U.S. Department of Labor

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

BRB No. 22-0037 BLA

TOMMY SHUPE (o/b/o HELEN L. SHUPE, Deceased Widow of GEORGE G. SHUPE) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 7/27/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits (2019-BLA-06033) rendered on a survivor's claim[1] filed on March 3, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with at least seventeen years of underground coal mine employment based on the parties' stipulation and found he had a totally disabling pulmonary or respiratory impairment at the time of his death. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Further, she found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding the Miner was totally disabled and therefore erred in finding the Section 411(c)(4) presumption invoked. It further argues the ALJ erred in finding the presumption unrebutted.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

[1] The Miner died on January 11, 2017. Director's Exhibit 18. His widow filed this survivor's claim on March 3, 2017, but she died on July 14, 2018, while it was pending before the district director. Director's Exhibit 19. Claimant, the widow's son, is pursuing the survivor's claim as the executor of her estate. *Id.* Because the Miner never established entitlement to benefits during his lifetime, Claimant is not eligible for derivative survivor's benefits at Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that the 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.

[3] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner had at least seventeen years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

accordance with applicable law.[4] 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 – Total Disability

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, Claimant must establish he "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). 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. 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the medical opinion evidence and the evidence as a whole. Decision and Order at 16.

Prior to evaluating the medical opinion evidence, the ALJ determined the Miner's usual coal mine employment was working as a roof bolter and required heavy labor. Decision and Order at 7; Director's Exhibit 5. We affirm this finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ considered the medical opinions of Drs. Habre and Zaldivar.[5] Dr. Habre examined the Miner on December 2, 2014, and opined he was suffering from respiratory failure, with moderate to severe hypoxemia and chronic bronchitis, and was totally disabled from performing his usual coal mine employment. Director's Exhibit 30. Dr. Zaldivar examined the Miner on February 13, 2013, and opined he had no pulmonary impairment at all. Employer's Exhibit 1. After reviewing additional evidence, he opined the Miner did not have a totally disabling pulmonary impairment but instead had a combination of

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia and Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 7-8.

[5] The ALJ found Dr. Gaziano did not address whether the Miner had a totally disabling pulmonary or respiratory impairment and, therefore, did not consider his opinion when weighing the evidence on the issue. Decision and Order at 15; Director's Exhibit 22.

cardiac and renal diseases that caused "overall respiratory impairment at times when he was fluid overloaded." Employers Exhibit 3. The ALJ found Dr. Habre's opinion was well-documented and reasoned. Decision and Order at 15-16. Conversely, she found Dr. Zaldivar's opinion unpersuasive as he conflated the issues of total disability and causation. *Id*.

Employer argues the ALJ erred in her consideration of the medical opinion evidence. Employer's Brief at 5-7. We disagree.

Employer initially argues the ALJ did not "explain how [Dr. Habre's] opinion can be credited" when he found the Miner totally disabled based upon the arterial blood gas studies, contrary to the ALJ's finding that the blood gas study evidence does not establish total disability.[6] Employer's Brief at 5. However, the ALJ was not required to discredit Dr. Habre's opinion as being in conflict with her finding that the overall weight of the blood gas studies was non-qualifying. Rather, total disability can be established with a reasoned medical opinion even in the absence of qualifying pulmonary function tests or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment). Dr. Habre diagnosed the Miner with a totally disabling respiratory impairment based on valid resting blood gas values that he explained demonstrated respiratory failure, as well as symptoms of chronic bronchitis requiring the use of a bronchodilator, shortness of breath, wheezing, coughing, and significant exertional dyspnea. Director's Exhibit 30 at 5. He explained the Miner's "significant pulmonary impairment" would render him unable to perform his work as a continuous miner operator and roof bolter. *Id.* The ALJ determined that Dr. Habre was well qualified to offer an

[6] While the ALJ found that the preponderance of the arterial blood gas studies do not establish total disability, her findings relied on an erroneous determination that the December 2, 2013 study was non-qualifying. Decision and Order at 9-10; Director's Exhibit 30; Claimant's Response Brief at 4. This error is harmless, however, as she nevertheless found the Miner totally disabled. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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).

opinion and understood the exertional requirements of the Miner's usual coal mine employment; she permissibly found Dr. Habre offered a well-reasoned and documented opinion that the Miner was totally disabled from a pulmonary standpoint from performing his usual coal mine employment. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 15-16.

We further reject Employer's argument that the ALJ erred in discrediting Dr. Zaldivar's opinion on the basis that he conflated total disability and disability causation. Employer's Brief at 5-7.

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *see also* 20 C.F.R. §718.204(a) ("If . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis."). Dr. Zaldivar admitted that the Miner had an "overall respiratory impairment" and agreed with Dr. Habre's finding of hypoxemia indicated on the arterial blood gas studies. Employer's Exhibit 3 at 9. He nevertheless opined the Miner was not totally disabled from a pulmonary standpoint because his hypoxemia was due to the presence of excess fluid in the lungs caused by cardiac and renal diseases. *Id.* at 10. Thus, Dr. Zaldivar failed to address whether the overall respiratory impairment he diagnosed, notwithstanding its cause, was totally disabling or prevented the Miner from performing his last coal mine job. Therefore, substantial evidence supports the ALJ's finding that Dr. Zaldivar conflated the issues of total disability and disability causation, and she therefore permissibly discredited his opinion. *See* 20 C.F.R. §718.204(b)(2); *Bosco*, 892 F.2d at 1480-81; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 16. Accordingly, we affirm her determination that Claimant established total disability through the medical opinion evidence and the evidence as a whole. *See* 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16.

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

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal

nor clinical pneumoconiosis,[7] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

The ALJ found the evidence establishes clinical and legal pneumoconiosis, and therefore found Employer failed to rebut the existence of either disease. Decision and Order at 23-30. As Employer does not challenge these findings, they are affirmed. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(2)(i); Decision and Order at 30.

The ALJ next considered whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 30-31. She limited her consideration to Dr. Zaldivar's opinion that the Miner's death was due to cardiac and renal causes unrelated to his occupation. Decision and Order at 30-31. Contrary to Employer's arguments, the ALJ permissibly found his opinion, that the Miner's death was unrelated to legal pneumoconiosis, entitled to little weight as he failed to diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the Miner had the disease. *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); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (doctor's opinion on causation may not be credited unless there are "specific and persuasive reasons" for concluding his view on causation is independent of his mistaken belief the miner did not have pneumoconiosis); Employer's Brief at 9-10.

We further reject Employer's argument that the ALJ's failure to explain the weight accorded Dr. Cinco's opinion requires remand. Employer's Brief at 7-8. Dr. Cinco opined the Miner's death was due to pneumonia and his "macular pneumoconiosis" did not contribute to his death "per se."[8] Director's Exhibit 51 at 15. Because the physician only

[7] "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 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).

[8] Dr. Cinco, the Miner's autopsy prosector, observed the presence of anthracotic pigmentation in the Miner's lungs accompanied by microscopic macular lesions consistent with coal workers' pneumoconiosis. Director's Exhibits 32; 51 at 13-15. He explained the

addressed whether the Miner's clinical pneumoconiosis contributed to his death, his opinion does not satisfy Employer's burden to establish legal pneumoconiosis played "no part" in the Miner's death. 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Moreover, given that he failed to diagnose legal pneumoconiosis, the same deficiency the ALJ identified in Dr. Zaldivar's opinion on death causation is present in Dr. Cinco's opinion; thus the ALJ's reason for discrediting Dr. Zaldivar's opinion is equally applicable to Dr. Cinco's. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one."); *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 558 (7th Cir. 1991); *Epling*, 783 F.3d at 504-05; *Ogle*, 737 F.3d at 1074; *Toler*, 43 F.3d at 116. Consequently, error, if any, in the ALJ's failure to consider Dr. Cinco's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's death was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 31. Further, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and thus affirm the award of benefits. 30 U.S.C. §921(c)(4) (2018).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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macular lesions are associated with the focal dilation of the alveoli and, as a result, did not impact air exchange. Director's Exhibit 51 at 15. When asked whether the macular pneumoconiosis caused or aggravated the Miner's death, he responded "not per se." *Id.* He also opined the acute focal pneumonia he found was "probably a terminal event." *Id.* at 15-16; Director's Exhibit 32 at 1-2.