U.S. Department of Labor

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

BRB No. 23-0139 BLA

ETHEL M. DINGUS (Widow of THELMAR N. DINGUS) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 02/15/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William P. Farley, Administrative Law Judge, United States Department of Labor.

Kathy Cantrell, Pound, Virginia.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Claimant appeals, without representation, Administrative Law Judge (ALJ) William P. Farley's Decision and Order Denying Benefits (2020-BLA-05736) rendered on a

survivor's claim filed on July 28, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

Initially, the ALJ found Claimant did not establish the Miner had complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. Next, the ALJ credited the Miner with fifteen years of underground 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 establish the Miner had pneumoconiosis or that his death was due to pneumoconiosis.[4] 20 C.F.R. §§718.202(a), 718.205. Thus, he denied benefits.

[1] The Miner died on February 27, 2013. Director's Exhibit 14. The Miner's widow, Ethel M. Dingus, filed a survivor's claim July 28, 2016, but died on December 1, 2022. Director's Exhibit 6; Claimant's January 30, 2023 Letter to the ALJ. Kathy Cantrell (Claimant), the widow's daughter, notified the ALJ seven days after he denied benefits that she is pursuing the survivor's claim on her mother's behalf. Claimant's January 30, 2023 Letter to the ALJ. Courtney Hughes, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Hughes is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] The Miner filed four prior claims for benefits that were denied. Director's Exhibits 1-4, 44. Because the Miner never established entitlement to benefits during his lifetime, his widow was not eligible for derivative survivor's benefits pursuant to 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 or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] The Director did not contest that the Miner had pneumoconiosis before the ALJ. Director's Brief at 3 n.3; Director's Exhibits 35, 47. The Director also determined that there is no responsible operator that can be held liable in this case and that the Black Lung Disability Trust Fund would be responsible for the payment of any benefits awarded. Decision and Order at 4; Director's Exhibit 35 at 7.

On appeal, Claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), urges the Board to remand the case for reconsideration of the pulmonary function study evidence and the evidence as a whole on total disability.[5]

In an appeal a claimant files without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (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, 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 is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents 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 qualifying pulmonary function studies or arterial blood gas studies,[7] 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). Qualifying evidence under any category "shall

[5] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had 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 4, 6.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his last coal mine employment Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 7, 44.

[7] 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).

establish a miner's total disability" absent "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found there were no qualifying pulmonary function studies or blood gas studies, and he credited Dr. Fino's opinion that the Miner had no respiratory impairment and was not totally disabled over the contrary opinion of Dr. Habre.[8] 20 C.F.R. §718.204(b)(2); Decision and Order at 6, 8-9. As explained below, the ALJ mischaracterized the evidence and erred in considering Dr. Fino's opinion. Based on the facts of this case, we reverse the ALJ's finding that Claimant did not establish total disability.

Pulmonary Function Studies

Claimant and the Director designated the February 11, 2011 and April 22, 2011 pulmonary function studies as part of their affirmative cases. Director's Exhibit 44 at 495, 510; Claimant's Evidence Summary Form; Director's Evidence Summary Form. Dr. Habre conducted the February 11, 2011 study as a part of the Department of Labor (DOL) complete pulmonary evaluation of the Miner from his fourth living miner's claim and obtained qualifying values pre- and post-bronchodilator under Appendix B of 20 C.F.R. Part 718.[9] Director's Exhibit 44 at 508-10. Dr. Michos reviewed the study for the DOL and determined that the "[v]ents are not acceptable." *Id.* at 501. Consequently, Dr. Habre conducted a second pulmonary function study on the Miner on April 22, 2011, and again obtained qualifying values pre- and post-bronchodilator. *Id*. at 495. Dr. Michos found this study to be valid. *Id.* at 494.

[8] The ALJ accurately found there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 4. Therefore, Claimant is unable to invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304.

[9] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i). For a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce both a qualifying FEV1 value and one of the following: either an FVC value or MVV value equal to or less than the values appearing in the tables set forth in Appendix B, or an FEV1/FVC ratio equal to or less than fifty-five percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). The qualifying values in Appendix B are based on gender, height, and age. 20 C.F.R. Part 718, Appendix B.

The ALJ's finding that none of the pulmonary function studies are qualifying is inaccurate and does not comply with the Administrative Procedure Act (APA).[10] Director's Brief at 2-3; 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). The ALJ failed to identify the pulmonary function studies designated by the parties and stated only that the record "does not include qualifying" pulmonary function studies. Decision and Order at 6. As noted, contrary to the ALJ's conclusion, both the February 11, 2011 and April 22, 2011 studies produced qualifying values. Director's Brief at 3.

Although Dr. Michos deemed the February 11, 2011 pulmonary function study invalid, he specifically validated the April 22, 2011 study. Director's Exhibit 44 at 494, 501. When the Miner performed that later study, he was eighty-six years old and sixty-six inches tall. *Id.* at 495. A study performed on a male miner of that age and height qualifies if it produces an FEV1 value at or below 1.57 and either an FVC value at or below 2.04, an MVV value at or below 63, or an FEV1/FVC ratio of 55 percent or less.[11] 20 C.F.R. Part 718, Appendix B. The April 22, 2011 pulmonary function study produced an FEV1 value of 1.29 and an FVC value of 1.89 pre-bronchodilator, and an FEV1 value of 1.46 and an FVC value of 1.88 post-bronchodilator. Director's Exhibit 44 at 495. Consequently, the study produced qualifying values pre- and post-bronchodilator for the Miner's age and height. *Id.*; *see* 20 C.F.R. Part 718, Appendix B.

We reject the Director's contention that the case should be remanded for the ALJ to resolve the "conflicting evidence" regarding the validity of the April 22, 2011 qualifying pulmonary function study. Director's Brief at 3. Pulmonary function studies are presumed to comply with the quality standards absent "evidence to the contrary." 20 C.F.R. §718.103(c); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging

[10] The APA requires every adjudicatory decision include "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).

[11] As the Miner was sixty-six inches in height, the determination of whether the study was qualifying is based on the values for the closest greater table height set forth at Appendix B of 20 C.F.R. Part 718 of 66.1 inches. *See Carpenter v. GMS Mine & Repair Maint. Inc.*, BLR , BRB No. 22-0100 BLA, slip op. at 4-5 (Sept. 6, 2023); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008). Because the Miner was over seventy-one years old when he performed the study, the maximum table values in Appendix B of 20 C.F.R. Part 718 apply. *See Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61, 1-65-66 (2012); *Meade*, 24 BLR at 1-47.

the validity of a study has the burden to establish the results are unreliable). While the Director references Drs. Fino's and Long's opinions from the living miner's claim questioning the validity of the April 22, 2011 study, *see* Director's Exhibit 44 at 341, 350, neither party designated these opinions as medical evidence in the survivor's claim.[12] Director's Brief at 2-3; Claimant's Evidence Summary Form; Director's Evidence Summary Form. Evidence from a prior living miner's claim does not automatically become part of the record in a survivor's claim; rather, the parties in a survivor's claim must designate that evidence in accordance with the evidentiary limitations at 20 C.F.R. §725.414. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007) (en banc);[13] *see also Earl Patton Coal Co. v. Patton*, 848 F.2d 668, 672 (6th Cir. 1988).

In short, there is only one valid pulmonary function study in the record in the survivor's claim, and that study is qualifying and uncontradicted. Director's Exhibit 44 at 495. None of the medical evidence submitted in this survivor's claim questions its validity. *Id.* at 494. We therefore hold that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i) as a matter of law.

Having reversed the ALJ's finding regarding the pulmonary function study evidence, and as there is no contrary evidence of record that the Miner was not totally

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[12] There is no question the February 11, 2011 pulmonary function study was invalid since the district director sent the Miner for a second test on April 22, 2011 as the regulations require.

[13] In his closing brief to the ALJ, the Director "move[d] to [a]dmit" Director's Exhibits 1-47 wholesale, without any reference to the evidentiary limitations or any specific pieces of evidence. Director's Closing Argument at 2 n.1. His evidence summary form makes clear, however, that he did not designate Drs. Fino's and Long's opinions, found at Director's Exhibit 44 at 341, 350. As the Board held in *Keener*:

> When a living miner files a subsequent claim, all the evidence from the miner's prior claims is specifically made a part of the record. *See* 20 C.F.R. §725.309(d). There is no comparable provision for the automatic inclusion of evidence in a survivor's claim filed pursuant to the revised regulations. Thus, the medical evidence from the prior living miner's claims must be designated as evidence by one of the parties in order for it to be included in the record relevant to the survivor's claim.

Keener v. Peerless Eagle Coal Co., 23 BLR 1-229, 1-241 (2007) (en banc).

disabled,[14] we hold Claimant established total disability based on the record as a whole and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 6.

Remand Instructions

Because Claimant invoked the Section 411(c)(4) presumption, the ALJ must consider whether the Director can rebut the presumption by establishing either the Miner did not have pneumoconiosis[15] or that no part of his death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i), (ii). In reaching his conclusions on remand, the ALJ must explain the bases for all of his credibility determinations and findings of fact as the APA requires. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[14] As noted, Dr. Fino's opinion rendered in the living miner's claim was not designated by the parties as medical evidence in the survivor's claim and thus was not properly admitted into evidence in this survivor's claim. Thus, the ALJ erred in weighing and crediting that opinion on the issue of total disability. Decision and Order at 6, 9. The Miner's designated treatment records and Claimant's affidavit, which the ALJ failed to consider, and Dr. Habre's opinion do not undermine the April 22, 2011 pulmonary function study results. Director's Exhibits 17-19, 44 at 91-145, 508-09. Finally, as they measure different types of impairment, the Miner's non-qualifying February 11, 2011 blood gas study does not call into question the valid and qualifying April 22, 2011 pulmonary function study results. *See Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984); Director's Exhibit 44 at 495, 514.

[15] The Director points out that he did not contest that the Miner had pneumoconiosis before the ALJ. Director's Brief at 3 n.3; Director's Exhibits 35, 47. In any case referred to the Office of Administrative Law Judges for a hearing, the district director is required to provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). The "hearing *shall be confined* to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a) (emphasis added); *see Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) ("Before the ALJ, issue exhaustion is plainly one of the rules of the game."); *Johnson v. Royal Coal Co.*, 326 F.3d 421, 425 (4th Cir. 2003) (20 C.F.R. §725.463(a) is among the "provisions [that] define the outer limit of the scope of the hearing, preventing its expansion"); *Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-323, 1-327-32 (2022) (en banc).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge