**U.S. Department of Labor**

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

BRB No. 23-0238 BLA

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| ALICE NAPIER<br>(Widow of RANDY NAPIER)<br><br>Claimant-Respondent<br><br>v.<br><br>SHAMROCK COAL COMPANY INCORPORATED<br><br>Employer-Petitioner<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 02/15/2024<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits on Modification of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits on Modification (2019-BLA-06116) rendered on a survivor's claim filed on November 15, 2012, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a February 6, 2018 Decision and Order Denying Benefits, ALJ Steven B. Berlin found Claimant[1] established the Miner had approximately 22.5 years of underground coal mine employment, but failed to establish total disability and therefore could not invoke the presumption that the Miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[2] Director's Exhibit 1. Considering Claimant's entitlement under 20 C.F.R. Part 718, ALJ Berlin found Claimant established clinical pneumoconiosis but did not establish that the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b). *Id*. Thus, ALJ Berlin denied benefits. On January 9, 2019, Claimant timely filed a request for modification with the district director. Director's Exhibit 7. The district director subsequently forwarded the case to the Office of Administrative Law Judges, where it was ultimately assigned to ALJ Golden (the ALJ). Director's Exhibit 9.

In his March 9, 2023 Decision and Order Awarding Benefits on Modification, the ALJ credited the Miner with twenty-one years of qualifying coal mine employment and found Claimant established the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. He further found that Employer did not rebut the presumption, that Claimant established modification based on a mistake in determination of fact at 20 C.F.R. §725.310, and that granting modification would render justice under the Act. Thus, he awarded benefits.

[1] Claimant is the widow of the Miner, who died on July 13, 2012. Director's Exhibit 2 at 775, 791. There is no evidence in the record that the Miner successfully established entitlement to benefits during his lifetime. Thus, Claimant is not entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner 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).

[2] Section 411(c)(4) 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); 20 C.F.R. §718.305.

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

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.[5] 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).

**Modification**

The sole basis for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). An ALJ has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Moreover, a party need not submit new evidence on modification because an ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established the Miner had twenty-one years of qualifying coal mine employment, his usual coal mine job required "medium work," and Employer did not rebut that the Miner had clinical pneumoconiosis arising out of coal mine employment. Decision and Order on Modification at 5-6, 19; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Director submitted a letter stating he would not file a substantive response; however, he noted his disagreement with Employer's position that the ALJ cited to "nonexistent MVV results" on pulmonary function testing. Director's Letter at 1 n.1.

[5] 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 work in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14.

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(i). A miner is considered to have been 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).

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 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ determined the pulmonary function studies[6] and medical opinions,[7] "on their own," do not establish total disability.[8] Decision and Order on Modification at 18; *see* 20 C.F.R. §718.204(b)(2)(i), (iv). However, he found "the treatment records contain ample information from which I can infer the Miner was totally disabled due to his dyspnea, hypoxia, shortness of breath, [chronic obstructive pulmonary disease (COPD)], and respiratory failure." Decision and Order on Modification at 7-18. Thus, the ALJ found

[6] The ALJ indicated that all of the pulmonary function studies in the record were performed during treatment and are contained in the Miner's treatment records. Decision and Order at 8. He found the November 21, 2011 and January 19, 2012 studies "not reliable" and therefore did not consider them in evaluating total disability. *Id*. at 9; Director's Exhibit 2 at 688, 735. Conversely, he found studies dated November 3, 2006, October 18, 2010, March 23, 2011, and March 16, 2012, are "reliable" and "probative" as to whether the Miner was totally disabled at the time of his death. Decision and Order on Modification at 9; Director's Exhibit 2 at 691, 711, 715, 719-22. He noted some of the studies "show extremely low MVV levels" but "no [pulmonary function study] is qualifying for disability." Decision and Order on Modification at 10.

[7] The ALJ stated that although Drs. Perper, Koura, Caffrey, Turner, and Dennis submitted medical or autopsy reports, they did not provide opinions as to whether the Miner had a totally disabling respiratory or pulmonary impairment. Decision and Order on Modification at 15; Director's Exhibit 2 at 119-21, 287, 330, 553-55, 764. The ALJ gave less weight to Dr. Castle's opinion because the physician did not adequately explain how the Miner could perform the exertional requirements of his usual coal mine work as a mine foreman given his low MVV on pulmonary function testing and physical limitations and did not explain how he relied on pulmonary function studies, which he believed to be invalid, to determine the Miner's pulmonary condition was normal. Decision and Order on Modification at 15-17; Director's Exhibit 2 at 123-36. The ALJ gave little to no weight to Dr. Roggli's opinion, diagnosing a mild obstructive impairment that was not totally disabling, as he was not aware of the exertional requirements of the Miner's usual coal mine work and stated he would "defer to a pulmonologist" concerning whether the Miner was totally disabled. Decision and Order on Modification at 17-18, *quoting* Director's Exhibit 2 at 97. Consequently, the ALJ determined none of the physicians provided a well-reasoned or well-documented opinion on total disability. Decision and Order on Modification at 18.

[8] The ALJ found the record did not contain any blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure and therefore Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order on Modification at 18.

Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and considering the evidence as a whole. Decision and Order on Modification at 18.

Employer contends the ALJ erred in relying on the Miner's symptoms to conclude he was totally disabled as there are no qualifying objective tests or medical opinions diagnosing total disability. Specifically, Employer argues the ALJ mischaracterized the pulmonary function study evidence by citing nonexistent MVV values[9] which he described as showing respiratory "abnormalities." Employer's Brief at 7, *citing* Decision and Order on Modification at 15.

Contrary to Employer's contention, the ALJ accurately found that the Miner's MVV was only sixty-nine percent of predicted on the October 18, 2010 pulmonary function study, fifty-one percent of predicted on the March 23, 2011 study, and thirty-five percent of predicted on his March 16, 2012 study. Decision and Order on Modification at 15; Director's Exhibit 2 at 714, 718, 722. We see no error in the ALJ's permissible inference that these percentages reflect respiratory or pulmonary abnormalities. *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252 (4th Cir. 2016) (Board cannot substitute its inferences for those of the ALJ but must limit its review to whether the ALJ's factual findings are supported by substantial evidence, i.e., such evidence as a reasonable mind could accept as supporting a conclusion).

The ALJ also rationally explained his conclusion as to why the Miner's treatment records support a finding of total disability. The ALJ considered hundreds of pages of treatment notes and summarized them in chronological order as they related to the progression of Claimant's cardiopulmonary condition prior to his death. Decision and Order on Modification at 10-15. Overall, the ALJ noted the Miner suffered from "dyspnea, COPD, wheezing, and chronic shortness of breath, all of which were repeatedly documented in the treatment records." *Id*. at 17.

In particular, the ALJ noted the Miner had a history of shortness of breath and dyspnea as far back as November 2006. Decision and Order on Modification at 10. He accurately noted the Miner was treated for shortness of breath multiple times, prescribed short acting beta-agonist albuterol and Advair, and diagnosed with dyspnea at rest "at least

[9] Employer mistakenly asserts the ALJ relied on peak expiratory flow (PEF) measurements as opposed to actual MVV values. Employer's error appears to stem from the fact that it is citing to the wrong pages in the record – it erroneously indicated that the ALJ provided the MVV values for the October 18, 2010, March 23, 2011, and March 16, 2012 studies at Director's Exhibit 2 at 734, 738, 742. *See* Employer's Brief at 7. The MVV values, however, are contained at Director's Exhibit 2 at 714, 718, 722.

ten times" and COPD "at least twice." *Id*. at 14; Director's Exhibit 2 at 333, 385, 416, 425, 688, 693, 698, 700, 702, 730, 745-46, 748. Relying on the most recent March 16, 2012 pulmonary function study, the ALJ found that the Miner had a mild obstructive impairment but also had significantly abnormal MVV results, as discussed above.[10] Decision and Order on Modification at 15.

The ALJ also properly addressed the Miner's "exertional limitations," which included being able to walk only one hundred feet and symptoms of dyspnea that could last all day. Decision and Order on Modification at 14; Director's Exhibit 2 at 378, 700. Evaluating these factors in conjunction with the "medium manual labor" required of the Miner's usual coal mine work as a mine foreman, he permissibly found "the treatment notes and hospitalization records[, including the objective studies contained within,] support the conclusion that the Miner was totally disabled from a respiratory or pulmonary impairment." *Id*. at 15; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

Further, because we can discern the ALJ's rationale underlying his total disability finding, we are not persuaded by Employer's argument that his determination does not satisfy the Administrative Procedure Act (APA).[11] *Wojtowicz v. Duquesne Light Co*., 12

[10] On the March 16, 2012 pulmonary function study, there is a notation of "PREMED – Mild Obstruction." Director's Exhibit 2 at 711. Employer contends Dr. Koura reviewed the data from this study and found no obstructive or restrictive impairment. Employer's Brief at 8, *citing* Director's Exhibit 2 at 734. However, the exhibit Employer cites is a review of a radiology report. In addition, the medical records from Dr. Koura only encompass the time period from November 30, 2011 to January 19, 2012. There is no mention of the March 16, 2012 study or whether the Miner had a totally disabling respiratory impairment in Dr. Koura's October 2, 2012 letter. Director's Exhibit 2 at 687-98, 764. Further, Dr. Koura is employed by the Kentucky Lung Clinic while the March 16, 2012 study was conducted at the St. Charles Respiratory Center in Virginia. *Id*. at 711-14. Thus, we find no basis in the record to support Employer's assertion that Dr. Koura reviewed the March 16, 2012 study, or to otherwise contradict the ALJ's determination that the March 16, 2012 pulmonary function study supports that the Miner had a mild obstructive impairment.

[11] The APA provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or

BLR 1-162, 1-165 (1989); Employer's Brief at 5-6, 10-11; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation under the APA is satisfied).

We consider Employer's general contentions of error to be a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Because substantial evidence supports the ALJ's finding that the Miner had a totally disabling respiratory or pulmonary impairment,[12] we affirm his determination that Claimant invoked the Section 411(c)(4) presumption and established modification based on a mistake in a determination of fact. 20 C.F.R. §725.310; Decision and Order on Modification at 18-19, 26. We further affirm, as unchallenged, the ALJ's finding that granting modification would render justice under the Act. *Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 25.

discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[12] While Employer generally asserts that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption, it does not identify any specific errors committed by the ALJ in reaching that determination. Employer's Brief at 2, 11. We therefore affirm the ALJ's findings that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(2); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Decision and Order on Modification at 24.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge