U.S. Department of Labor

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

BRB No. 22-0090 BLA

BETTY JEAN DORTON (Widow of BRUCE DORTON) Claimant-Respondent v. ISLAND CREEK COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/07/2023 DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Request for Modification and Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Granting Claimant's Request for Modification and Awarding Benefits (2017-

BLA-05952) on a survivor's claim[1] filed on January 6, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ accepted the parties' stipulation that the Miner worked twenty-four years in coal mine employment. He found the evidence insufficient to establish complicated pneumoconiosis and thus concluded Claimant was unable to invoke the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Although he found Claimant established at least fifteen years of qualifying coal mine employment, the ALJ determined the Miner was not totally disabled at the time of his death and, thus, Claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4).[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2). Considering the merits of the survivor's claim under 20 C.F.R. Part 718, the ALJ found Claimant established that the Miner suffered from both clinical pneumoconiosis arising out of coal mine employment and legal pneumoconiosis, and that the Miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b). Consequently, the ALJ found Claimant established modification based on a mistake in a determination of fact. 20 C.F.R. §725.310. Further

[1] Claimant is the widow of the Miner, who died on October 29, 2013. Director's Exhibits 2, 10, 11. Because the Miner did not establish entitlement to benefits during his lifetime, Claimant cannot invoke Section 422(*l*) of the Act. *See* 30 U.S.C. §932(*l*) (2018) (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).

[2] This case involves a request for modification of a district director's denial of benefits. Director's Exhibit 40. Upon consideration of Claimant's request, the district director issued a proposed decision and order granting the request for modification and awarding benefits on March 9, 2017. Director's Exhibit 49. Employer timely requested a hearing, and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 55-56. In cases involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

[3] 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(b).

finding that granting modification rendered justice under the Act, the ALJ awarded benefits.

On appeal, Employer asserts the ALJ erred in admitting Dr. Perper's report into the record because it exceeds the evidentiary limitations and its admission violates Employer's due process rights. Employer also contends the ALJ erred in finding the Miner had legal pneumoconiosis and his death was due to both clinical and legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[4]

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.[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).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). 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).

Evidentiary Challenge

Because the ALJ is given broad discretion in resolving procedural and evidentiary matters, a party seeking to overturn an ALJ's evidentiary ruling must establish that the ALJ's action represented an abuse of discretion. 20 C.F.R. §725.455(c); *see Dempsey v.*

[4] We affirm, as unchallenged on appeal, the ALJ's findings that the miner had twenty-four years of coal mine employment and suffered from clinical pneumoconiosis arising out of his coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7 & n.30, 11, 13, 19; Hearing Transcript at 5.

[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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 & n.8; Hearing Transcript at 6.

Sewell Coal Corp., 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986).

Employer argues the ALJ erred in admitting Dr. Perper's report because it exceeds the evidentiary limits for autopsy evidence. Employer's Brief at 4-5. We disagree. Claimant initially identified the report of Dr. Dy, the autopsy prosector, as her affirmative autopsy report and Dr. Perper's report as her affirmative medical report. *See* Director's Exhibits 14, 40. Claimant subsequently submitted Dr. Perper's amended report, which corrected some typographical errors in his initial report. Claimant's Exhibit 1. At the hearing held before ALJ William T. Barto, Employer objected to the admission of Dr. Perper's opinion in its entirety because it asserted Claimant improperly submitted it as a second affirmative autopsy report in violation of the evidentiary limitations. Hearing Transcript at 6-9. ALJ Barto advised the parties he would rule on Employer's objection prior to them filing post-hearing briefs.[6] *Id*. at 10. Subsequent to the hearing, the case was reassigned to the ALJ.

On January 4, 2021, the ALJ issued an Order Overruling Employer's Evidentiary Objection. He determined that Dr. Perper's report was admissible both as a rebuttal autopsy report to Dr. Caffrey's autopsy report and as an affirmative medical opinion. Order at 2.

Employer argues the ALJ erred in admitting Dr. Perper's opinion as a rebuttal autopsy report pursuant to 20 C.F.R. §725.414. *See* Employer's Brief at 4-5; Director's Exhibit 40; Claimant's Exhibit 1. It asserts Dr. Caffrey's report was "misidentified as an affirmative report" and was "contemplated, prepared, and submitted, as a rebuttal report to Dr. Dy, which had already been submitted as the Claimant's affirmative autopsy report." Employer's Brief at 4.

Contrary to Employer's contention, on its Evidence Summary Form, it designated Dr. Caffrey's report as "initial," i.e., affirmative,[7] autopsy evidence.[8] The ALJ properly

[6] Employer stated that it "guess[ed] [Dr. Perper's] conclusions other than his review of the slides could be admitted, but [it was] not sure how that could be parsed." Hearing Transcript at 7-8.

[7] The evidence summary form label of "initial" evidence specifically relates to evidence admissible by an employer as "affirmative" evidence under 20 C.F.R. §725.414(a)(3)(i). The form contains a separate designation for "rebuttal" evidence admissible under 20 C.F.R. §725.414(a)(3)(ii).

[8] Further, on its notice of filing Dr. Caffrey's report, Employer made no indication it was filed as a rebuttal autopsy report. Employer's Exhibit 2. Rather the notice describes

recognized that a party may submit both an affirmative autopsy report and, where the opposing party has submitted affirmative autopsy evidence, a rebuttal autopsy report. Order at 2, *referencing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). As Dr. Perper reviewed the autopsy slides and other medical evidence, including medical reports and treatment records, in preparing his report, the ALJ accurately found it admissible as both a rebuttal autopsy report and an affirmative medical report. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc) (report constitutes both an autopsy report and a medical report when a physician reviews autopsy slides and additional medical records, and then bases his report on both the pathological and clinical evidence); Order at 2; Director's Exhibit 40; Claimant's Exhibit 1. Because Employer has not established the ALJ abused his discretion, we affirm his admission of Dr. Perper's opinion into the record. Consequently, we affirm the ALJ's Order overruling Employer's evidentiary objection.

Part 718 Entitlement

In a survivor's claim where no statutory presumptions are invoked, a claimant must establish by a preponderance of the evidence that the Miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes an award of benefits. *Trumbo*, 17 BLR at 1-87-88. The ALJ found Claimant established the Miner had clinical pneumoconiosis arising out of coal mine employment and legal pneumoconiosis, and that his death was due to pneumoconiosis. Decision and Order at 12-25.

Legal Pneumoconiosis

To prove that the Miner had legal pneumoconiosis, Claimant must establish he had a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The ALJ considered four medical opinions. Decision and Order 13-19. Drs. Perper and Gaziano opined the Miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibit 40; Claimant's Exhibits 1, 2. Although Drs. Caffrey and

---

the exhibits as a "pathology report of the 10-30-13 autopsy slides prepared by Dr. P. Raphael Caffrey." *Id*. In preparing his report, Dr. Caffrey reviewed Dr. Dy's autopsy report, the autopsy slides, the death certificate, and Dr. Perper's report. *Id*. Employer also designated Dr. Caffrey's initial and supplemental reports collectively as one of its affirmative medical reports. Employer's Evidence Summary Form; Employer's Exhibits 2, 4.

Tuteur agreed the Miner had COPD, they opined it was due to smoking and unrelated to coal mine dust exposure. Employer's Exhibits 2, 4-7.

The ALJ credited Dr. Perper's opinion as reasoned and documented, found Dr. Gaziano relied on an inaccurate smoking history but gave his opinion some weight as corroborated by Dr. Perper's reasoned opinion, and concluded the opinions of Drs. Caffrey and Tuteur were not well-reasoned. 20 C.F.R. §718.202(a)(4); Decision and Order at 13-19.

Employer initially asserts the ALJ improperly found Dr. Perper's opinion well-reasoned and well-documented and improperly conflated COPD with legal pneumoconiosis. Employer's Brief at 7, 11. We disagree.

As the ALJ found, Dr. Perper stated the "[Miner] had respiratory symptomatology of COPD, radiological findings of COPD, clinical diagnoses of COPD, and the autopsy findings substantiated moderate and severe emphysematous changes, the pathological counterparty of COPD, that constitutes legal pneumoconiosis." Decision and Order at 14, *quoting* Claimant's Exhibit 1. Dr. Perper specifically explained the Miner's COPD, manifested as centrilobular emphysema on x-ray and demonstrated as an obstructive impairment on pulmonary function testing, was due to both his twenty-year smoking history and his twenty-four years of coal mine dust exposure. Director's Exhibit 40; Claimant's Exhibit 1. As further support for his opinion, he discussed medical literature and noted the additive nature of smoking and coal mine dust exposure in causing centrilobular emphysema/COPD. *Id.*

Contrary to Employer's contention, we see no error in the ALJ's crediting of Dr. Perper's opinion. The ALJ permissibly found the physician's "comprehensive and exhaustive report" was "consistent with the record" and based on data including symptomology, treatment records, autopsy slides and report, pathological, radiological and clinical findings of COPD, as well as occupational and smoking histories. Decision and Order at 14-15; *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). Additionally, the ALJ permissibly concluded Dr. Perper's rationale is consistent with the Department of Labor's recognition that the effects of smoking and coal dust exposure can be additive. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 15. Because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Perper's medical opinion is documented, well-reasoned, and sufficient to support a finding that the Miner had legal pneumoconiosis in the form of COPD/emphysema due in part to coal mine dust exposure. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337 (4th Cir. 1996); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993).

We further reject Employer's argument that the ALJ did not adequately explain why he found Dr. Caffrey's opinion unpersuasive. Employer's Brief at 6, 8-11. Dr. Caffrey opined the Miner did not have legal pneumoconiosis because "the number-one cause of emphysema is the toxic products present in tobacco smoke," the amount of coal dust in the Miner's lungs was "minimal to mild," and thus it followed that the Miner's smoking played "a major role, if not the [sole] role," in his developing COPD. Employer's Exhibits 2, 6. Dr. Caffrey also opined the Miner's "mild" clinical pneumoconiosis "was not severe enough to be considered legal pneumoconiosis." Employer's Exhibit 4.

Contrary to Employer's contention, the ALJ permissibly found Dr. Caffrey's opinion "on the etiology of Miner's COPD is speculative and based on generalities, for while smoking may have a significant effect on the development of COPD, it does not explain why this individual Miner's COPD was not also caused by his 24-years of coal mine dust exposure." Decision and Order at 17; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (ALJ permissibly rejected physician's opinion where physician failed to adequately explain why coal mine dust exposure did not exacerbate a miner's smoking-related impairment); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Employer's Exhibit 2, 4, 6. Thus, we affirm the ALJ's finding that Dr. Caffrey's opinion is not adequately reasoned.

Employer next challenges the ALJ's rejection of Dr. Tuteur's opinion on legal pneumoconiosis as speculative and unpersuasive. Employer's Brief at 10-11. But we see no error in that finding. As the ALJ accurately noted, Dr. Tuteur stated the Miner's emphysema was "almost certainly" due to recurrent aspiration associated with hiatal hernia and dementia, while subsequently asserting the emphysema is "fully explained" by progressive aspiration of reflux into the lungs. Decision and Order at 18, *quoting* Employer's Exhibits 5, 7. The ALJ found Dr. Tuteur's opinion "particularly problematic" in view of treatment records reflecting diagnosis and treatment for COPD several years before the diagnoses of dementia, hiatal hernia, and reflux. Decision and Order at 18; *see* Director's Exhibit 16. Because the ALJ acted within his discretion in finding Dr. Tuteur's opinion lacked sufficient explanation for his diagnoses in view of the treatment records, we affirm his finding that it is not reasoned on the issue of legal pneumoconiosis.[9] Decision and Order at 19; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

[9] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Caffrey and Tuteur, we need not address Employer's remaining arguments regarding the additional reasons the ALJ gave for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-11.

Lastly, Employer argues the ALJ erred in giving any weight to Dr. Gaziano's opinion that the Miner had legal pneumoconiosis because he underestimated the Miner's smoking history and his conclusion lacked supporting medical documentation or evidence. Employer's Brief at 6, 8; *see* Decision and Order at 15; Claimant's Exhibit 2. Because we affirm the ALJ's reliance on Dr. Perper's opinion, which is substantial evidence to support his finding the Miner had legal pneumoconiosis, any alleged error by the ALJ in also crediting Dr. Gaziano's opinion would be harmless. *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's Brief at 8. Thus, we affirm the ALJ's conclusion that Claimant established the Miner had legal pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Hicks*, 138 F.3d at 528; Decision and Order at 19.

Death Causation

A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of his death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Collins v. Pond Creek Mining Co*., 751 F.3d 180, 184 (4th Cir. 2014); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000).

Drs. Perper and Gaziano opined the Miner's pneumoconiosis hastened his death while Drs. Caffrey and Tuteur opined it did not. Employer contends the ALJ erred in finding that Claimant satisfied her burden of proving that the Miner's death was due to pneumoconiosis because Dr. Perper did not explain the mechanism by which the Miner died and the ALJ failed to explain his credibility determinations. Employer's Brief at 6-10. We disagree.

Dr. Perper explained the Miner's death was due to clinical and legal pneumoconiosis "with resulting pulmonary symptomatology with exacerbation, eventually complicated by recurrent aspiration pneumonia, with confirmatory findings at autopsy of both clinical and legal [pneumoconiosis] (emphysema/COPD) and acute and organizing pneumonia." Claimant's Exhibit 1. The ALJ found Dr. Perper's opinion that the Miner died from complications of pneumonia and COPD credible because it is supported by a physician's report of an October 18, 2013 chest x-ray in the Miner's treatment records, taken just eleven days before the Miner's death, which specifically stated the Miner's pneumonia was complicating his underlying COPD (which the ALJ found is legal pneumoconiosis) and

chronic interstitial lung disease.[10] *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Compton*, 211 F.3d at 211; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (ALJ has the discretion to weigh the evidence and draw inferences therefrom); Decision and Order at 22; Director's Exhibit 16 at 419. As the ALJ acted within his discretion in finding Dr. Perper's opinion adequately explained and sufficient to support Claimant's burden of proof, we affirm his crediting of it. Decision and Order at 22; *see Hicks*, 138 F.3d at 533-34; *Akers*, 131 F.3d at 441-42.

Moreover, the ALJ permissibly found the opinions of Drs. Caffrey and Tuteur were not credible on the cause of the Miner's death because they failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding the Miner had the disease. *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) (doctor's opinion on causation may not be credited unless there are "specific and persuasive reasons" for concluding his view on causation is independent of his mistaken belief the miner did not have pneumoconiosis); Decision and Order at 24-25; Employer's Brief at 8, 10; Employer's Exhibits 2, 4-7.

Employer's arguments relating to Dr. Perper's opinion and the ALJ's findings on death causation are a request that we reweigh the evidence, which we are not empowered to do. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753 (4th Cir. 1999) (The Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis."); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established that the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Sparks*, 213 F.3d at 190; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80 (4th Cir. 1992); Decision and Order at 25.

We therefore affirm the ALJ's finding that Claimant established a mistake in a determination of fact. 20 C.F.R. §725.310; Decision and Order at 26. We further affirm the ALJ's finding that granting modification would render justice under the Act as it is

[10] The Miner's death certificates lists "cardiopulmonary arrest" as the immediate cause of death and states it was due to or as a consequence of "pneumonia," which in turn was due to or as a consequence of a history of post-traumatic stress disorder. Director's Exhibit 11. Dr. Perper found the death certificate lacked credibility, and Employer asserts this necessarily undermines his opinion. However, the ALJ was not required to discredit Dr. Perper's opinion simply because he expressed disagreement with the death certificate, so long as the ALJ found his opinion reasoned and documented. *Looney*, 678 F.3d at 316-17; Decision and Order at 21; Employer's Brief at 7.

unchallenged. *See Skrack*, 6 BLR at 1-711. Consequently, we affirm the award of survivor's benefits.

Accordingly, the ALJ's Decision and Order Granting Claimant's Request for Modification and Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge