U.S. Department of Labor

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

BRB No. 21-0349 BLA

CAROLE F. HUGHES (Widow of RAYMOND H. HUGHES)	)	
Claimant-Respondent	)	
v.	)	
GREENWICH COLLIERIES COMPANY	)	
	)	DATE ISSUED: 12/08/2022
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Ralph J. Trofino, Johnstown, Pennsylvania, for Employer.

BEFORE: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05674) rendered on a survivor's claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited the Miner with 18.25 years of underground coal mine employment and found he had a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[3] Employer further argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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.[4] 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).

[1] Claimant is the widow of the Miner, who died on March 27, 2018. Director's Exhibit 12. The Miner filed three living miner claims, none of which resulted in an award of benefits. Director's Exhibits 1-3. Because the Miner was not receiving benefits at the time of his death or "determined to be eligible to receive benefits" on a claim prior to his death, Claimant is not eligible for derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*1*)(2018).

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

[3] We affirm, as unchallenged on appeal the ALJ's finding that the Miner had 18.25 years of qualifying coal mine employment and Claimant did not establish complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7-8.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania.

Invocation of 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 at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine 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 the evidence supporting total disability against the contrary evidence. *See 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).

The ALJ found Claimant did not establish total disability based on the pulmonary function study evidence or arterial blood gas study evidence,[5] and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 11-12. Considering the medical opinions of

See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 9.

[5] The ALJ considered the results of three pulmonary function studies, dated December 29, 2014, November 19, 2015, and July 11, 2017, and four arterial blood gas studies dated December 29, 2014, November 19, 2015, January 14, 2016, and September 1, 2017, all of which were conducted during the course of the Miner's treatment and produced non-qualifying results. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-12. A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii). The record also contains non-qualifying arterial blood gas studies dated February 26, 2018 and March 3, 2018. Employer's Exhibits 1, 22.

Drs. Goldblatt, Swedarsky, and Wick,[6] as well as the Miner's treatment records,[7] the ALJ determined the medical opinion evidence "do[es] not support the absence of a totally disabling respiratory impairment." Decision and Order at 12-14; *see* 20 C.F.R. §§ 718.204(b)(2)(iv), 725.414(a)(4). He further determined, however, that, "[b]ased upon a totality of the evidence . . . , Claimant established a total pulmonary disability in the [M]iner based on her lay testimony." *Id.* at 15.

Employer initially argues the ALJ applied an incorrect burden of proof in finding the Miner totally disabled. Employer's Brief at 7. We agree. As Employer contends, Claimant bears the burden of affirmatively establishing by a preponderance of the evidence the existence of a totally disabling respiratory or pulmonary impairment. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994), *aff'g sub nom*. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993); 20 C.F.R. §718.204(b)(2); Employer's Brief at 7. Rather than properly applying that standard, the ALJ concluded the medical evidence does not disprove total disability. And, while he summarized the physicians' opinions and at least some of the Miner's treatment records, he failed to explain whether this evidence supported a finding that Claimant was totally disabled from a respiratory impairment at the time of his death.[8] *See Wojtowicz v. Duquesne Light Co.*,

[6] Dr. Goldblatt opined the Miner had "advanced pulmonary disease." Director's Exhibit 13 at 2. Dr. Swedarsy opined there was no evidence of impairment prior to the Miner's diagnosis of cancer in 2014 and that, while there were some changes in pulmonary function after the Miner's surgery to remove portions of his lung, there is no objective evidence that it was debilitating. Employer's Exhibits 2 at 42; 25 at 46-47. Dr. Wick opined that there is no support for a finding that "decedent's occupation had any impact on his death, nor did it cause disabling pulmonopathy." Employer's Exhibit 26 at 2.

[7] After examining the Miner in July 2014 and October 2015, Dr. Zeidan indicated he was unable to "identify a definite pulmonary cause for the [Miner's] unexplained exertional dyspnea" and recommended additional workup due to "the possibility of unidentified cardiac etiology as a culprit cause." Employer's Exhibit 20 at 7. Various records also document the Miner's diagnosis and treatment for lung cancer, heart disease, complaints of shortness of breath with exertion, and associated testing and treatment. Director's Exhibits 14-15; Employer's Exhibits 3-7, 10, 14-18. It is unclear if the ALJ considered all these records, as not all were identified in his summary of the evidence.

[8] A physician need not phrase his or her opinion specifically in terms of "total disability" to support such a finding under 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). A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is or was unable to do his last coal mine job. *See*

12 BLR 1-162, 1-165 (1989); Decision and Order at 13-14. When discussing Claimant's lay testimony, despite earlier stating the medical opinions do not support the absence of total disability, he summarily concluded total disability "was not demonstrated by" that same evidence. Decision and Order at 15. Consequently, we must vacate the ALJ's findings regarding the medical opinion evidence on the issue of total disability and remand the case for the ALJ to address whether Drs. Goldblatt's, Swedarsky's, and Wick's opinions are reasoned and documented and support Claimant's burden of establishing total disability. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); 20 C.F.R. §718.204(b)(2)(iv).

Employer next asserts that, because the record contains medical evidence relevant to total disability, the ALJ erred in relying on Claimant's lay testimony to find total disability established. Employer's Brief at 7-8. It also argues Claimant's lay testimony cannot form the sole basis for a finding of total disability. *Id*. We agree in part.

Having apparently found total disability not established by the medical evidence, the ALJ noted that, in the absence of such evidence, "lay evidence may be considered in determining whether the [M]iner was totally disabled due to pneumoconiosis, or died due to the disease." Decision and Order at 14. Thus, the ALJ considered Claimant's testimony that the Miner was advised to stop working in underground mines in the 1980s, that she noticed the Miner had breathing difficulties in the 1990s, that the Miner's ability to breathe deteriorated over time, and that he developed difficulty with doing activities such as climbing stairs, walking, and engaging in his daily activities. *Id.* (discussing Hearing Tr. at 16).

Contrary to Employer's argument, the ALJ did not err in considering Claimant's testimony. The applicable regulation states that, in a deceased miner's claim, lay testimony "must be considered sufficient to establish total disability" if no relevant medical evidence exists, but "such a determination must not be based *solely* upon the affidavits or testimony of any person who would be eligible for benefits . . . if the claim were approved."[9]

Poole, 897 F.2d at 894; *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). Employer does not challenge the ALJ's finding that the Miner's last coal mine job was working as a beltman, which required heavy labor; thus, it is affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 5.

[9] Employer cites to both 20 C.F.R. §718.204(d)(2) and §718.305(b)(4) when addressing the ALJ's consideration of Claimant's lay testimony. Employer's Brief at 7.

20 C.F.R. §718.305(b)(4) (emphasis added). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held under an analogous provision at 20 C.F.R. §727.203(a)(5) that consideration of lay evidence is permissible where the medical evidence of record is "insufficient to establish total disability or lack thereof," not that it is merely absent. *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 289 (3d Cir. 1988); *Hillibush v. U.S. Dept. of Labor*, 853 F.2d 197, 203-05 (3d Cir. 1988) (applying similar rule under 20 C.F.R. §718.305(b)); *see also Cook v. Director, OWCP*, 901 F.2d 33, 36 (4th Cir. 1990) (consideration of lay evidence is available where the medical evidence of record is insufficient to establish total disability). Thus, contrary to Employer's argument, the ALJ may rely upon lay testimony in the case of a deceased miner if the medical evidence neither establishes nor refutes total disability and the ALJ permissibly credited Claimant's testimony. *See Koppenhaver*, 864 F.2d at 289; *Hillibush*, 853 F.2d 197, 203-05; 20 C.F.R. §718.305(b)(4).

As noted, however, it is unclear what weight, if any, the ALJ intended to give the medical opinion evidence, including the Miner's treatment records, on total disability. We agree with Employer that to the extent the ALJ intended to rely *solely* on Claimant's lay testimony to establish total disability, he erred. 20 C.F.R. §718.305(b)(4); Decision and Order at 15. Because Claimant would be eligible for benefits if the claim is awarded, her testimony cannot be the sole basis for such a finding.[10] *Id*. Thus, we vacate the ALJ's findings that claimant established total disability and invoked the Section 411(c)(4) presumption.

On remand, the ALJ must reconsider whether the medical opinion evidence,[11] including evidence in the Miner's treatment records, supports the existence of a totally

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But Section 718.204(d)(2) does not apply when considering the applicability of the Section 411(c)(4) presumption. *See* 77 Fed. Reg. 19,456, 19,461-62 (Mar. 30, 2012).

[10] While Claimant argues the ALJ permissibly credited Claimant's lay testimony "together with corroborating treatment records" to find the Miner totally disabled, the ALJ did not make this finding. Claimant's Response at 4.

[11] As Employer indicates, the ALJ's findings regarding Dr. Goldblatt's credentials are conflicting, as he first stated that the physician's credentials are not contained in the record, but then listed his alleged credentials, without reference to the source of this information. Decision and Order at 13. If on remand the ALJ relies upon Dr. Goldblatt's opinion and those listed credentials, he must explain the evidentiary basis for his finding. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3rd Cir. 1997) (an ALJ must adequately explain his reasoning for crediting a physician).

disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(iv). When weighing the medical opinions, the ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; *Clark*, 12 BLR at 1-155. He must also explain his findings in accordance with the Administrative Procedure Act.[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If Claimant establishes total disability based on the medical opinions and the Miner's treatment records, the ALJ must then weigh all of the relevant evidence, including Claimant's lay testimony, together to determine whether she has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198. In considering Claimant's lay testimony, the ALJ must clarify the basis for his reliance on it in accordance with applicable regulations and case law. *See* 20 C.F.R. §718.305(b)(4); *Koppenhaver*, 864 F.2d at 289; *Hillibush*, 853 F.2d at 203-05.

If the ALJ again finds Claimant has established total disability, she will have invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. 20 C.F.R. §718.304(d)(1)(i). Because Employer does not contest the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption, if he finds the presumption invoked, the ALJ may reinstate the award of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). If the ALJ finds the evidence does not establish total disability, however, he must consider whether the evidence establishes that the Miner had pneumoconiosis arising out of coal mine employment and that the Miner's death was due to pneumoconiosis by a preponderance of the evidence.[13] *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

[12] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[13] Because these findings must be made by the ALJ in the first instance, we decline to address the Employer's arguments that Claimant cannot satisfy her burden to establish the Miner's death was due to pneumoconiosis if the Section 411(c)(4) presumption is not invoked.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits, and remand the case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge