U.S. Department of Labor

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

BRB Nos. 22-0062 BLA
and 22-0063 BLA

ELIZABETH MAYNARD (o/b/o and Widow of JENNINGS MAYNARD)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/27/2023
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

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

Before: BOGGS, ROLFE and JONES, Administrative Appeals Judges.

ROLFE and JONES, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2021-BLA-05338 and 2021-BLA-06030) 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 November 4, 2019,[1] and a survivor's claim filed on July 27, 2021.

With respect to the miner's claim, the ALJ found Claimant established the Miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption that the Miner's total disability was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and, therefore, established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits. Because the Miner was entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

[1] The Miner filed a prior claim for benefits on August 26, 1993, but the record for that claim file was destroyed. Miner Claim (MC) Director's Exhibit 63. The ALJ therefore assumed the Miner's prior claim was denied for failure to establish any element of entitlement. Decision and Order at 3. Claimant is the widow of the Miner, who died on June 24, 2021. Survivor Claim (SC) Director's Exhibit 10. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[2] 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. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds "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(d); *see 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). Because the ALJ assumed the Miner failed to establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element to obtain a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); ALJ Exhibit 4; MC Director's Exhibit 63.

[4] Section 422(*l*) of the Act 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

On appeal, Employer argues the ALJ erred in finding Claimant established the Miner had a totally disabling respiratory or pulmonary impairment and invoked the Section 411(c)(4) presumption.[5] Alternatively, it argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), 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 (1965).

Miner's Claim

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

To invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), Claimant must establish he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 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.[7] 20 C.F.R. §718.204(b)(2)(i)-

survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[5] We affirm, as unchallenged, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10.

[7] The ALJ found Claimant did not establish total disability based on the pulmonary function study evidence and determined there was 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 4, 9.

(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); *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 that Claimant established total disability based on the Miner's blood gas studies and in consideration of the evidence as a whole. Decision and Order at 4-12. We affirm, as unchallenged, the ALJ's finding that the two arterial blood gas studies of record are qualifying[8] for total disability under the regulatory criteria set forth at Appendix C because the Miner's PCO2 values were above 50 for each test. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 5, 8; MC Director's Exhibits 13, 34; *see Skrack*, 6 BLR at 1-711.

Employer contends, however, that the ALJ ignored that none of the medical experts concluded the Miner was totally disabled based on the blood gas study evidence and thus he failed to properly weigh all the contrary evidence prior to finding Claimant established total disability. Employer's Brief at 3-8. We disagree.

The ALJ considered each of the three medical opinions of record. 20 C.F.R. §718.204(b)(2)(iv). Dr. Mettu conducted the Department of Labor's complete pulmonary evaluation on December 31, 2019. He noted that the Miner was too weak to undergo pulmonary function testing but noted the Miner had a "normal" PO2 value on blood gas testing. MC Director's Exhibit 13. Dr. Mettu indicated he was unable to assess the Miner's respiratory disability due to the lack of pulmonary function tests. *Id*. In a supplemental report, Dr. Mettu noted there were no objective findings to support a finding of total disability. MC Director's Exhibit 25. Contrary to Employer's contention, we see no error in the ALJ's conclusion that Dr. Mettu's opinion "is insufficient to preclude the Miner's blood gas studies from establishing total disability" since he did not acknowledge that the Miner's blood gas study was qualifying based on the PCO2 value of more than 50 or otherwise explain his opinion.[9] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 10.

[8] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] Despite failing to discuss all of the objective evidence, Dr. Mettu nonetheless stated the Miner was totally disabled from performing "any job" because he appeared very weak during the physical examination. MC Director's Exhibit 25.

Dr. Selby prepared a consultative report based on his review of the medical record and determined the Miner was not totally disabled from a respiratory or pulmonary standpoint. MC Director's Exhibit 29. As the ALJ observed, Dr. Selby acknowledged during his deposition that the arterial blood gas studies in the record were qualifying based on the PCO2 value but determined that the value was "just barely elevated" and "d[id] not necessarily connote disability." Employer's Exhibit 4 at 14-15. He reasoned that it is common for people to have an elevated PCO2 and still be able to perform manual labor. *Id*. The ALJ permissibly found that Dr. Selby's opinion is "purely speculative" and based on generalities rather than the specific facts of the Miner's case. *See Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 7, 11. Thus, we affirm the ALJ's determination to give Dr. Selby's opinion little probative weight.

Dr. Tuteur examined the Miner and concluded he was totally disabled but stated it was "not associated with age appropriate limitation of pulmonary capacity." MC Director's Exhibit 34. He subsequently testified that the arterial blood gas studies showed no impairment of oxygen exchange, noting the Miner's normal PO2; however, he also testified that the Miner's elevated PCO2 "indicates alveolar hypoventilation." Employer's Exhibit 3 at 16-17. Dr. Tuteur explained that because the Miner's FEV1, FEV, lung volumes, and PO2 were normal, "he has not only the ventilatory capacity to perform properly but he also has the ability to exchange gas to achieve sufficient[,] and in this case highly efficiently[,] the transfer of oxygen from the air through the lungs into the blood." *Id*. at 17. The ALJ permissibly found that his opinion is not well-reasoned because he did not "give any reason to refute the Department's determination that an elevated PCO2 of 50 or above is presumptive evidence of total disability standing alone, regardless of the miner's PO2." *See Rowe*, 710 F.2d at 255; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 12.

Consequently, we affirm, as supported by substantial evidence, the ALJ's discrediting of all of the medical opinions. Thus, while Claimant did not establish total disability by medical opinion evidence,[10] we affirm the ALJ's overall conclusion, based on

[10] Our dissenting colleague's argument she would vacate the ALJ's finding of disability because -- as a fact-finder -- she would hold the medical opinion evidence outweighs the blood gas studies is demonstrably wrong for at least two reasons. *First*, Dr. Mettu, who conducted the Department of Labor (DOL)'s complete pulmonary evaluation, concluded from observation the Miner was "too weak" to take a pulmonary function test, was "totally disabled," and was obviously unable to perform "any job" (in response to the DOL's question of whether coal mine employment caused his respiratory impairment). MC Director's Exhibit 25. It is difficult to see how that conclusion supports our colleague's

the qualifying blood gas study evidence, that the Miner suffered from a totally disabling respiratory or pulmonary impairment.[11] 20 C.F.R. §718.204(b); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 9-12.

In light of our affirmance of the ALJ's findings that Claimant established the Miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm his determination that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 718.305, 725.309(c); Decision and Order at 13.

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assertion the physicians concluded the Miner was not disabled from a pulmonary standpoint. *Second*, the ALJ did not substitute his medical judgment for those of the experts on the blood gas testing: he simply applied the regulatory standards for establishing disability and refused to credit Employer's physicians -- who acknowledged the results established disability under the regulations -- on their explanations why the regulations should not apply given the Miner's advanced age. Decision and Order at 4-8, 10-12. A PCO2 value of 50 or above, like here, is disabling regardless of the corresponding PO2. 20 C.F.R. Part 718, Appendix C; Decision and Order at 5. And the ALJ permissibly rejected Employer's argument otherwise because the DOL already considered "comments that the [blood gas] table values were too liberal to account for the factor of age and adjusted them accordingly." Decision and Order at 6, *citing* 45 Fed. Reg. 13,712 (Feb. 29, 1980). Thus, this is not an example, as in the authority cited by our colleague, where the ALJ explained away a non-qualifying pulmonary function test under the regulations by speculating it "must have been a day when his breathing was less troublesome." *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Nor is it an example of an ALJ independently applying the quality standard requirements to interpret the validity of pulmonary function studies, which requires medical expertise. *Schetroma v. Director*, 18 BLR 1-19, 1-22-24 (1993). Rather, it is a textbook example of an ALJ interrelating all of the relevant evidence from the different categories and permissibly holding the valid blood gas testing -- which plainly meets qualifying regulatory criteria -- establishes disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

[11] Because the ALJ provided valid reasons for discrediting Drs. Mettu's Selby's, and Tuteur's opinions, we need not address Employer's challenges to the additional reasons the ALJ gave for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 4-8.

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,[12] or "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

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Drs. Selby's and Tuteur's opinions that the Miner did not have legal pneumoconiosis. MC Director's Exhibits 27, 34; Employer's Exhibits 3-4. The ALJ found their opinions insufficient to satisfy Employer's burden of proof. Decision and Order at 16-17. Employer argues the ALJ improperly characterized the evidence regarding legal pneumoconiosis and that his findings are not supported by substantial evidence. Employer's Brief at 8-11. We disagree.

Dr. Selby found the Miner's blood gas studies showed no impairment and the Miner's elevated PCO2 was not significant. MC Director's Exhibit 29. He diagnosed the Miner with a restrictive impairment but stated that this was "entirely due to his age, comorbid illnesses . . . and general weakness." *Id.* Thus, he concluded that the Miner did not suffer from legal pneumoconiosis.[13] *Id.* In his deposition, Dr. Selby reiterated the

[12] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is 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).

[13] Dr. Selby also noted the Miner's cough for five to ten years and sputum production in the last three years but determined this was not evidence of chronic bronchitis

findings in his report. Employer's Exhibit 4. Dr. Tuteur opined that the Miner did not have any impairment caused by inhalation of coal mine dust and therefore did not have legal pneumoconiosis. MC Director's Exhibit 34. He noted that the Miner had an elevated PCO2, which he stated indicated alveolar hypoventilation and was caused by the Miner's paralyzed left hemidiaphragm. Employer's Exhibit 3 at 17-18.

Having rejected Dr. Selby's opinion at total disability based on a mistaken belief that the Miner's PCO2 was not evidence of a respiratory impairment, the ALJ permissibly found that Dr. Selby's opinion was also not credible regarding the cause of this impairment.[14] *Rowe*, 710 F.2d at 255; Decision and Order at 17. The ALJ also permissibly found that while "Dr. Tuteur explained that a paralyzed hemidiaphragm is not caused by coal dust exposure, he failed to explain how he was able to rule out coal mine dust exposure as a primary or secondary cause of the Miner's elevated CO2." Decision and Order at 16; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Moreover, the ALJ accurately noted that Dr. Tuteur's opinion "is premised entirely on his view that the Miner's elevated PCO2, which the Department considers presumptive evidence of total disability, caused *no* impairment, despite being associated with hypoventilation." Decision and Order at 16 (emphasis in original); *see* 20 C.F.R. §718.204(b)(2)(ii).

Because the ALJ's credibility findings are supported by substantial evidence, we affirm his determination that Employer did not disprove legal pneumoconiosis.[15] *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Martin*, 400 F.3d at 305; Decision and Order at 18. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

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because when it is caused by an occupational source, it "occurs at the time of exposure and then almost always disappears within months after exposure ceases." MC Director's Exhibit 29.

[14] The ALJ noted "Dr. Selby did not address any other possible cause of the Miner's elevated PCO2" and "did not provide any convincing rationale to rebut the presumption that the Miner's elevated PCO2 was not caused at least in part by his coal dust exposure." Decision and Order at 17.

[15] As the ALJ gave valid reasons for discrediting Drs. Selby's and Tuteur's opinions, we need not address Employer's other arguments regarding the additional reasons he gave for rejecting their opinions. *See Kozele*, 6 BLR at 1-382 n.4; Employer's Brief at 9-11.

Disability Causation

The ALJ next considered whether Employer established 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); Decision and Order at 18. The ALJ permissibly discounted the opinions of Drs. Selby and Tuteur regarding the cause of the Miner's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the existence of the disease.[16] *See 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); Decision and Order at 18. We, therefore, 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), and the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we also affirm the ALJ's determination

[16] Drs. Selby's and Tuteur's opinions as to whether the Miner's respiratory disability was related to legal pneumoconiosis rested on their assumption that legal pneumoconiosis did not exist.

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); Decision and Order at 20.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's affirmance of the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and therefore also dissent from their affirmance of the award of benefits. In weighing the medical opinion evidence and the evidence as a whole concerning total disability, the ALJ erred by imposing his own interpretation of the data when medical judgment is required to interpret it. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Here all the physicians agree that the blood gas data taken as a whole does not evidence disability.[17] MC Director's Exhibits 13, 25, 29, 34; Employer's Exhibits 3 at 16-19, 4 at 13-17. Their opinion evidence is contrary evidence to the PCO2 and the ALJ cannot independently assume that the PCO2 standing alone establishes disability.[18] *Marcum*, 11 BLR at 1-24; Decision and Order at 9-12. Thus,

[17] Contrary to the majority, Dr. Mettu's statement that Claimant was "too weak" to take the pulmonary function test does not establish he is totally disabled under the Act, as it does not address respiratory or pulmonary impairment as the basis for inability to perform the testing. *See* 20 C.F.R. §718.204(b)(1). Moreover, Dr. Mettu stated there were no objective findings to support a determination that Claimant was totally disabled by a respiratory or pulmonary impairment and noted Claimant's normal PO2 on blood gas testing.

[18] In relevant part, Appendix C to 20 C.F.R. Part 718 states: "A miner who meets the following medical specifications must be found to be totally disabled, in the absence of rebutting evidence, if the values specified in one of the following tables are met[.]"

I would have vacated the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, and remanded for further consideration as to entitlement accordingly. *Marcum*, 11 BLR at 1-24; *see also Schetroma*, 18 BLR at 1-22-24.

JUDITH S. BOGGS
Administrative Appeals Judge