatment records "assist" or "aid" Employer in disproving the

[19] "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).

existence of legal pneumoconiosis.[20] *Id*. at 19. Further, he found that "despite [Dr. Jarboe's] review of numerous treatment records documenting the Miner's symptoms and history of, *inter alia*, shortness of breath, dyspnea, smothering, wheezing, hypoxia, [COPD], and bronchitis," the doctor neither proffered an opinion as to the cause of these conditions nor discussed how they were unrelated to the twenty-seven year coal mine employment he considered." *Id*. He found Dr. Jarboe's opinion not well-reasoned, and thus insufficient to rebut the presumption of legal pneumoconiosis. *Id*.

Employer does not allege specific error in the ALJ's discrediting of Dr. Jarboe's opinion on the issue of legal pneumoconiosis. Employer's Brief at 29-32. Thus we affirm this credibility finding. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983); 20 C.F.R. §802.211(b); Decision and Order on Modification at 19.

Employer argues the ALJ inaccurately characterized "Dr. Gooch's opinion as diagnosing legal pneumoconiosis where it did not." Employer's Brief at 30. It therefore asserts the ALJ's mischaracterization of Dr. Gooch's opinion "alleviated impermissibly [Claimant's] burden of proof." *Id*. Dr. Gooch opined the Miner had "underlying pulmonary fibrosis, felt to be related to pneumoconiosis, and emphysema." Director's Exhibit 62 at 2. He also diagnosed "COPD with pneumoconiosis." Director's Exhibit 63 at 71, 130, 132. The ALJ concluded Dr. Gooch's opinion constitutes a diagnosis of legal pneumoconiosis because the doctor "understood the Miner's occupational exposure to coal dust and diagnosed '[COPD] with pneumoconiosis.'" Decision and Order on Modification at 19. Contrary to Employer's assertion, Employer has the burden to disprove the existence of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. Because the ALJ correctly determined Dr. Gooch's opinion does not aid Employer in meeting its burden on rebuttal, we decline to address Employer's arguments regarding the ALJ's weighing of the doctor's opinion. *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); Decision and Order at 19; Employer's Brief at 28-31.

Because the ALJ acted within his discretion in discrediting Dr. Jarboe's opinion, the only medical opinion supportive of Employer's burden, we affirm his finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); Decision and Order on Modification at 19. Employer's failure to

[20] Employer does not challenge the ALJ's weighing of the Miner's treatment records on the issue of legal pneumoconiosis.

disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[21] Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The ALJ next considered whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); Decision and Order on Modification at 20-21. Contrary to Employer's argument, the ALJ permissibly discredited Dr. Jarboe's death causation opinion because the doctor did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the Miner had the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order on Modification at 20; Employer's Brief at 31-35. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's death was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

Thus we affirm the ALJ's findings that Employer did not rebut the Section 411(c)(4) presumption, 20 C.F.R. §718.305(d)(2), and that Claimant therefore established a mistake in a determination of fact. 20 C.F.R. §725.310; Decision and Order on Modification at 22. We further affirm, as unchallenged, the ALJ's finding that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 22. Therefore, we affirm the award of benefits.

[21] Because we affirm the ALJ's findings on the issue of legal pneumoconiosis, we need not address Employer's arguments on the issue of clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 25-28.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge