U.S. Department of Labor

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

BRB Nos. 20-0536 BLA and
20-0537 BLA

SUE CREE (Widow of and o/b/o RICHARD L. CREE) Claimant-Respondent v. CENTRAL CAMBRIA DRILLING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/29/2021 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits and the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order on Remand Awarding Benefits (2013-BLA-05328) and Decision and Order

Awarding Benefits (2015-BLA-05117) rendered on miner's and survivor's claims filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).[1] The miner's claim is before the Benefits Review Board for a third time,[2] and the survivor's claim is before the Board for a second time.[3] The Board consolidates these appeals for purposes of decision only.

The parties have stipulated the Miner had 27.94 years of coal mine employment and was totally disabled at the time of his death. 20 C.F.R. §718.204(b)(2). In the miner's claim, the Board has affirmed the ALJ's findings that Claimant established clinical pneumoconiosis arising out of coal mine employment but that the evidence is insufficient to establish either legal pneumoconiosis or that the Miner's total disability was due to his clinical pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(c); *see Cree v. Central Cambria Drilling Co.*, BRB No. 17-0609 BLA, slip op. at 9 n.9, 11 (Oct. 16, 2018) (unpub.). Thus, unless Claimant establishes entitlement based on the rebuttable

[1] The Miner filed his claim on December 30, 2011, but died on August 5, 2014, while his claim was pending. Miner's Claim (MC) Director's Exhibit 2. Claimant, his widow, is pursuing the claim on his behalf, and filed her own survivor's claim on August 29, 2014, which was not consolidated with the Miner's claim. Survivor's Claim (SC) Exhibit 9.

[2] We incorporate the procedural histories set forth in *Cree v. Central Cambria Drilling Co.*, BRB No. 15-0129 BLA, slip op. at 3-4 (Nov. 2, 2015) (unpub.), issued in the survivor's claim, and *Cree v. Central Cambria Drilling Co.*, BRB No. 16-0135 BLA, slip op. at 2 n.4 (Dec. 13, 2016) (unpub.) and *Cree v. Central Cambria Drilling Co.*, BRB No. 17-0609 BLA (Oct. 16, 2018) (unpub.), issued with respect to the miner's claim.

[3] The miner's and survivor's claims took different procedural paths until they were recently consolidated. The hearing in the miner's claim was held on September 21, 2015, when the miner's and survivor's claims were not consolidated. The Board remanded the miner's claim in 2016 and 2018 for the ALJ to consider the length of the Miner's coal mine employment. The Board noted in its 2018 decision that the cases were not consolidated. *Cree*, BRB No. 17-0609 BLA, slip op. at 2 n.1. The ALJ on remand issued separate decisions (both dated Aug. 31, 2020), for the miner's and survivor's claims, which are the subject of this appeal. We discuss the relevant issue in the survivor's claim later in this decision.

presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[4] benefits are precluded in the miner's claim.

The Board previously vacated the ALJ's finding that Claimant did not invoke the presumption because he failed to adequately explain why Claimant did not establish fifteen years of qualifying coal mine employment. *Cree*, BRB No. 17-0609 BLA, slip op. at 6. The Board held the ALJ did not address evidence in the record relevant to whether the Miner's aboveground coal mine work occurred at an underground mine site, thereby proving it constituted qualifying coal mine employment. *Id*. Further, the Board held the ALJ failed to adequately explain why, even if the Miner did not work at underground mines, Claimant failed to prove substantially similar coal mine work based on the Miner's and physicians' statements regarding his dust exposure. *Id*. at 6-8. Thus, the Board vacated the denial of benefits and remanded the case for further consideration as to whether Claimant established fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *Id*. at 11-12. The Board also instructed the ALJ to consider whether Employer rebutted the presumption, if invoked. *Id*. at 11.

In his Decision and Order on Remand Awarding Benefits dated August 31, 2020, the ALJ found all of the Miner's 27.94 years of coal mine employment occurred at an underground coal mine site and therefore constituted qualifying coal mine employment. He therefore found Claimant invoked the Section 411(c)(4) presumption. The ALJ further found Employer did not rebut the presumption and awarded benefits. In a separate Decision and Order issued in the survivor's claim on the same day, the ALJ found that because the Miner was determined to be eligible to receive benefits, Claimant is also automatically entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[5]

[4] 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.

[5] Section 422(*l*) provides that the 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).

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption.[6] On the merits in the miner's claim, it contends the ALJ erred in finding Claimant established over fifteen years of qualifying coal mine employment, that she invoked the presumption, and that Employer did not rebut it. In the survivor's claim, Employer asserts the ALJ erred in failing to hold a hearing prior to awarding benefits. Neither Claimant nor the Director has responded to Employer's appeal.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are 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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

Invocation - Qualifying 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 surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). Aboveground employment at an underground coal mine is qualifying for purposes of invoking the Section 411(c)(4) presumption, without separate proof of substantial similarity. *Muncy*, 25 BLR at 1-29. The ALJ found all of the Miner's coal mine employment occurred at underground mines and thus found Claimant established at least fifteen years of qualifying coal mine employment.

Employer does not dispute that the Miner's 27.94 years of work in shaft and slope construction constitutes coal mine employment; instead, it asserts the ALJ did not adequately explain how he found Claimant established at least fifteen years of qualifying

[6] Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer, in its initial brief, contended the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 26-27. However, in a December 15, 2021 letter, Employer withdrew its challenge. Moreover, Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

[7] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. MC Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

coal mine employment in contrast to his prior decision. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 7; Employer's Brief at 12-18. Employer contends the ALJ did not adequately consider whether the Miner was regularly exposed to coal mine dust during his surface coal mine employment. Employer's Brief at 12-18. It also asserts the ALJ erred in relying on the preamble to regulatory revisions, promulgated by the Mine Safety and Health Administration (MSHA), to support his findings that the Miner worked at an underground mine. *Id.* at 13. Employer's arguments are without merit.

Contrary to Employer's contention, the effect of the Board's vacating the ALJ's prior decision was to return the parties to the status quo ante, with all of the rights, benefits, or obligations they had prior to the issuance of that decision. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985); MC Decision and Order at 3 n.4. Consequently, the ALJ was permitted to revisit and reconsider the evidence on the issue of the Miner's qualifying coal mine employment, and render new findings. *Id.* To the extent Employer's arguments in this appeal rely on the ALJ's prior findings from his 2017 decision, they lack merit. Employer's Brief at 14, 17-18.

The Miner passed away prior to his September 21, 2015 hearing, precluding his testimony. However, on his "Employment History" form, CM-911a, he provided a list of his coal mine employers, including the coal mine sites for many of the employers, and the dates of his employment. MC Director's Exhibit 3. He described his employment as "shaft and slope" construction work from June 1964 to September 2000. He further noted he was a drill runner and rock loader from June 1964 to July 1965, a hoist runner from February 1969 to 1975, and a hoist operator from March 1975 to September 2000. *Id.* He stated he was exposed to dust, gas, and fumes for all of his coal mine employment. *Id.* On his "Description of Coal Mine Work and Other Employment" form, CM-911, the Miner listed his job as a driller from 1964 to 1968 and a hoist operator from 1970 to 2000. MC Director's Exhibit 4. He described his work as a hoist operator in "shaft and slope construction" as "pouring concrete, putting men in and out of a hole, mucking, [and] putting forms in." *Id.*

An employment statement from the R.G. Johnson Company, self-described as "contractors and engineers" in the business of "shafts, slopes, mining construction," certified the company employed the Miner "in shaft and slope construction work" as a drill runner and rock loader from June 1964 to July 1965 and as a hoist runner between February 25, 1969 and August 25, 1971. MC Director's Exhibit 8. The Miner's Social Security Administration (SSA) earnings records confirm this employment as well as his employment with additional coal mine and construction companies, including his most recent coal mine employment with Employer from the second quarter of 1975 to 2000. MC Director's Exhibit 9. In addition, Dr. Koliner noted the Miner worked as a driller and

crane operator, most recently for Employer "outside but [he] did drill in a dust mix concrete environment for shaft drilling." MC Director's Exhibit 14. Dr. Fino reported the Miner worked three years underground and thirty four years above ground at coal mines. MC Director's Exhibit 15. The Miner told Dr. Fino that his last job as a hoist operator was one hundred percent light labor and "the hardest part of the job was breathing cement and coal dust." *Id.*

In determining that all of the Miner's coal mine work involved shaft and slope construction work at an underground mine site, the ALJ permissibly credited the Miner's employment forms and SSA earnings records. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); MC Decision and Order at 7-9. The ALJ further found his conclusion supported by the regulatory definition of an underground coal mine:

> Underground coal mine means a coal mine in which the earth and other materials which lie above and around the natural deposit of coal (*i.e.*, overburden) are not removed in mining; including all land, structures, facilities, machinery, tools, equipment, *shafts*, *slopes*, tunnels, excavations and other property, real or personal, appurtenant thereto.

20 C.F.R. §725.101(30) (emphasis added); *see* MC Decision and Order at 8. Thus, contrary to Employer's contentions, the ALJ cited specific evidence in concluding that all of the Miner's coal mine employment was performed at underground mines.[8] Employer's Brief at 12-18. Moreover, Employer has not set forth any contrary evidence or explained why the evidence on which the ALJ relies is insufficient.

Consequently, we reject Employer's assertion that the ALJ did not properly consider whether Claimant established substantial similarity or that the Miner was regularly exposed to coal mine dust. Employer's Brief at 16-17. Because the ALJ determined all of the Miner's work occurred underground or above ground at underground mine sites, he was not required to do so. *See Muncy*, 25 BLR at 1-29; 20 C.F.R. §718.305(b)(1)(i).

[8] Because we have affirmed the ALJ's finding that the relevant evidence of record, as supported by the definition of an underground mine, establishes all of the Miner's coal mine employment occurred at an underground mine site, it is not necessary to address Employer's argument that the ALJ relied on the preamble to the Department of Labor, Mine Safety and Health Administration (MSHA) regulations. MC Decision and Order at 8-9; Employer's Brief at 13, 18. We note that the ALJ stated the MSHA regulations supported his finding. MC Decision and Order at 8-9.

We therefore affirm the ALJ's finding that Claimant established the Miner had at least fifteen years of qualifying coal mining employment. *See* 30 U.S.C. §921(c)(4) (2018); *Soubik*, 366 F.3d at 233; *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997); MC Decision and Order at 9. Further, as the parties' stipulated that total disability was established,[9] we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. MC Decision and Order at 11; Employer's Brief at 7.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[10] or that "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)(i), (ii). The ALJ found Employer failed to establish rebuttal under either method.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish the Miner did 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 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).

Although Employer concedes the Miner had clinical pneumoconiosis, it states its argument as the Miner's clinical pneumoconiosis did not arise from coal mine employment. In actuality, its argument is that the ALJ erred in discrediting its experts who opined that the Miner did not suffer from clinical pneumoconiosis. 20 C.F.R. §§718.201(a)(1), 718.203, 718.305(d)(1)(i)(B); *see* Employer's Brief at 19-20. We reject Employer's contention that the ALJ erred in discrediting the opinions of its experts.

[9] The Board previously affirmed the parties' stipulation that Claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). *Cree*, BRB No. 16-0135 BLA, slip op. at 2 n.4.

[10] "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).

The record contains four interpretations of two x-rays, dated February 7, 2012 and July 24, 2012. All of the physicians observed the presence of small opacities consistent with pneumoconiosis. MC Director's Exhibits 14, 15, 16, 17. However, Dr. Wolfe, a Board-certified radiologist and B reader, opined that opacities he observed on the February 7, 2012 x-ray could be from causes other than pneumoconiosis. MC Director's Exhibit 16. The ALJ permissibly found Dr. Wolfe's opinion unpersuasive to rebut the presumed etiology of Claimant's clinical pneumoconiosis since Dr. Wolfe indicated the opacities he saw were "nonspecific" and thus did not definitively eliminate coal dust exposure as the cause. *See Kertesz*, 788 F.2d at 163; MC Decision and Order at 20.

Dr. Fino, a B reader and Board-certified pulmonologist, also indicated that the "irregular" opacities he observed on the July 24, 2012 x-ray "are not secondary to coal mine dust inhalation" because they are located in the lower lung zone only. MC Director's Exhibit 15. He explained that when coal mine dust causes an abnormality on a chest x-ray, it appears as rounded opacities, identified as p, q, and r opacities, primarily in the upper portion of the right lung. *Id*. Dr. Fino stated "the presence of only irregular opacities, in the absence of rounded opacities, is inconsistent with the diagnosis of coal workers' pneumoconiosis." *Id*.

The ALJ permissibly found Dr. Fino's rationale unpersuasive because two dually-qualified radiologists identified type p and r rounded opacities, which under Dr. Fino's logic is consistent with coal mine dust exposure. *Kertesz*, 788 F.2d at 163; MC Decision and Order as 20; MC Director's Exhibits 14, 17. Moreover, the ALJ found the autopsy evidence, which Dr. Fino did not review, identified *fibroanthracotic* nodules between 0.4 and 0.5 centimeters showing coal mine dust in the Miner's lungs. MC Decision and Order at 20; MC Claimant's Exhibit 1. Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to disprove the Miner's clinical pneumoconiosis arose out of coal mine employment.[11] *Soubik*, 366 F.3d at 234. Consequently, we affirm the ALJ's finding that Employer did not rebut clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B).

[11] Employer asserts Dr. Fino's opinion was entitled to greatest weight because he is a pulmonologist and a B reader. However, an ALJ may permissibly credit readings by dually-qualified physicians based on their specific radiological qualifications. *Worach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); Employer's Brief at 19. Moreover, even assuming Dr. Fino is the most qualified physician, his opinion is inconsistent with the regulations, which do not require a specific size, shape, or location of the opacities on an x-ray to qualify as clinical pneumoconiosis arising out of coal mine dust exposure. 20 C.F.R. §718.202(a)(1).

Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[12] *See* 20 C.F.R. §718.305(d)(1)(i). We thus affirm his determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis.

Disability Causation

The ALJ next addressed whether Employer rebutted the Section 411(c)(4) presumption by showing that "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); *see* MC Decision and Order at 22. The ALJ rationally discounted Dr. Fino's opinion on disability causation because he did not diagnose clinical pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the existence of that disease. 20 C.F.R. §718.305(d)(1)(ii); s*ee Soubik*, 366 F.3d at 234; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an ALJ "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); MC Decision and Order at 22-23. Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, other than its general contention that Claimant does not have clinical pneumoconiosis, which we have rejected. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was due to clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711; MC Decision and Order at 21. Because Employer did not rebut the Section 411(c)(4) presumption, we affirm the award of benefits in the Miner's claim.

The Survivor's Claim

The ALJ found Claimant satisfied the prerequisites for automatic entitlement under Section 932(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. *See* 30 U.S.C. §932(*l*); SC Decision and Order at 1-2 & n.1.

[12] Therefore it is not necessary to address Employer's arguments concerning the ALJ's finding that it did not rebut legal pneumoconiosis. MC Decision and Order at 20-21; Employer's Brief at 20-21.

In its brief, Employer initially contended the ALJ erred in awarding Claimant derivative benefits on her survivor's claim without first holding a hearing as it requested.[13] However, in a December 15, 2021 letter, Employer withdrew its challenge and now agrees a hearing is unnecessary in the survivor's claim if there is a final award of benefits in the miner's claim.

Because we have affirmed the award of benefits in the miner's claim, we also affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[13] Employer asserted that it requested a hearing in the survivor's claim upon receipt of the ALJ's Order to Show Cause why Claimant was not entitled to derivative benefits. Employer's Brief at 6. A hearing in the survivor's claim was scheduled for January 8, 2018. However, the ALJ continued the hearing by Order issued January 3, 2018, pending the outcome of the Miner's claim. ALJ's Order Granting Claimant's Motion for Continuance and Order Holding Case in Abeyance. There is no evidence in the record that a hearing was held prior to the ALJ's August 31, 2020 Decision and Order awarding benefits.

Accordingly, the ALJ's Decision and Order on Remand Awarding Benefits in the miner's claim is affirmed, and the Decision and Order Awarding Benefits in the survivor's claim is vacated and remanded for further proceedings as directed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge