U.S. Department of Labor

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

BRB Nos. 21-0472 BLA
and 21-0473 BLA

RUTH D. KENNEDY (o/b/o and Widow of CARL KENNEDY) Claimant-Respondent v. OLGA COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/16/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Carrie Bland's[1] Decision and Order Awarding Benefits (2014-BLA-05847 and 2015-BLA-05271) 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 miner's subsequent claim filed on May 25, 2011,[2] and a survivor's claim filed on April 28, 2014.

The ALJ credited the Miner with nineteen and one-half years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant[3] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[5] 20 C.F.R. §725.309(c). She further found Employer did not rebut the

[1] The miner's claim was originally assigned to ALJ Pamala J. Lakes, who remanded the case to the district director following the Miner's death. MC Director's Exhibit 62. Following proceedings before the district director, the miner's claim was assigned to Associate Chief ALJ William S. Colwell, who consolidated the miner's claim with the survivor's claim. January 14, 2016 Order Denying and Granting Employer's Motions. ALJ Colwell subsequently retired, and the case was reassigned to ALJ Bland (the ALJ).

[2] The Miner filed three prior claims for benefits, all of which were denied. Miner's Claim (MC) Director's Exhibits 1-3. The district director denied his most recent prior claim, filed on March 25, 2002, for failure to establish any element of entitlement. MC Director's Exhibit 3.

[3] Claimant is the widow of the Miner, who died on March 21, 2014. Survivor's Claim (SC) Director's Exhibit 4. She is pursuing the Miner's claim on his behalf, along with her own survivor's claim.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability 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.

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must also deny the subsequent claim unless she 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(c)(1); *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(c)(3). The

presumption and awarded benefits in both claims, determining Claimant is entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6]

On appeal, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption by establishing total disability. It further contends she erred in finding it did not rebut the presumption and in awarding survivor's benefits under Section 422(*l*).[7] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed 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.[8] 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).

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

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based upon 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 Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987);

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district director denied the Miner's prior claim because he did not establish any element of entitlement; therefore, Claimant had to submit evidence establishing at least one element in order to have the miner's claim reviewed on the merits. *See id.*; Director's Exhibit 3.

[6] Under Section 422(*l*) of the Act, 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).

[7] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 19.5 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9.

[8] 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); Hearing Transcript at 21; Director's Exhibit 6.

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 established total disability based on the pulmonary function studies, medical opinions, and weighing of the evidence as a whole.[9] Decision and Order at 11, 16-18; *see* 20 C.F.R. §718.204(b)(2)(i), (iv).

Pulmonary Function Studies

The ALJ considered six pulmonary function studies dated June 7, 2011, December 15, 2011, February 12, 2012, February 21, 2013, January 20, 2014, and March 12, 2014. Decision and Order at 11; MC Director's Exhibits 18-19; Employer's Exhibit 3; Claimant's Exhibits 1, 6. The June 7, 2011 study, performed by Dr. Forehand, produced qualifying values before and after the administration of bronchodilators. MC Director's Exhibit 18 at 21. The December 15, 2011 study, performed by Dr. Fino, produced non-qualifying values before and after bronchodilators. MC Director's Exhibit 19 at 132. The February 2, 2012 study, also performed by Dr. Fino, produced qualifying values before and after bronchodilators, but the doctor found the study is invalid.[10] *Id.* at 12. The February 21, 2013 study, performed by Dr. Rosenberg, produced qualifying values before and after bronchodilators. Employer's Exhibit 3 at 14. The January 20, 2014 study, performed by Dr. Habre, produced qualifying values before and after bronchodilators. Claimant's Exhibit 1 at 9. Finally, the March 12, 2014 study, performed by Dr. Almatari, produced qualifying values before and after bronchodilators. Claimant's Exhibit 6 at 1.

The ALJ gave "less probative weight" to the non-qualifying December 15, 2011 and qualifying February 12, 2012 pulmonary function studies because they "were not validated." Decision and Order at 11. Noting the remaining studies all produced qualifying results, she found Claimant established by a preponderance of the evidence that the Miner was totally disabled at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer argues the ALJ erred in finding the pulmonary function studies establish total disability. Employer's Brief at 5-17. We disagree.

When weighing pulmonary function studies, the ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b),

[9] The ALJ found the arterial blood gas studies did not establish total disability and that there is no evidence the Miner had cor pulmonale with right-sided congestive heart failure. Decision and Order at 12; *see* 20 C.F.R. §718.204(b)(2)(ii)-(iii).

[10] Dr. Fino opined the February 2, 2012 study is "invalid because of a premature termination to exhalation" and "lack of reproducibility in the expiratory tracings," and "a lack of an abrupt onset to exhalation." MC Director's Exhibit 19 at 6.

718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in her role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). In accomplishing this task, the ALJ must consider all relevant evidence, resolve any conflicts as to the reliability of the testing, and explain her findings in compliance with the Administrative Procedure Act (APA).[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer initially contends the ALJ erred in discounting Dr. Fino's opinion that all of the pulmonary function studies he reviewed are invalid. Employer's Brief at 10-11; Employer's Exhibit 7 at 16-17. We disagree. As the ALJ noted, Dr. Fino provided specific reasons for opining the December 15, 2011 and February 2, 2012 studies are invalid. Decision and Order at 13; Director's Exhibit 19 at 6-7, 126. He opined the remainder of the studies he reviewed are invalid, however, because the Miner put forth "poor effort, independent of heart disease and independent of his being morbidly obese," and explained that individuals with heart disease may lack the stamina necessary to put forth adequate effort on a pulmonary function study. Employer's Exhibit 16 at 17. The ALJ permissibly found these statements not well-reasoned because they are generalized and do not explain the Miner's specific situation. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Decision and Order at 15. She further permissibly discredited Dr. Fino's assertion that the Miner put forth poor effort because it is inconsistent with the statements of the other examining physicians and technicians who all, consistently, noted good effort with the studies that Dr. Fino reviewed. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); Decision and Order at 15.

We likewise reject Employer's contention that the ALJ erred in rejecting the validity opinions of Dr. Rosenberg. Employer's Brief at 11-14. The ALJ noted Dr. Rosenberg "did not make any indications that [the February 21, 2013 study] was invalid" on the report, *see* Decision and Order at 11 n.14 (citing Employer's Exhibit 3 at 13), but noted he subsequently opined at his deposition that the study was invalid due to incomplete effort from the Miner. Employer's Exhibits 3 at 8; 7 at 13-14. She further observed Dr.

[11] The Administrative Procedure Act requires that every adjudicatory decision include 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).

Rosenberg opined the January 20, 2014 study was invalid because the Miner had been hospitalized due to coronary artery disease the month prior, and pulmonary function studies must be performed on someone in a "stable state" to be reliable. Decision and Order at 14; Employer's Exhibit 16 at 8-10. The ALJ permissibly found Dr. Rosenberg's opinion not well-reasoned or documented because it is inconsistent with the statements of the technician who administered the February 21, 2013 study, who reported the Miner "understood the test and cooperated well with good effort," Employer's Exhibit 3 at 14, as well as the opinions of Drs. Habre and Forehand, neither of whom considered either study invalid.[12] *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d at 441; Decision and Order at 11 n.3, 15 n.16; Claimant's Exhibits 1, 12. Given the ALJ's permissible reasons for discounting Dr. Rosenberg's opinion, we consider Employer's argument that the ALJ failed to take his "detailed and reasoned" discussion into full consideration, Employer's Brief at 13, a request to reweigh the record, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Employer correctly asserts the ALJ failed to consider Dr. Renn's opinion concerning the validity of the qualifying June 7, 2011 pulmonary function study.[13] Employer's Brief at 15-16. Employer is also correct that the ALJ failed to consider that the Miner underwent the qualifying March 12, 2014 pulmonary function study only nine days prior to his death, as well as the statement in the report summary indicating none of the tests performed were acceptable and only four were reproducible. Employer's Brief at 16; Claimant's Exhibit 6 at 1. In light of the uncontradicted, qualifying, and valid February 21, 2013 and January 20, 2014 pulmonary function studies, however, any errors the ALJ made in her evaluation of the June 11, 2011 and March 12, 2014 studies are 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). We therefore affirm the ALJ's finding that the preponderance of the evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i).

[12] Dr. Forehand reviewed the February 21, 2013 pulmonary function study as well as Dr. Rosenberg's validity opinion. Claimant's Exhibit 12 at 4-6. Dr. Habre conducted the January 20, 2014 pulmonary function study and indicated the Miner demonstrated "good" cooperation and understanding of instructions. Claimant's Exhibit 1 at 9.

[13] Employer further contends the ALJ erred by not considering Dr. Renn's opinion that the non-qualifying December 15, 2011 pulmonary function study is invalid. Employer's Brief at 15-16. However, as the ALJ determined this study is invalid, any error in failing to consider Dr. Renn's opinion concerning the validity of this study is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 11.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Forehand and Habre that the Miner was totally disabled and those of Drs. Fino and Rosenberg that he was not. Decision and Order at 12-16; MC Director's Exhibits 18 and 19; Claimant's Exhibit 1; Employer's Exhibit 3. She credited Drs. Forehand's and Habre's opinions as well-reasoned and the most consistent with the objective evidence, including the qualifying pulmonary function studies, and therefore afforded them great probative weight. Decision and Order at 16. In contrast, she found the opinions of Drs. Fino and Rosenberg poorly documented and afforded them no probative weight. *Id.* at 15-16. Therefore, crediting the opinions of Drs. Forehand and Habre over those of Drs. Fino and Rosenberg, she determined Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 16-18.

Employer argues the ALJ erred in discrediting the opinions of Drs. Fino and Rosenberg.[14] Employer's Brief at 9-14, 16-17. We disagree.

The ALJ permissibly found Dr. Fino's opinion "unreasonable" because he based his opinion on the lack of valid objective testing. Decision and Order at 15 (quoting Employer's Exhibit 15 at 14); *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his or her findings unless they are inherently unreasonable). She further permissibly discredited Dr. Fino's and Rosenberg's opinions because they based their opinions on their conclusions that there are no valid, qualifying pulmonary function studies, contrary to her determination that the pulmonary function studies establish total disability. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 15-16.

Consequently, we affirm the ALJ's determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16. As Employer raises no other challenges to the ALJ's weighing of the evidence, we affirm her determination that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 17-18. We therefore affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption and established a change in an

[14] We affirm, as unchallenged, the ALJ's crediting of the opinions of Drs. Forehand and Habre that the Miner was totally disabled. *See Skrack*, 1-710 BLR at 1-711; Decision and Order at 16.

applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c)(1); Decision and Order at 17-18.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[15] or that "no part of [his] 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 by either method.

Legal Pneumoconiosis

The ALJ considered Drs. Fino's and Rosenberg's opinions that the Miner did not have legal pneumoconiosis. Decision and Order at 19; Miner's Claim Director's Exhibit 9; Employer's Exhibits 1, 3, 7-8, 15-16. Dr. Fino opined there is no valid objective evidence demonstrating the Miner had any obstructive or restrictive respiratory impairment. Employer's Exhibit 15 at 14, 16. Dr. Rosenberg opined the Miner did not have a restrictive impairment but rather that any impairment he had was caused by obesity and an elevated hemidiaphragm. Employer's Exhibit 3 at 8. The ALJ found neither opinion sufficiently reasoned to disprove legal pneumoconiosis. Decision and Order at 19.

Employer contends the ALJ erred. Employer's Brief at 17-23. We disagree.

The ALJ rationally gave very little weight to Dr. Fino's opinion because he found no respiratory impairment, contrary to her determination that the Miner had a disabling respiratory impairment, and so the doctor could not opine on the cause of an impairment he did not believe the Miner had. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark*, 12 BLR at 1-155; Decision and Order at 19. Similarly, the ALJ permissibly discredited Dr. Rosenberg's opinion because he opined the Miner did not have an obstructive impairment, contrary to her finding that the Miner had a totally disabling

[15] 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). This 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).

obstructive impairment,[16] and thus he could not "effectively comment" on whether the Miner's obstructive impairment was significantly related to or aggravated by his twenty years of coal mine dust exposure. Decision and Order at 19; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark*, 12 BLR at 1-155; *see also Looney*, 678 F.3d at 316 (if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation under the APA is satisfied).

Employer's arguments again amount to a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson*, at 12 BLR 1-113. We thus affirm the ALJ's finding that Employer failed to rebut the presumption that the Miner had legal pneumoconiosis. Decision and Order at 19. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. Therefore, we affirm the ALJ's conclusion that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "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); Decision and Order at 21. She permissibly discredited the opinions of Drs. Fino and Rosenberg on disability causation because they failed to diagnose legal pneumoconiosis, contrary to her finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 21. Having affirmed the ALJ's findings on legal pneumoconiosis, and because Employer raises no other arguments, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the award of benefits in the miner's claim.

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to

[16] The ALJ credited Dr. Forehand's opinion that the Miner was totally disabled due to obstructive lung disease. Decision and Order at 16; Miner's Claim Director's Exhibit 18 at 4. As Employer does not challenge this determination on appeal, it is affirmed. *Skrack*, 7 BLR at 1-711.

Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 21-22.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge