U.S. Department of Labor

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

BRB No. 21-0640 BLA

ALICE MARIE MULLENS (Widow of ALVA A. MULLENS)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK KENTUCKY MINING	)	
and	)	DATE ISSUED: 12/19/2022
CONSOL ENERGY, INCORPORATED	)	
Employer/Carrier- Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Alice Marie Mullens, Cowen, West Virginia.

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

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Claimant[1] appeals, without representation, Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Denying Benefits (2020-BLA-05383) rendered on a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ found no evidence of complicated pneumoconiosis; therefore, he found Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018). The ALJ credited the Miner with twenty-one years of qualifying coal mine employment but found Claimant did not establish the Miner had a totally disabling pulmonary or respiratory impairment at the time of his death. The ALJ thus found Claimant could not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not meet her burden to establish the Miner had either clinical or legal pneumoconiosis, or that his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b). Thus, he denied benefits.

[1] Claimant is the widow of the Miner, who died on June 30, 2018. Director's Exhibits 2, 10. On August 8, 2018, Administrative Law Judge Natalie Appetta issued a Decision and Order Denying Benefits in the miner's lifetime claim, which the Benefits Review Board affirmed. *Mullens v. Island Creek Coal Co.*, BRB No. 18-0568 BLA (Oct. 7, 2019) (unpub.). The Board denied Claimant's subsequent Motions for Reconsideration. *Mullens*, BRB No. 18-0568 BLA (Oct. 21, 2020) (Order) (ubpub.); *Mullens*, BRB No. 18-0568 BLA (June 25, 2020) (Order) (unpub.).

[2] Because the Miner was not entitled to benefits during his lifetime, Claimant is not eligible for derivative survivor's benefits at Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier respond in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive response.[4]

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below.[5] *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). 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 (1965).

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

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, Claimant must establish he "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). Total disability is established if the Miner's pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on

[4] We affirm the ALJ's finding that the Miner had twenty-one years of qualifying coal mine employment as Employer does not challenge it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[5] At the hearing, the ALJ properly informed Claimant of her right to be represented by an attorney of her choice, without charge to her. 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-304, 1-307 (1984); Hearing Transcript at 5. He further asked Claimant if she desired to proceed without representation, and she responded in the affirmative. Hearing Transcript at 6-7, 13. He allowed her opportunity to submit evidence and to object to the evidence submitted by the Director and Employer. *Id.* at 7, 9, 11-13. Moreover, the ALJ questioned Claimant regarding her understanding of the elements she had to prove and gave her the opportunity to provide an opening statement as to her husband's condition and why she was entitled to benefits. *Id.* at 16-21. Accordingly, the ALJ complied with the requirements of 20 C.F.R. §725.362(b) in conducting the hearing. *Shapell*, 7 BLR at 1-307.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20; Director's Exhibit 3.

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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 accurately found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii), as none of the pulmonary function studies were qualifying[7] and the record contains no evidence that the Miner had cor pulmonale with right-sided congestive heart failure. Decision and Order at 14-15; Director's Exhibit 12; Employer's Exhibits 104, 108.

Blood Gas Study Evidence

The ALJ considered the results of two blood gas studies. Decision and Order at 8, 14-15. Dr. Zaldivar's October 26, 2016 study produced qualifying values at rest but non-qualifying values with exercise.[8] Employer's Exhibit 104. Dr. Lenkey's June 29, 2017 study produced non-qualifying values at rest and did not include any exercise blood gas testing. Director's Exhibit 12; Employer's Exhibit 108. Substantial evidence thus supports the ALJ's finding that the preponderance of blood gas studies are non-qualifying. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012);

[7] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i). In assessing whether the Miner's studies yielded qualifying table values, the ALJ correctly determined an average height of 69.75 inches and rounded the value to 70.1 inches to conform to the nearest greater height appearing in the tables set forth in Appendix B. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 7 n.6, n.8. Because the Miner was over 71 years old when he performed the studies, the ALJ properly used the maximum table values in Appendix B of 20 C.F.R. Part 718. *Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61, 1-65-66 (2012); *Meade*, 24 BLR at 1-47; Decision and Order at 7 n.7.

[8] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

Decision and Order at 15. We therefore affirm the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 14-15.

Medical Opinion Evidence and Treatment Records[9]

The ALJ correctly determined Claimant did not submit affirmative medical opinion evidence regarding the Miner's total disability, the Miner's death certificate did not state an opinion as to whether the Miner was totally disabled during his lifetime, and neither of Employer's experts, Drs. Zaldivar and Vuskovich, diagnosed a totally disabling respiratory or pulmonary impairment. Decision and Order at 15-16. Nonetheless, we are unable to affirm the ALJ's finding that the medical opinions do not establish the Miner was totally disabled as the ALJ conducted only a limited analysis of the relevant evidence. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing, as non-qualifying testing may still render a miner incapable of performing his usual coal mine work.[10] 20 C.F.R. §718.204(b)(2)(iv). Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion*.") (emphasis added); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may infer total disability by comparing the severity of impairment or related physical limitations that a physician diagnoses with the exertional requirements of the miner's usual

[9] The ALJ accurately observed the record contains no evidence of cor pulmonale with right-sided heart failure for consideration at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 15.

[10] The ALJ noted "[the] Miner's last coal mine job was a strip job as a driller/shooter." Decision and Order at 5; Employer's Exhibit 103 at 12. He found that in this role, "the Miner would drill down into a mountain, creating a hole where explosives would be planted." Decision and Order at 5. He further found the position required "operating heavy equipment and the use of a truck and a shovel." *Id.* The ALJ however did not make a specific finding as to the level of exertion the position required.

coal mine work); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (miner is totally disabled if he cannot perform the exertional requirements of his previous job).

Although Dr. Zaldivar opined the mild restriction and moderate diffusion impairment demonstrated on the Miner's pulmonary function studies, alone, were not totally disabling, he indicated the Miner could be suffering from lung distress which, with heavy exertion, "may" be totally disabling.[11] Employer's Exhibit 106 at 18. He further explained, although the Miner's non-qualifying exercise blood gas study demonstrates "normal oxygenation," the Miner's chronic hyperventilation "result[s] in a subjective sensation of shortness of breath even in the absence of any hypoxemia"). Employer's Exhibits 104 at 5, 22, 106 at 18.

In reviewing Dr. Zaldivar's October 26, 2016 blood gas study, Dr. Vuskovich stated:

> [the Miner's] abnormally low PaCO2 results shows that [he] was *vigorously* hyperventilating. He was hyperventilating because ventilation is the only physiologic process by which humans rid themselves of carbon dioxide. This was a chronic phenomenon . . . . [The Miner's] ABG determinations results

[11] Dr. Zaldivar examined the Miner on October 26, 2016; he diagnosed a mild restriction and moderate diffusion impairment based on the results of the Miner's pulmonary function study and diagnosed "hyperventilation with normal oxygenation" and "metabolic acidosis likely due to renal disease" based on the results of his blood gas study. Employer's Exhibit 104 at 4, 22. Upon reviewing the June 29, 2017 objective studies of Dr. Lenkey, Dr. Zaldivar diagnosed asthma and pulmonary fibrosis, further stating the results of Dr. Lenkey's diffusion capacity value was much lower "which means that the pulmonary fibrotic process may well have advanced." Employer's Exhibit 109 at 7. At his March 17, 2017 deposition, Dr. Zaldivar further commented with regard to the Miner's respiratory symptoms and blood gas results:

> [the Miner's] lungs are distressed because, as I said, he's hyperventilating because he's so acidotic. His pH is low, and that is from the renal disease. So *at any time he's going to breathe harder* because of the inability of the kidneys to get rid of the acid in his blood. *And that may keep him from doing heavy labor*, but the ventilatory study alone would not. Or the blood gases for that matter, pO2 was adequate.

Employer's Exhibit 106 at 18 (emphasis added) (referencing the Miner's October 26, 2016 pulmonary and blood gas studies).

> [sic] showed that he was in a state of poorly compensated metabolic acidosis; poorly compensated because his pH was below normal range.

Employer's Exhibit 5 at 6 (emphasis added) (footnote omitted).[12] In addition, the ALJ did not consider potentially relevant information from the miner's treatment records in conjunction with the other evidence.[13] Remand thus is required because the ALJ did not consider whether the whole of the Miner's respiratory condition precluded his coal mine work, taking into account the evidence as to chronic hyperventilation, symptoms of lung distress, and the treatment record diagnoses of severe to end-stage chronic obstructive pulmonary disease.

Further, although the ALJ correctly noted a total disability determination may not be based *solely* on Claimant's lay testimony, 20 C.F.R. §718.204(d)(3); Decision and Order at 16, he erred in failing to consider whether the Miner's and Claimant's lay testimonies[14]

[12] Dr. Vuskovich interpreted Dr. Lenkey's June 29, 2017 blood gas study as showing that the Miner "was still in a state of metabolic acidosis." Employer's Exhibit 5 at 8. Dr. Vuskovich opined the Miner's "general state of health" was "substantially degraded by medical conditions unrelated to coalmine dust exposure and pneumoconiosis" including "chronic kidney failure with chronic metabolic acidosis" resulting in hyperventilation. *Id.* at 16. He further stated, "Coalmine dust exposure was not a substantially contributing cause of any current disabling pulmonary impairment. [The Miner's] idiopathic pulmonary fibrosis and renal failure with metabolic acidosis were not caused by, significantly contributed to, or substantially aggravated by his exposure to respirable coal dust in his coal mine employment." *Id.* at 15-16.

[13] The Miner's treatment records document shortness of breath, diagnose severe to end-stage COPD based on the Miner's symptoms and bloodwork, and document his starting supplemental oxygen on March 12, 2018. Director's Exhibit 12 at 24, 28, 32, 37, 105, 126. They also contain computed tomography (CT) scan readings by Dr. Davis, who read the Miner's January 25, 2016 and November 27, 2017 CT scans as positive for emphysema/COPD, chronic interstitial pneumonitis, and lower lobe opacities. *Id.* at 49, 104. Dr. Davis, however, did not specify the severity of the Miner's COPD.

[14] Regarding the limits of his exertional/respiratory capacity, the Miner testified on November 10, 2016, in his 2015 lifetime claim for benefits, "I can't do nothing." Employer's Exhibit 103 at 26. He stated he must sit down and rest after walking fifty or seventy-five yards; if he shoots an animal while hunting from a vehicle, he is unable to drag it back and someone else must do it for him; he is unable to do any yard work, walk his dog, or take out the trash; and his wife does all the household chores, yard work, and "pretty well keeps [him]." *Id.* at 33-36. At the hearing in this survivor's claim, Claimant

in conjunction with the physician-confirmed chronic respiratory symptoms and physical limitations[15] precluded the Miner from performing his usual coal mine employment. *See* 30 U.S.C. §923(b) ("In determining the validity of claims, all relevant evidence shall be considered...."); 20 C.F.R. §718.204(d)(4) ("Statements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a determination as to whether the miner was totally disabled at the time of death.").

Because the ALJ did not address all relevant evidence as to whether the Miner had a totally disabling pulmonary or respiratory impairment, we vacate his determination that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894. We therefore vacate the ALJ's overall finding that Claimant did not establish the Miner was totally disabled and did not invoke the Section 411(c)(4) presumption. Consequently, we vacate the ALJ's denial of benefits.

Part 718 Entitlement Without A Section 411(c) Presumption[16]

In a survivor's claim where the Section 411(c)(3)[17] and 411(c)(4) presumptions are not invoked, the claimant must establish the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. *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). Failure to establish any one of the requisite elements of entitlement precludes an award of benefits. *See Trumbo*, 17 BLR at 1-87-88. The ALJ found none of the medical evidence supports a finding of clinical or legal pneumoconiosis; however, he

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testified the Miner was on oxygen and inhalers and she spent her nights during the last two years of his life watching "to see if he would get the next breath or not." Hearing Transcript at 17-18.

[15] Regarding the Miner's October 26, 2016 blood gas study, Dr. Zaldivar stated the Miner exercised at a rate of 2.4 miles per hour on a two percent incline but exercise was stopped due to "tiredness" at 3:08 minutes. Employer's Exhibit 104 at 22.

[16] Although we must remand the case for further consideration as to whether Claimant invoked the Section 411(c)(4) presumption, in the interest of judicial efficiency, we address the ALJ's other findings under 20 C.F.R. Part 718.

[17] Because the ALJ correctly found the record contains no evidence of complicated pneumoconiosis, we affirm his finding that Claimant is unable to invoke the irrebuttable presumption at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); *see* 20 C.F.R. §718.304; Decision and Order at 21.

did not consider the credibility of Physician Assistant John Blake's diagnosis of pneumoconiosis contained in the Miner's treatment records.[18] Employer's Exhibit 102 at 11. Any error the ALJ may have made in failing to address the treatment-record diagnosis is harmless because, as discussed below, Claimant cannot affirmatively establish that the Miner's death was due to pneumoconiosis based on this record and the ALJ's permissible credibility findings. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Death Due to Pneumoconiosis

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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80 (4th Cir. 1992).

The only evidence addressing death causation consists of the death certificate, certified by the Miner's primary care physician, Dr. Mace. *See* Director's Exhibits 2, 10. The death certificate noted no autopsy was performed and listed "acute pneumonitis" as the direct cause of death and "coal workers' pneumoconiosis" as a significant contributing cause of death. *Id.* The ALJ permissibly found the death certificate insufficient as it does not contain an assessment of the Miner's respiratory or pulmonary condition or any explanation for diagnosing pneumoconiosis as an underlying cause of death. Decision and Order at 15. Thus we affirm, as supported by substantial evidence, the ALJ's determination that Claimant did not establish death causation and we affirm his finding that Claimant did not establish entitlement under 20 C.F.R. Part 718. *See Compton*, 211 F.3d at 212; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc); Decision and Order at 26.

Remand Instructions

On remand, the ALJ must first determine the exertional requirements of the Miner's usual coal mine work and consider the medical opinions in light of those requirements. 20 C.F.R. §718.204(b)(1)(i); *see Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9

[18] The ALJ accurately observed the only x-ray of record was read as negative for the disease, the record contains no biopsy/autopsy evidence nor evidence of complicated pneumoconiosis, and no physician diagnosed either clinical or legal pneumoconiosis. Decision and Order at 20-25.

BLR at 1-51-52. Although the ALJ found that none of the physicians specifically diagnosed the Miner as totally disabled, he must still determine whether they diagnosed a respiratory impairment which, when considered in conjunction with the exertional requirements of his usual coal mine work, supports a finding that the Miner was totally disabled. The ALJ must also reweigh the evidence as a whole and determine whether Claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198. The ALJ must explain his findings as the Administrative Procedure Act (APA) requires.[19] 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989.

If Claimant establishes total disability, she will have invoked the Section 411(c)(4) presumption, in which case the ALJ must consider whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). In that event, the ALJ's previous findings that Claimant suffered from neither clinical nor legal pneumoconiosis would be vacated, Decision and Order at 25, and the ALJ must reconsider the evidence with the burden shifting to Employer to affirmatively establish the Miner had neither legal nor clinical pneumoconiosis,[20] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." *Id.*; *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 (2015).

If Claimant does not establish total disability, the ALJ may reinstate his denial of benefits as Claimant did not establish the Miner's death was due to pneumoconiosis under Part 718.

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[19] The APA 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[20] Thus, application of the Section 411(c)(4) presumption would presume that the treatment record diagnoses of COPD and emphysema are significantly related to, or substantially aggravated by, dust exposure in coal mine employment, and is therefore legal pneumoconiosis. Director's Exhibit 12 at 24, 37, 49, 104-106; *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). Similarly, application of the Section 411(c)(4) presumption would presume that the treatment x-ray and CT scan readings of "pulmonary opacities" and "chronic interstitial infiltrates/fibrosis/densities" arise out of coal mine employment and are therefore clinical pneumoconiosis. Director's Exhibit 12 at 49-50, 54, 68, 78, 87-88, 93-94, 96, 104; *see Minich*, 25 BLR at 1-155 n.8.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge