U.S. Department of Labor

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

BRB No. 19-0515 BLA

VIRGINIA MELTON (Widow of PAUL DOUGLAS MELTON) Claimant-Petitioner v. TRINITY COAL CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/12/2021 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Virginia Melton, Wooten, Kentucky.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

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

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Joseph E. Kane's Decision and Order Denying Benefits (2017-BLA-06225) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on November 14, 2016.[2]

The administrative law judge credited the miner with thirty-seven years of surface coal mine employment in conditions substantially similar to an underground mine but found Claimant did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found Claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). He also found that because the record lacks evidence of complicated pneumoconiosis, the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act is inapplicable.[4] 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. Considering whether Claimant could establish entitlement to benefits without a presumption, the administrative law judge determined Claimant established the miner had pneumoconiosis arising out of coal mine employment, but did not establish his death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

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[1] Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on Claimant's behalf that the Board review the administrative law judge's decision, but Ms. Jenkins is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant is the survivor of the miner, who died on August 10, 2016. Director's Exhibit 12. While the miner filed a claim for Kentucky State Workers' Compensation, there is no indication in the record that he filed a claim for federal black lung benefits. *See* Director's Exhibit 21 at 10.

[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.

[4] As the record contains no evidence of complicated pneumoconiosis, we affirm the administrative law judge's finding that Claimant failed to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 4.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.[5]

In an appeal a claimant files without the assistance of counsel, the Benefits Review Board considers whether the Decision and Order Denying Benefits below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

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 was totally disabled if his 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 pulmonary function tests, 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 administrative law judge must weigh the relevant evidence supporting a finding of total disability against the 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 administrative law judge determined Claimant did not establish total disability, as the sole qualifying[7] blood gas study was outweighed by the contrary probative evidence of record. Decision and Order at 4-5.

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[5] We affirm, as unchallenged, the administrative law judge's determinations that the miner worked in qualifying coal mine employment for thirty-seven years and had clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 6-8.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 21 at 8.

[7] A "qualifying" pulmonary function study or blood gas study yields values equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part

The administrative law judge correctly found no qualifying pulmonary function studies[8] and no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 4; Director's Exhibits 16, 17, 19. We therefore affirm his findings Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). See *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005).

The administrative law judge considered blood gas studies dated March 19, 2014, and June 4, 2015, that produced non-qualifying values and a June 16, 2016 blood gas study that yielded qualifying values.[9] Decision and Order at 4; Director's Exhibits 15-17. The administrative law judge permissibly assigned less weight to the June 16, 2016 blood gas study as it was performed during the miner's hospitalization for an acute respiratory illness.[10] 20 C.F.R. §§718.105, 718.204(b)(2)(ii); *Director, OWCP v. Rowe*, 710 F.2d 251,

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718. A "non-qualifying" pulmonary function study or blood gas study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The administrative law judge considered two pulmonary function studies dated March 19, 2014, and June 4, 2015, that resulted in non-qualifying values before and after the administration of bronchodilators. Decision and Order at 4; Director's Exhibits 16, 17. The record however contains an additional pulmonary function study in the miner's treatment records, dated April 30, 2015, which yielded non-qualifying values. Director's Exhibit 19. Because this test supports the administrative law judge's determination that the pulmonary function study evidence does not support a finding of total respiratory disability, his error in not addressing this test is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] The administrative law judge mistakenly stated the date of this blood gas study as June 15, 2016, instead of June 16, 2016. Decision and Order at 4; Director's Exhibit 15. We deem this clerical error harmless. *See Larioni,* 6 BLR at 1278.

[10] This blood gas study is contained in the miner's treatment records, so it is not subject to the quality standard requiring that blood gas studies "must not be performed during or soon after an acute respiratory or cardiac illness." 20 C.F.R. §718.101(b); Appendix C to 20 C.F.R. Part 718. However, the administrative law judge was nevertheless required to determine whether the study can reliably establish total disability. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000) ("Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator must still be persuaded the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.").

255 (6th Cir. 1983); Decision and Order at 4. Thus, we affirm his finding Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge also considered Dr. Broudy's medical opinion and the miner's treatment records. Decision and Order at 5; *see* Director's Exhibits 15, 16, 18;[11] Employer's Exhibit 1. Dr. Broudy opined that the miner had a mild, restrictive ventilatory defect, but was able, from a pulmonary standpoint, to perform the duties of his usual coal mine work. Director's Exhibit 16. During his deposition, Dr. Broudy reiterated his opinion and testified that the miner "did not have [a] total respiratory disability due to any cause." Employer's Exhibit 1 at 10. The administrative law judge found Dr. Broudy's opinion was based on the objective medical studies and correctly found that it did not support a finding of total disability. Decision and Order at 5.

The administrative law judge also found the Miner's treatment records do not discuss whether the Miner suffered from a pulmonary disability. He noted while discharge forms from Saint Joseph London hospital dated September 29, 2015, and December 10, 2015, have the word "disabled" written under the "Employer Information" section, the records did not discuss the basis of this notation or the type of disability. Decision and Order at 5; Director's Exhibits 15 at 47, 82. Thus, the administrative law judge determined that the medical opinion evidence and treatment records do not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 5.

Although no treating physician explicitly opined the miner was totally disabled from a respiratory standpoint, a physician need not phrase his or her opinion in terms of "total disability" to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985) ("[i]t is not essential for a physician to state specifically that an individual is totally impaired . . . ."). In determining whether total respiratory or pulmonary disability has been established, an administrative law judge must consider not only medical opinions phrased in terms of total disability, but those that provide a medical assessment of exertional limitations which may support the conclusion that the miner was totally disabled by a respiratory impairment. *See Poole,* 897 F.2d at 894, 13 BLR at 2-356. Here the Miner's records contain information relevant to his pulmonary condition that was not considered. Based on a pulmonary consultation after a June 15, 2016 blood gas study,

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[11] The administrative law judge inadvertently referred to Director's Exhibits 16 and 18 as Employer's Exhibits 16 and 18. Decision and Order at 5. We deem this clerical error harmless. *See Larioni,* 6 BLR at 1278.

the Miner was placed on Bilevel positive airway pressure (BiPAP) therapy.[12] Director's Exhibit 15. A June 19, 2016 x-ray report, taken while the Miner was in the hospital, contained the notation "History: [r]espiratory distress." *Id.* By the time the Miner was discharged on June 22, 2016, he had improved so that BiPAP therapy was no longer required but "would need home oxygen." *Id.* The final discharge diagnosis was "[a]cute hypoxemic respiratory failure secondary to atelectasis of the lungs." *Id.*

In addition, we note the administrative law judge did not consider Dr. Minami's autopsy report or Dr. Caffrey's opinion when evaluating whether the Miner had a totally disabling respiratory impairment. *See* Decision and Order at 4-5. Dr. Minami observed "features consistent with mild simple coal worker's [*sic*] pneumoconiosis" and "mild emphysematous changes." Director's Exhibit 14. Dr. Caffrey also stated the Miner had "a mild degree of simple coal workers' pneumoconiosis" but opined it "would not have caused him any discernible pulmonary disability." Employer's Exhibit 2.

We make no judgment as to whether this evidence meets or could meet the requirements for establishing total disability. However, where the administrative law judge fails to consider relevant evidence, and thereby fails to make appropriate factual findings and credibility determinations, the proper course for the Board is to remand the case for such determinations, instead of filling in the gaps in the administrative law judge's decision. *Rowe*, 710 F.2d at 255. Consequently, we must vacate the administrative law judge's determination that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and overall at 20 C.F.R. §718.204(b)(2), and thus also failed to invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis.

On remand, the administrative law judge must consider all of the relevant evidence, resolve conflicts in the evidence, and properly explain his findings and determinations on the issue of total disability. *See* 30 U.S.C. §923(b); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *Gray v. SLC Coal Co.*, 176 F.3d 382, 388 (6th Cir. 1999); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416 (6th Cir. 1997); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Further, the administrative law judge must weigh together all of the evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, to determine whether the evidence establishes total disability at 20 C.F.R. §718.204(b)(2). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on*

[12] The records indicate the Miner reported he did not previously use oxygen or BiPAP therapy at home, did not have chronic obstructive pulmonary disease, or use inhalers of any kind. Director's Exhibit 15.

recon., 9 BLR 1-236 (1987)(en banc). The Sixth Circuit has held that the presence in the record of "medical evidence on the issue of disability due to a respiratory or pulmonary impairment" precludes the use of a widow's lay testimony to invoke the presumption of death due to pneumoconiosis. *Coleman v. Director, OWCP*, 829 F.2d 3, 5 (6th Cir. 1987) (under a presumption with a lay testimony provision analogous to 20 C.F.R. §718.305(b)(4)); *Sword v. G & E Coal Co.*, 25 BLR 1-127, 131 -32 (2014)(Hall, J., dissenting), quoting *Coleman*, 829 F.2d at 5; *see also Eldridge v. Dan-Del Coal Co., Inc.*, No. 95-4066, 82 F.3d 417 (Table), 1996 WL 172125, slip op. at 2 (6th Cir., Apr. 11, 1996) (unpub.), citing *Coleman*, 829 F.2d at 5 (although "claimant [widow] argue[d] that the ALJ did not fairly consider the widow's testimony that the miner suffered from shortness of breath and pulmonary discomfort prior to his death . . . , the ALJ did not err by refusing to assign great weight to the widow's testimony, because there was sufficient medical evidence, without the lay opinion, to make a determination of whether the miner died due to pneumoconiosis."); *Tyree v. Director, OWCP*, No. 88-3513, 863 F.2d 884 (Table), 1988 WL 128030 (6th Cir, Dec. 2, 1988)(unpub. Order) citing *Coleman*, 829 F.2d at 5 ("The use of lay evidence . . . was precluded due to the existence of some medical evidence").[13]

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[13] The Act provides that "[w]here there is no medical or other relevant evidence in the case of a deceased miner, such affidavits, from persons not eligible for benefits in such case . . . shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis." 30 U.S.C. §923(b). The implementing regulation at 20 C.F.R. §718.305(b)(4) clarifies that:

> [I]n the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits . . . if the claim were approved.

20 C.F.R. §718.305(b)(4).

While our colleague notes that 30 U.S.C. §923(b) requires that "all relevant evidence shall be considered, including, where relevant . . . [the miner's] wife's affidavits," Section 923(b) further distinguishes what evidence may be considered "in the case of a deceased miner." Our colleague characterizes the Sixth Circuit's decision in *Coleman* and the Board's decision in *Sword* as merely holding that, in the case of a deceased miner, a widow's lay testimony could not form the *sole* basis for a total disability finding in light of the existence of medical evidence on the issue. However, the Sixth Circuit agreed in

If on remand the administrative law judge again finds Claimant did not establish total disability, as discussed *supra*, he may reinstate the denial of benefits. However, if the administrative law judge determines Claimant established the Miner was totally disabled at the time of his death, Claimant will have invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.305(b), (c). He must then evaluate whether Employer rebutted the presumption by establishing the Miner did not

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Coleman "that the relevant inquiry" as to whether a widow's lay testimony could be considered to invoke the presumption is predicated on "whether any medical evidence exists on the issue of disability . . . due to a respiratory or pulmonary impairment." *Coleman*, 829 F.2d at 5. Thus, under both Section 923(b) of the Act and Section 718.305(b)(4), if there is no relevant medical evidence in the case of a deceased miner, total disability due to a respiratory or pulmonary impairment can then be established based solely on lay testimony from persons not eligible for benefits, but cannot be established based solely on lay testimony from the miner's widow or other persons eligible for benefits. But if there is relevant medical evidence on the issue of disability due to a respiratory or pulmonary impairment in the case of a deceased miner, lay testimony from the miner's widow or other persons eligible for benefits to invoke the presumption of death due to pneumoconiosis is precluded. *Coleman*, 829 F.2d at 5; *Sword*, 25 BLR at 131 -32.

Further, our colleague's citation to an unpublished decision in *Fuller v. Excel Mining, LLC*, BRB No. 18-0276 BLA (Jan. 14, 2020) (Boggs, J., dissenting) (unpub.) is unavailing, as it failed to apply the appropriate precedent in *Coleman* and *Sword* in that case that also arose within the jurisdiction of the Sixth Circuit. *Coleman* is controlling circuit precedent which the Board is bound to follow in this case, and the Board is also bound by its own precedent in *Sword*. Although our colleague cites to what may appear to be an inconsistent holding from the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-407 (6th Cir. 2019), that case only holds that a widow's relevant testimony must be considered when determining the length of her husband's coal mine employment, but does not address the use of lay testimony to establish total disability due to a respiratory or pulmonary impairment in the case of a deceased miner and the Sixth Circuit's relevant precedent in *Coleman*.

In addition, our colleague's reference to *Hillibush v. U.S. Dep't of Labor*, *Benefits Review Bd.*, 853 F.2d 197, 203-04 (3d Cir. 1988) is also unavailing, as unlike that case, the record in this case contains relevant and sufficient medical evidence which the administrative law judge failed to consider on the issue of disability due to a respiratory or pulmonary impairment, which is why this case must be remanded.

have legal and clinical pneumoconiosis or that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2).

Death Due to Pneumoconiosis

In the interest of judicial economy, we will address whether the administrative law judge's findings concerning death causation are supported by substantial evidence. In a survivor's claim where no statutory presumptions are invoked, claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2). Death is considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of the miner's 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 of death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 302-03 (6th Cir. 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003). The administrative law judge determined Claimant established the miner had clinical pneumoconiosis arising out of coal mine employment but did not establish pneumoconiosis was a substantially contributing cause of the miner's death. Decision and Order at 6-9.

With respect to the cause of the miner's death, the administrative law judge considered the Miner's death certificate and the medical opinions of Drs. Broudy and Caffrey.[14] Decision and Order at 8-9. Although the death certificate includes coal workers' pneumoconiosis as an underlying cause of the miner's death, the administrative law judge acted within his discretion in finding it insufficient, in and of itself, to establish pneumoconiosis was a substantially contributing cause of the miner's death because there is no indication the coroner who signed the death certificate possessed any relevant qualifications or personal knowledge specific to the miner to assess the cause of his death.[15]

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[14] The administrative law judge also considered Dr. Minami's report concerning the autopsy he performed on the miner's right lung. Director's Exhibit 14. The administrative law judge accurately noted Dr. Minami diagnosed mild simple coal workers' pneumoconiosis but did not render an opinion on the cause of the miner's death. *Id.*; *see* Decision and Order at 9.

[15] Gregory Walker, whose title is listed as coroner, completed the death certificate. Director's Exhibit 12. He listed the immediate cause of death as arteriosclerotic cardiovascular and coronary artery disease post heart bypass surgery and included chronic kidney disease and coal workers' pneumoconiosis as underlying causes. *Id*. He also noted

See Addison v. Director, OWCP, 11 BLR 1-68, 1-70 (1988); Decision and Order at 8; Director's Exhibit 12. Further, the administrative law judge found the evidence does not specify what evidence the coroner relied on when rendering his final diagnoses, especially given that the miner's treatment records leading up to his death mention only coronary artery disease and renal failure and not pneumoconiosis. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 (4th Cir. 2000); Decision and Order at 8-9; Director's Exhibits 12, 15. In addition, the administrative law judge rationally found the opinions of Drs. Broudy and Caffrey that pneumoconiosis played no role in the miner's death were insufficient to establish death causation by pneumoconiosis as both physicians attributed the miner's death to medical issues unrelated to coal workers' pneumoconiosis.[16] *See Williams*, 338 F.3d at 518; *Carpeta v. Mathies Coal Co.,* 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 9; Director's Exhibits 16, 18; Employer's Exhibits 1, 2. Because the administrative law judge accurately determined there is no evidence of record that pneumoconiosis was a substantially contributing cause of the miner's death, we affirm his determination Claimant did not establish the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. *See Williams*, 338 F.3d at 518; Decision and Order at 9. Thus, if on remand, the administrative law judge again finds Claimant failed to establish total disability, he may reinstate the denial of benefits. *See Trumbo v. Director, OWCP*, 17 BLR 1-85, 1-87-88 (1993).

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hypertension, insulin dependent diabetes, and past cerebrovascular accidents as contributing causes. *Id*.

[16] Dr. Broudy opined the Miner's death was caused by "complications of his long history of brittle insulin-dependent diabetes mellitus" and he had "renal failure requiring dialysis, coronary artery disease and neuropathy." Director's Exhibit 18; Employer's Exhibit 1. Dr. Broudy further stated there was no evidence the Miner died as a result of coal workers' pneumoconiosis or the inhalation of coal mine dust. *Id*. Dr. Caffrey opined the Miner's "simple coal workers' pneumoconiosis… did not cause, contribute to or hasten his death." Employer's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in my colleagues' decision to remand this claim for the administrative law judge to consider all relevant evidence. I write separately, however, to express my disagreement with the majority's purported exclusion of Claimant's testimony on the question of whether the Miner was totally disabled and its assessment of which evidence is relevant to that issue.

The critical issue in this case is whether Virginia Melton, widow of the Miner, Paul Melton, can prove that he had "at the time of his death, a totally disabling respiratory or pulmonary impairment," which is defined as an inability to perform his "usual coal mine work" or "gainful" and "comparable" work. 20 C.F.R. §§718.204(b)(1), 718.305(b)(1)(iii). If so, she may be eligible to invoke the Section 411(c)(4) presumption

that his death was due to pneumoconiosis, thus shifting the burden to Employer to prove either that he did not have pneumoconiosis or that pneumoconiosis played "no part" in his death. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2).

As the majority indicates, the record contains medical evidence on this issue in the form of treatment records establishing that on June 15, 2016, less than two months before his death on August 10, 2016, Mr. Melton was hospitalized with "acute hypoxemic respiratory failure secondary to atelectasis of the lungs," i.e., a collapsed lung,[17] "and probable obstructive sleep apnea and hypoventilation syndrome." Director's Exhibit 15 at 3. He was treated with a bilevel positive airway pressure (BiPap) ventilator and "oxygen at 7 to 8 L[itres]." *Id*. at 7. At discharge on June 22, 2016, Dr. Khan noted Mr. Melton's condition had improved such that he "did not require BiPAP support anymore" but he "would need home oxygen" because "his oxygen saturation . . . dropped to below 88% on room air." *Id*. at 4. The majority also accurately notes that an autopsy reveals Mr. Melton suffered from pneumoconiosis, emphysema, and fibrosis, and his death certificate identifies pneumoconiosis as an underlying cause of death. Director's Exhibits 12, 14; Employer's Exhibit 2.

Mrs. Melton also testified about her husband's respiratory condition. She stated "he's had breathing problems for a long time," including during his work as safety director for Employer. Director's Exhibit 21 at 16, 27. He suffered shortness of breath, complained he could not breathe, and "would smother." *Id*. at 35, 43; *see* Hearing Transcript at 17-18, 25. Consistent with the treatment records, she testified he was hospitalized for breathing problems "during the latter part of his life" and "was on oxygen at the end." Director's Exhibit 21 at 30; *see* Hearing Transcript at 26. While hospitalized, "they couldn't get him off the vent[ilator]. He could hardly breathe on his own." Director's Exhibit 21 at 38. Six months before his death, she and Mr. Melton had to sell their horses because he could no longer help take care of them. *Id*. at 49 – 50. He could only "sit in the car and watch" her feed them because "he didn't have enough breath to even walk to even pet on his horses." *Id*. She stated he could not walk or do any type of exercise, household chores, or yard work. *Id*. at 53 – 54. On a "normal day," he "watched [television] all day long," but "at the end . . . he slept all the time." *Id*. "At the end," he was "so weak that he couldn't move. You could hear him breathe from one end of the house to the other." *Id*. at 55.

The majority rightfully holds that the administrative law judge erred in failing to consider that Mr. Melton's treatment records can meet the requirements of 20 C.F.R. §718.204(b)(1) despite not being phrased specifically in terms of "total disability." *See*

[17] Three chest x-rays conducted during Mr. Melton's hospitalization confirm the collapsed lung diagnosis. *Id*. at 36, 38, 42.

Poole v. Freeman United Coal Mining Co., 897 F.2d 888, 894 (7th Cir. 1990). To state the obvious, suffering from hypoxemic respiratory failure due to a collapsed lung, obstructive sleep apnea, and hypoventilation syndrome; being placed on a ventilator; and requiring home oxygen due to an inability to maintain oxygen saturation above 88 percent on room air suggests Mr. Melton did not have the respiratory capacity to perform his previous work as a coal miner. 20 C.F.R. §718.204(b)(2)(iv) (reasoned medical judgment, supported by acceptable clinical and diagnostic techniques, can establish total disability); *see* Director's Exhibit 15.

Of concern, however, is the majority's statement that the existence of medical evidence in the record "precludes the use" of Mrs. Melton's lay testimony to establish total disability and thus invoke the Section 411(c)(4) presumption. *See supra* n. 13. To the extent the majority intends to suggest that the administrative law judge cannot credit her testimony *at all* on the issue of total disability, it errs. The regulation underpinning the majority's conclusion provides the following guidelines on the use of lay testimony:

> In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based *solely* upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

20 C.F.R. §718.305(b)(4) (emphasis added); *see also* 20 C.F.R. §718.204(d)(3) (identical guidelines within the definition of total disability); 30 U.S.C. §923 (similar to first clause of 20 C.F.R. §718.305(b)(4); if no medical evidence exists in the claim of a deceased miner, affidavits of persons not eligible for benefits "shall be considered to be sufficient" to establish total disability or death due to pneumoconiosis).

Any inference that the administrative law judge cannot consider Mrs. Melton's testimony when evaluating whether her husband was totally disabled is contrary to the plain language of the regulation. On its face, the regulation prohibits "such a finding" based "solely" upon the testimony of an individual, like Mrs. Melton, who is eligible to receive benefits in the claim; it does not state such evidence lacks relevance or cannot be considered at all in conjunction with the medical evidence of record. 20 C.F.R. §718.305(b)(4). In promulgating the regulation, the Department confirmed that the regulation's purpose is to deem affidavits or testimony "from individuals who would be entitled to benefits . . . [in]sufficient, *by themselves*, to support a finding of total disability

due to a respiratory or pulmonary impairment." 77 Fed. Reg. 19,456, 19,462 (Mar. 30, 2012) (emphasis added).

Here, of course, Mrs. Melton's testimony need not form the "sole" basis for a finding of total disability as her testimony largely confirms the significant respiratory problems documented in Mr. Melton's treatment records, including his hospitalization for respiratory failure less than two months before his death and the resulting physical limitations and need for supplemental oxygen at the end of his life. *See, e.g., Fuller v. Excel Mining, LLC*, BRB No. 18-0276 BLA (Jan. 14, 2020) (Boggs, J., dissenting) (unpub.) (affirming administrative law judge's crediting of medical opinion, treatment records, and widow's testimony to find the deceased miner totally disabled);[18] *see also Poole,* 897 F.2d at 894 (administrative law judge must consider exertional limitations when evaluating total disability).

The two cases cited by the majority do not support exclusion of Mrs. Melton's testimony. The Sixth Circuit's decision in *Coleman*, and the Board's decision in *Sword* (which, in turn, relied on *Coleman*), held that a widow's lay testimony could not form the *sole* basis for a total disability finding in light of the existence of medical evidence on the issue. *See Coleman v. Director, OWCP*, 829 F.2d 3, 5 (6th Cir. 1987) (under a lay testimony provision comparable to 20 C.F.R. §718.305(b)(4), widow's affidavit alone could not establish total disability because the record contains medical evidence of "the nonexistence of a lung impairment"); *Sword v. G & E Coal Co*., 25 BLR 1-127, 131-32 (2014)(Hall, J., dissenting) (where the administrative law judge discounted all of the

[18] In *Fuller*, the Board affirmed an administrative law judge's finding of total disability based on Dr. Perper's opinion, treatment records, and the widow's testimony that the miner "couldn't breathe," would "smother," and was on supplemental oxygen "at the end." *Fuller*, BRB No. 18-0276 BLA, slip op. at 4-10. With respect to the widow's testimony, the panel unanimously held the administrative law judge's crediting thereof did not run afoul of 20 C.F.R. §718.305(b)(4) because his total disability finding was not based "solely" on her testimony. *Id*. at 9 n.10. While the dissenting judge would have remanded for the administrative law judge to reconsider Dr. Perper's opinion, she raised no concerns about his partial reliance on the widow's testimony and otherwise agreed with the majority's conclusions "[i]n all other respects." *Id*. at 13-16. The majority's suggestion in this case that *Fuller* was wrongly decided pursuant to *Coleman* and *Sword* constitutes a belated (and unconvincing) attempt to re-litigate *Fuller*.

medical evidence pertaining to total disability, he could not rely "solely" on the widow's testimony to find the miner had a totally disabling respiratory impairment).

The holding in *Coleman* arose in the context of a widow's argument that her testimony alone could establish total disability because "the medical evidence of record is irrelevant," while the decision in *Sword* addressed an administrative law judge's finding of total disability based "solely" on a widow's testimony. *Coleman*, 829 F.2d at 4; *Sword*, 25 BLR at 131-32. Neither decision purported to hold that a widow's testimony could not be credited *alongside* medical opinions and treatment records,[19] and neither undermines the statutory requirement that:

> In determining the validity of claims under this part, *all relevant evidence shall be considered*, including, where relevant, medical tests such as blood

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[19] In subsequent unpublished decisions, the Sixth Circuit has routinely applied *Coleman* in a manner consistent with this dissent and the regulations at 20 C.F.R. §§718.204(d)(3) and 718.305(b)(4), i.e., as prohibiting a finding of total disability based "solely" or "alone" upon lay testimony when there is medical evidence in the record. *See White v. Eastover Min. Co.*, 66 F.3d 327, 327 (Table) (6th Cir. 1995)(unpub.) ("[W]hen medical evidence exists regarding the issue of a miner's pulmonary condition, a finding of pneumoconiosis or total disability cannot be made *solely* by relying on lay testimony or statements.") (emphasis added); *Daniels v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 21 F.3d 427, 427 (Table) (6th Cir. 1994)(unpub.) ("[L]ay testimony, *alone*, cannot support entitlement to benefits unless no other relevant medical evidence exists.") (emphasis added); *Bartley v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 19 F.3d 18, 18 (Table) (6th Cir. 1994)(unpub.) (Miner's "lay testimony *may be considered in determining whether he is totally disabled*, [but] when medical evidence exists regarding the issue of a miner's pulmonary condition, a finding of total disability cannot be made *solely* by reliance on such lay evidence.") (emphasis added); *Akers v. Corbin Coal Co.*, 989 F.2d 498, 498 (Table) (6th Cir. 1993)(unpub.) ("[W]hen medical evidence exists regarding the issue of a miner's pulmonary condition, a finding of pneumoconiosis or total disability cannot be made *solely* by reliance on a miner's own statements and lay evidence."); *Clark v. S. Ohio Coal Co.*, 956 F.2d 268, 268 (Table) (6th Cir. 1992)(unpub.) ("*[U]ncorroborated* lay evidence . . . could not have satisfied the claimant's burden of proof on the issue of total disability.") (emphasis added); *but see Tyree v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 863 F.2d 884, 8884 (Table) (6th Cir. 1988)(unpub.) ("The use of lay evidence . . . was precluded due to the existence of some medical evidence."). In other cases, the court has cited *Coleman* simply for the proposition that an administrative law judge is not required to credit lay testimony over conflicting medical evidence. *See Eldridge v. Dan-Del Coal Co.*, 82 F.3d 417, 417 (Table) (6th Cir. 1996)(unpub.) ("[T]he [administrative law judge] did not err by refusing

> gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, *or his wife's affidavits*, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

30 U.S.C. §923(b) (emphasis added);[20] *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires

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to assign great weight to the widow's testimony, because there was sufficient medical evidence, without the lay opinion, to make a determination of whether the miner died due to pneumoconiosis."); *Winebarger v. Ohio Amco, Inc.*, 959 F.2d 237, 237 (Table) (6th Cir. 1992)(unpub.) ("[I]t is . . . within the [administrative law judge's] discretion to rely more heavily on medical evidence, rather than other types of evidence of record, such as lay testimony and years of coal mining employment, when such medical evidence cannot establish the claimant's burden of proving pneumoconiosis or total disability.").

[20] The majority implies that a widow's testimony might not be relevant *for any purpose* in a claim involving a deceased miner because Section 923(b) "distinguishes what evidence may be considered 'in the case of a deceased miner.'" *See supra* at 7 n.13. Its argument ignores, however, that the requirement to consider "all relevant evidence," including a miner's wife's testimony, x-rays, medical tests, etc. applies to all "claims under this part." *See, e.g., Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-407 (6th Cir. 2019) (Board violated requirement to consider "all evidence" by "cavalierly" ignoring widow's relevant testimony regarding the length of her husband's coal mine employment). The clause specifying that "other appropriate affidavits" and "other supportive materials" may also be relevant "in the case of a deceased miner" in no way limits the earlier requirement to consider all relevant evidence in all claims.

Nor is the relevance of a widow's testimony undermined by the provision stating that "affidavits, from persons not eligible for benefits . . . shall be considered to be sufficient" to establish entitlement to benefits. 30 U.S.C. §923(b). While that provision allows the widow of a deceased miner to establish entitlement based on other persons' affidavits when no medical evidence exists, it does not answer the question in this case of whether a widow's testimony can be credited alongside other evidence to establish entitlement. *See Dempsey v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 811 F.2d 1154, 1159 (7th Cir. 1987), *quoting* S.Rep. No. 209, 95th Cong., 1st Sess. 11-12 (1977) (Purpose of amended Section 923(b) is "to provide for the legal sufficiency of affidavits in the case of a deceased miner because '[e]vidence available to a miner's widow is often incomplete, inadequate, or non-existent.'"). The implementing regulation makes clear that a finding of entitlement must not be based "solely" on the testimony of a

remand); *Fife v. Director*, 888 F.2d 365 (6th Cir. 1989) (noting importance of lay testimony when the miner is deceased but holding lay testimony in a living miner's claim insufficient to establish total disability "without corroborating medical evidence"); *U.S. Coal, Inc. v. Melton*, 121 F.3d 710, 710 (Table) (6th Cir. 1997)(unpub.) (relying on *Fife* and 20 C.F.R. §718.204(d)(2) to hold lay testimony insufficient to establish total disability "absent corroborating medical evidence"); *see also Hillibush v. U.S. Dep't of Labor*, *Benefits Review Bd*., 853 F.2d 197, 203 – 204 (3d Cir. 1988) (criticizing Board's overreliance on *Coleman* to exclude widow's testimony when "the record contains *any* piece of medical evidence, even insufficient medical evidence," as the medical evidence in *Coleman* "was not merely insufficient to establish the presence of lung disease, but was, in fact, an affirmative determination that no lung disease was present"); *Mancia v. Director, OWCP*, 130 F.3d 579, 588 (3d Cir. 1998) (Regulation requiring "competent medical evidence" to establish entitlement "does not allow the ALJ to ignore uncontradicted relevant lay testimony where it corroborates the medical testimony of a treating physician and is consistent with the medical records.").

While diminishing the value of Mrs. Melton's probative testimony, the majority instructs the administrative law judge to weigh certain evidence that, if considered in context, actually loses its relevance. For example, it identifies Dr. Caffrey's opinion that Mr. Melton had clinical pneumoconiosis but it was too mild to cause "any discernable pulmonary disability." *See supra* at 6, *quoting* Employer's Exhibit 2 at 5. This statement, however, addresses disability causation, i.e., whether pneumoconiosis caused Mr. Melton's impairment, *see* 20 C.F.R. §718.204(c), not the relevant question at 20 C.F.R. §718.204(b) of whether he had a totally disabling impairment due to any cause.

Dr. Caffrey's opinion falls short in other respects. In addition to clinical pneumoconiosis, he observed emphysema and fibrosis on autopsy but did not offer an opinion on whether they were totally disabling or were caused by coal mine dust exposure, i.e., legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). Further, his understanding of Mr. Melton's medical history is incomplete. While he accurately notes "the record from [June 22, 2016] from St. Joseph London Hospital" reveals treatment for "abdominal pain secondary to peritoneal dialysis," he neglects to acknowledge (or was unaware) that Mr.

person who would be eligible for benefits, but in no way precludes consideration of a widow's testimony in conjunction with other evidence of record. 20 C.F.R. §718.305(b)(4).

Melton was treated for hypoxic respiratory failure during that same hospitalization. Employer's Exhibit 2 at 5.

The majority also identifies Dr. Broudy's opinion that Mr. Melton has a mild restrictive ventilatory impairment, but it is not totally disabling. *See supra* at 4-5; Director's Exhibits 15, 16, 18; Employer's Exhibit 1. Left unsaid, however, is that Dr. Broudy specifically limited his total disability assessment to objective testing he conducted in March 2014 and Dr. Westerfield conducted in June 2015, predating Mr. Melton's hospitalization for respiratory failure and need for supplemental oxygen by at least a year. *See* Director's Exhibit 16; Employer's Exhibit 1 at 8-9, 11, 13. Dr. Broudy acknowledged Mr. Melton's subsequent treatment for acute hypoxemic respiratory failure and diagnoses of obstructive sleep apnea and hypoventilation syndrome, but did not address those factors in rendering his total disability opinion. *See* Director's Exhibit 16; Employer's Exhibit 1 at 13-15. Thus, while Dr. Broudy's opinion may not affirmatively support Mrs. Melton's burden to prove total disability, it is equally true that his assessment Mr. Melton was not totally disabled in 2014 and 2015 does not undermine the evidence indicating that Mr. Melton was totally disabled "at the time of his death" in 2016. 20 C.F.R. §718.305(b)(1)(iii).

Consequently, while I concur with my colleagues that the administrative law judge must consider all relevant evidence concerning the issue of total disability, I disagree with respect to the majority's characterization of the relevance of the evidence and, in particular, any inference that Mrs. Melton's testimony cannot be considered.

GREG J. BUZZARD
Administrative Appeals Judge