U.S. Department of Labor

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

BRB Nos. 22-0283 BLA
and 22-0284 BLA

HELEN BOYD (Widow of and o/b/o ALSY BOYD)	)	
Claimant-Petitioner	)	
v.	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 8/18/2023
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

John C. Webb, V and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Tracy A. Daly's Decision and Order (2019-BLA-06060 and 2019-BLA-06061) denying benefits 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 request for modification of the denials of a miner's subsequent claim filed on September 21, 2012,[2] and a survivor's claim filed on February 21, 2013.

In an April 21, 2016 Decision and Order Denying Benefits, ALJ Lystra A. Harris found with respect to the miner's claim that Claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); *see also* 20 C.F.R. §725.309,[4] but that Employer rebutted the presumption by establishing the Miner did not have clinical or legal pneumoconiosis. Having determined that the evidence was insufficient to establish the existence of pneumoconiosis, she found benefits precluded in both the miner's and survivor's claims.

On March 20, 2017, Claimant filed a timely request for modification. The district director issued a Proposed Decision and Order Denying Request for Modification on

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[1] Helen Boyd, the deceased miner's widow, passed away on July 10, 2020, and her son, Kenneth Boyd, is pursuing both the miner's and survivor's claims. Decision and Order on Modification at 3; Survivor's Claim (SC) Director's Exhibits 8, 33.

[2] The Miner filed three prior claims, each of which the district director denied because the Miner failed to establish any element of entitlement. Miner's Claim (MC) Director's Exhibits 1-3.

[3] Section 411(c)(4) 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); 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 that "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; *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. Because the district director denied the Miner's prior claim for failure to establish any element of entitlement, Claimant was required to submit evidence establishing at least one element to warrant a review of the subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 3.

March 15, 2019. Pursuant to Claimant's hearing request, the case was returned to the Office of Administrative Law Judges and assigned to ALJ Daly (the ALJ). The ALJ credited the Miner with thirty-five years of qualifying underground coal mine employment, based on the parties' stipulation, and found he was totally disabled, an issue Employer did not contest. 20 C.F.R. §718.204(b)(2). Thus, the ALJ concluded Claimant invoked the Section 411(c)(4) presumption. Considering the new evidence submitted on modification in conjunction with the evidence previously submitted in the Miner's prior claims and current claim, the ALJ found Employer disproved the Miner had pneumoconiosis and thus rebutted the presumption. Consequently, he determined Claimant failed to establish a mistake of fact in the prior denial and denied benefits in the miner's and survivor's claims. 20 C.F.R. §725.310.

On appeal, Claimant generally contends he was prejudiced by having to defend Judge Harris's prior finding that the Miner was totally disabled.[5] Claimant also argues the ALJ erred in finding Employer successfully rebutted the Section 411(c)(4) presumption. Employer responds urging affirmance of the ALJ's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response.

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.[6] 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, 362 (1965).

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[5] The district director denied Claimant's modification request because he found the Miner was not totally disabled. Claimant asserts he was prejudiced by the district director's finding as ALJ Harris had already determined the Miner was totally disabled and entitled to invoke the Section 411(c)(4) presumption. We consider any error by the district director or the ALJ in reconsidering the issue of total disability to be harmless because the ALJ specifically found no mistake in ALJ Harris's determination that the Miner was totally disabled, and thus he found Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 9; *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).

[6] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit because the Miner performed his last coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 4.

The sole basis on which an ALJ may grant modification in a deceased miner's claim or a survivor's claim is that a mistake in a determination of fact was made in the prior decision. 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). The party opposing modification, therefore, bears the burden of establishing the ALJ committed an abuse of discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

The ALJ reviewed ALJ Harris's decision, detailing the evidence submitted in the Miner's current and three prior claims, and the new medical opinions of Drs. Ronson, Lopez, and Kamal to determine whether Claimant established a mistake in a determination of fact regarding ALJ Harris's denial of benefits in both claims. Decision and Order at 7-11. Like ALJ Harris, he concluded Employer rebutted the Section 411(c)(4) presumption. Consequently, he found Claimant failed to establish a basis for modification in the miner's claim and that benefits are therefore precluded in the survivor's claim. *Id.* at 11-12. Claimant contends the ALJ erred in weighing the evidence relevant to rebuttal and thus erred in denying benefits in both claims. We disagree.

Miner's Claim - Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish that the Miner had neither legal nor clinical pneumoconiosis,[7] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1287-88 (11th Cir. 2019).

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish that the Miner does not have any of the diseases "recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of

[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "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).

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).

The record contains two readings of x-rays dated February 27, 2008, and November 12, 2012. Employer's Exhibits 1, 2. Because Dr. Meyer, a dually-qualified Board-certified radiologist and B reader, read each film as negative for pneumoconiosis, ALJ Harris concluded the "preponderant" x-ray evidence is negative and supports rebuttal of the Section 411(c)(4) presumption. April 21, 2016 Decision and Order Denying Benefits (2016 Decision and Order) at 21. Thus, regarding the x-ray evidence of record, the ALJ correctly determined that ALJ Harris made no mistake of fact. Decision and Order at 11.

Claimant asserts that because Dr. Meyer identified the film quality for each film as a "3," they are not reliable to affirmatively rebut the presumption. Claimant's Brief at 10; *see* 2016 Decision and Order at 20-21. However, the regulations do not require x-ray readings to be of optimal quality; they only need to "be of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. §718.102(a); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1-1215-16 (1984). Because Dr. Meyer did not identify the film as unreadable, we reject Claimant's contention. *Lambert v. Itmann Coal Co.*, 6 BLR 1-256, 1-258 (1983) (where physician has read the film for the existence of pneumoconiosis, the Board must conclude that physician found it of suitable quality).

There is no biopsy or autopsy evidence in the record and no evidence of complicated pneumoconiosis. 20 C.F.R. §718.304; 2016 Decision and Order at 21 n.13. Further, the ALJ agreed with ALJ Harris's finding that the computed tomography (CT) scans in the Miner's treatment records, which she noted did not "definitively opine as to the presence of" clinical pneumoconiosis, were inconsistent.[8] Decision and Order at 11; 2016 Decision and Order at 33 n.16. We therefore affirm, as unchallenged, the ALJ's finding that ALJ Harris made no mistake of fact regarding the CT scan evidence of record. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

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[8] The record includes a reading of a June 12, 2002 CT scan by Dr. Vaum. MC DX-4 at 268-69. He described diffuse interstitial lung disease that was "probably" fibrotic and could be due to chronic disease or an active interstitial process. *Id.* Dr. Vaum stated that pneumoconiosis and tuberculosis could both have this appearance, but he did not diagnose either condition. *Id.* Dr. Smith read a February 21, 2005 CT scan as showing diffuse nodularity of the pulmonary interstitium that likely represented interstitial lung disease. MC DX-4 at 231-32. Dr. King read an August 17, 2009 CT scan and found diffuse interstitial lung disease with a micronodular pattern, but Dr. Bearden did not make that finding after reading a May 26, 2009 CT scan taken just three months earlier. MC DX-4 at 156-57; SC DX-1 at 580.

Regarding the medical opinion evidence relevant to clinical pneumoconiosis, Dr. Fino reviewed the x-rays, which he noted revealed no interstitial lung disease, and the August 2019 CT scan. Employer's Exhibit 3. Thus, Dr. Fino's opinion in regard to clinical pneumoconiosis merely reiterates evidence ALJ Harris found did not establish clinical pneumoconiosis, a finding the ALJ correctly determined represented no mistake in fact. Decision and Order at 9, 11; 2016 Decision and Order at 32, 33 n.16. While Dr. Ronson diagnosed clinical pneumoconiosis based on a CT scan, the ALJ noted he "did not identify the CT scan to which he referred, other than that it was performed in 2002"; Dr. Vaum, who offered the only reading of a CT scan taken in 2002, did not definitively conclude that the CT scan showed the presence of clinical pneumoconiosis or interstitial lung disease. Claimant's Exhibit 4; Decision and Order at 11. The ALJ permissibly rejected Dr. Ronson's diagnosis of clinical pneumoconiosis because Dr. Ronson either relied on an unidentified CT scan as showing pneumoconiosis or at least mischaracterized the CT scan he did rely on, and we have already affirmed the ALJ's finding that ALJ Harris made no mistake of fact in finding that the CT scan evidence was inconsistent and did not definitively diagnose clinical pneumoconiosis. Decision and Order at 11; 2016 Decision and Order at 33 n.16; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Skrack*, 6 BLR at 1-711. Although Claimant argues Dr. Fino's observation, that a CT scan he reviewed revealed interstitial lung disease with micronodular pattern, supports Dr. Ronson's opinion, Claimant fails to explain why Dr. Fino's opinion supports a finding of clinical pneumoconiosis or why the ALJ's discrediting of Dr. Ronson's opinion was improper. Decision and Order at 11; Claimant's Brief at 11. Because the ALJ adequately explained his weighing of the x-ray, CT scan, and medical opinion evidence, we affirm his conclusion that Employer disproved the existence of clinical pneumoconiosis. *Bradberry v. Director, OWCP*, 117 F.3d 1361 (11th Cir. 1997); Decision and Order at 11; Decision and Order at 35-36.

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 Co*., 25 BLR 1-149, 159 (2015).

The ALJ weighed Drs. Fino's[9] and Zaldivar's opinions, which Judge Harris originally considered, along with three new medical reports from the Miner's treating

[9] The ALJ did not rely on Dr. Fino's opinion that the Miner did not have legal pneumoconiosis, noting that ALJ Harris gave Dr. Fino's opinion "minimal probative weight" regarding legal pneumoconiosis and therefore he, like ALJ Harris, relied solely on

physicians – Drs. Lopez, Ronson, and Kamal – which Claimant submitted in support of her modification request. Decision and Order at 7-11. The ALJ discredited all of the opinions, except for Dr. Zaldivar's opinion. *Id.* Claimant contends the ALJ erred in not relying on the opinions of the Miner's treating physicians as to whether he had legal pneumoconiosis. Claimant's Brief at 13. We disagree.

Although an ALJ may assign controlling weight to a treating physician's opinion, the weight given to such an opinion shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence, and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade"). As explained below, because the ALJ permissibly found the opinions of Drs. Lopez, Ronson, and Kamal not well reasoned, we see no error in his conclusion that they are not determinative of whether Claimant has legal pneumoconiosis. Decision and Order at 10-11.

Dr. Lopez opined that the Miner had interstitial lung disease which "could" have been related to or aggravated by his thirty-five years of coal mine employment. Claimant's Exhibit 3. The ALJ permissibly found Dr. Lopez's opinion was equivocal and unsupported because his treatment records do not discuss the cause of the Miner's alleged lung disease. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (ALJ may reject an equivocal medical opinion); *see* Decision and Order at 10; Claimant's Exhibits 3, 6, 9.

In response to questions from Claimant's counsel, Dr. Kamal stated that whether the Miner had a respiratory impairment that was significantly related to, or substantially aggravated by, coal dust exposure should be answered by a pulmonologist. Claimant's Exhibit 5. Based on this statement, we affirm the ALJ's finding that Dr. Kamal's opinion does not support a finding of legal pneumoconiosis. *Jones*, 386 F.3d at 992; Decision and Order at 11.

Dr. Ronson opined that the Miner "had progressive respiratory disease that was CLEARLY and UNDENIABLY associated with pneumoconiosis . . . ." Claimant's Exhibit 4 (emphasis in original). He reviewed the Miner's medical history and concluded the Miner's shortness of breath was due to his lung condition as it existed prior to his worsening cardiac condition and that the Miner's cardiac condition did not become an issue until shortly before his death. *Id.* Thus, Dr. Ronson opined that the Miner had legal pneumoconiosis based on the lack of a smoking history, the Miner's thirty-five-year coal

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Dr. Zaldivar's opinion to conclude that Employer rebutted the 411(c)(4) presumption. Decision and Order at 9.

dust exposure, shortness of breath due to his lung disease that occurred prior to his heart disease, documented chronic obstructive pulmonary disease (COPD), and evidence of "classic" pneumoconiosis on CT scan. *Id.*

Contrary to Claimant's contention, the ALJ permissibly found Dr. Ronson's opinion unpersuasive because the Miner's treatment records indicate his shortness of breath occurred simultaneously with medical records indicating serious heart problems. Decision and Order at 11; *see* Claimant's Brief at 5-8, 12-15. The ALJ also noted inconsistencies in Dr. Ronson's opinion, such as justifying his COPD diagnosis by citing to "certified pulmonologist" notes even though Dr. Lopez, the Miner's treating pulmonologist, did not include a diagnosis of COPD nor do any other medical records. Decision and Order at 11. The ALJ has discretion to weigh the evidence, draw appropriate inferences, and determine credibility, and the Board cannot substitute its judgment for that of the ALJ even if our conclusions would have been different. *See Jones*, 386 F.3d at 992; *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder."); *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

In contrast, the ALJ noted ALJ Harris found that Dr. Zaldivar provided a more reasoned and documented opinion that there is no evidence to justify a diagnosis of legal pneumoconiosis and concluded ALJ Harris made no mistake in her determination to credit Dr. Zaldivar's opinion. Decision and Order at 9-10. The ALJ noted Dr. Zaldivar concluded that the Miner's pulmonary impairment was not due to an intrinsic disease but was due to his congestive heart failure, coupled with obesity, and weakness or paralysis of the right diaphragm. Decision and Order at 9; Employer's Exhibit 4. Dr. Zaldivar stated the Miner had a "history . . . of progressive deterioration due to inability to move very much caused by the poor cardiac reserve due to ischemic and nonischemic cardiomyopathy, . . . coupled with aortic valve replacement." Employer's Exhibit 4 at 8.

The ALJ thoroughly discussed ALJ Harris's reasons for crediting Dr. Zaldivar's opinion. Decision and Order at 9-10. In addition, the ALJ reviewed Dr. Zaldivar's reasons and bases for ruling out legal pneumoconiosis, noting Dr. Zaldivar pointed out that the Miner's cardiac history and medical records show a history of his worsening cardiac status, and concluded the Miner's shortness of breath is attributable to a failing left ventricle and diastolic dysfunction. *Id.*; Employer's Exhibit 4 at 6-8.

Claimant generally contends Dr. Ronson's opinion is more credible and that the ALJ erred in weighing the medical opinions because Dr. Lopez diagnosed not only a restrictive defect but a "combined" lung disease on numerous occasions. Claimant's Brief at 14. Thus, Claimant maintains that Dr. Ronson's opinion diagnosing COPD is supported by Dr. Lopez's records, despite the ALJ's finding to the contrary. *Id.* In addition, Claimant

alleges Dr. Zaldivar considered "every possibility other than coal dust exposure" when he explained the possible causes of Miner's lung nodules. *Id*. at 11-12. She further contends that Dr. Zaldivar's opinion overall is too weak to rebut the presumption that the Miner had legal pneumoconiosis. *Id*. at 12.

We consider Claimant's general contentions of error to be a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Again, the ALJ has discretion to weigh the evidence, draw appropriate inferences, and determine credibility, and the Board cannot substitute its judgment for that of the ALJ even if our conclusions would have been different. *See Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; *Anderson*, 12 BLR at 1-113; *Fagg*, 12 BLR at 1-79. Because substantial evidence supports the ALJ's finding that Employer disproved clinical and legal pneumoconiosis, we affirm the ALJ's conclusion that Employer rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i). *See Jones*, 386 F.3d at 992-93 (deference is given to an ALJ's findings and reversal is only appropriate if those findings are contrary to law or unsupported by substantial evidence); *Jordan*, 876 F.2d at

1460; Decision and Order at 11. Thus, we affirm the ALJ's determination that Claimant failed to establish modification based on a mistake in a determination of fact and the denial of benefits in the miner's claim. 20 C.F.R. §718.310; Decision and Order at 12.

Because the Miner was not found entitled to benefits based on his claim, Claimant is not entitled to derivative benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), 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 survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

Having affirmed the ALJ's findings, relevant to rebuttal of the Section 411(c)(4) presumption, that the Miner did not have pneumoconiosis, we also affirm the ALJ's conclusion that Claimant is unable to establish pneumoconiosis, a requisite element of entitlement for survivor's benefits. *See* 20 C.F.R. §§718.20202, 718.205; Decision and Order at 11-12. Thus, we affirm the ALJ's finding that Claimant did not establish a basis for modification of the denial of her survivor's claim.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge