U.S. Department of Labor

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

BRB Nos. 21-0298 BLA
and 21-0299 BLA

LULA ANN BOLLING (o/b/o and Widow of DONALD BOLLING) Claimant-Respondent v. SAPPHIRE COAL COMPANY and BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/23/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

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

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim (2014-BLA-05208, 2016-BLA-05172) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on January 24, 2013,[1] and a survivor's claim filed on September 8, 2015.[2]

The ALJ found Claimant established the Miner had at least fifteen years of surface coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ also

[1] Claimant is the widow of the Miner, who died on August 6, 2015. Miner's Claim (MC) Director's Exhibit 2. She is pursuing both his claim and her survivor's claim. MC Director's Exhibit 6.

[2] ALJ Christopher Larsen previously awarded benefits in both the miner's and survivor's claims after holding a formal hearing. In response to Employer's appeal in that case, the Benefits Review Board remanded the matter to the Office of Administrative Law Judges (OALJ) for reassignment to a new ALJ in light of the United States Supreme Court's decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). *See Bolling v. Sapphire Coal Co.*, BRB Nos. 18-0285 BLA, 18-0286 BLA (Dec. 3, 2018) (unpub.). The OALJ reassigned the case to ALJ Steven B. Berlin (the ALJ). The parties waived their right to a formal hearing and agreed to a decision on the record.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

determined Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

On appeal, Employer argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and total disability necessary to invoke the Section 411(c)(4) presumption. Employer also challenges the ALJ's rebuttal findings, asserting he improperly relied on the preamble to the 2001 revised regulations when weighing the opinions of Drs. Rosenberg and Vuskovich and otherwise erred in finding their opinions insufficient to rebut the presumption of pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, asserting the ALJ did not err in relying on the preamble.

The 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).

The Miner's Claim

Invocation of the Section 411(c)(4) Presumption - Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground

[4] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his or her 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).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 3.

mine if [Claimant] demonstrates that the [M]iner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

Length of Coal Mine Employment

Employer first argues the ALJ erred in calculating the length of coal mine employment. Employer's Brief at 6-9. It conceded in its closing brief to the ALJ, however, that the Miner had at least fifteen years of surface coal mine employment. October 1, 2020 Employer's Brief at 23-26. Stipulations of fact fairly entered into are binding on the parties. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Nippes v. Florence Mining Co.*, 12 BLR 1-108, 109 (1985). Based on Employer's concession before the ALJ, we affirm the ALJ's finding that the Miner worked at least fifteen years in surface coal mine employment.[6] Decision and Order at 5.

Substantially Similar Surface Coal Mine Employment

Employer next argues the ALJ erred in finding Claimant established the Miner was regularly exposed to coal mine dust.[7] Employer's Brief at 6-9. Its arguments have no merit.

[6] Employer argues the ALJ erred in crediting the Miner with thirty years of coal mine employment based on its prior stipulation before ALJ Larsen. Employer's Brief at 4-6. While the ALJ acknowledged Employer's prior stipulation before ALJ Larsen and credited the Miner with thirty years of coal mine employment, he also correctly found Employer conceded at least fifteen years of coal mine employment before him. Decision and Order at 3; *see* October 1, 2020 Employer's Brief at 23-24, 26. As Employer has not shown how the ALJ's consideration of its stipulation before ALJ Larsen alters the outcome in this case, we decline to address its contention. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

[7] Employer argues the ALJ erred by failing to compare the conditions of the Miner's surface coal mine employment to those known to prevail in underground mines. Employer's Brief at 6-9. It further asserts he did not adequately apportion the Miner's coal mine employment by considering which of his individual job duties occurred in substantially similar conditions. *Id.* We disagree. Claimant is not required to prove the dust conditions aboveground were identical to those underground, *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013), nor does she have to prove the Miner "was around surface coal

The ALJ considered the Miner's employment history forms and deposition testimony. Decision and Order at 4-5. He also considered the accounts of working conditions the Miner shared with Drs. Alam and Rosenberg, physicians who examined him. *Id*. On his employment history forms, the Miner stated he worked at the tipple from 1972 to 1977 and then from 1980 to 2000. Miner's Claim (MC) Director's Exhibit 3. He stated he was exposed to dust, gas, and fumes during this time. *Id*. He also stated his work at the tipple was "very dusty." MC Director's Exhibit 4.

At his deposition, the Miner testified his earlier surface coal mine work involved "running a raw coal tipple" with no water to minimize the dust from the crushers and vibrators so the dust caused it to be very dark and difficult to see. MC Claimant's Exhibit 1 at 18-20. He further testified he later worked at the preparation plant, where water helped to control the dust, but "the smaller particles was [sic] what you had to watch, your float dust." *Id*. at 20. He stated he was required to wash the dust off the machinery and equipment every day. *Id*. at 20-21. Dr. Alam also indicated the Miner "shoveled and swept dust," MC Claimant's Exhibit 3, while Dr. Rosenberg reported the Miner "had a lot of coal dust exposure as the tipple came down the line by the vibrators" and "no masks or respiratory protection was utilized." MC Employer's Exhibit 4.

The ALJ permissibly relied on the Miner's credible, uncontested testimony and employment forms detailing his working conditions and his accounts to Drs. Alam and Rosenberg to find he was regularly exposed to coal mine dust for at least fifteen years. *Kennard*, 790 F.3d at 664-65; *Sterling*, 762 F.3d at 490; *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1343-44 n.17 (10th Cir. 2014); 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); Decision and Order at 5. As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the Miner had at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Total Disability

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 studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R.

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dust for a full eight hours on any given day for that day to count." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001). Rather, Claimant need only establish the Miner was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).

§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 the Miner was totally disabled based on the medical opinions and the evidence as a whole.[8] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 15-17.

Employer argues the ALJ erred in finding the medical opinions establish total disability. Employer's Brief at 9-12.

The ALJ considered the opinions of Drs. Alam, Rosenberg, and Vuskovich. Dr. Alam opined the Miner was totally disabled from a pulmonary standpoint. MC Claimant's Exhibits 8, 9. Although Dr. Rosenberg opined the pulmonary function and arterial blood gas testing prior to the Miner developing lung cancer does not support total disability, he stated the Miner may have had a total pulmonary disability at "some point" after he developed lung cancer. Employer's Exhibit 12 at 26-27. Dr. Vuskovich also opined the Miner's objective testing conducted before he developed lung cancer does not evidence total disability, but he acknowledged the Miner may not retain the ventilatory capacity to perform his usual coal mine work "at some point" after he developed lung cancer. Employer's Exhibit 11 at 24-25.

The ALJ found Drs. Alam's, Rosenberg's, and Vuskovich's opinions support total disability. Decision and Order at 16. He found Dr. Alam's opinion credible and supported by the opinions of Drs. Rosenberg and Vuskovich. *Id*. at 15-16. Thus he found the Miner had a totally disabling respiratory or pulmonary impairment.[9] *Id*. at 16.

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[8] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 15.

[9] Contrary to Employer's argument, the ALJ did not err in finding the opinions of Drs. Rosenberg and Vuskovich support a finding of total disability because they both opined that, at "some point" before his death, the Miner would be unable to perform his usual coal mine work because of his lung cancer, a pulmonary condition. Decision and Order at 15-16; Employer's Brief at 12-13. 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

Employer argues the ALJ erred in crediting Dr. Alam's opinion because the pulmonary function and arterial blood gas studies are non-qualifying[10] for total disability. Employer's Brief at 10. This argument has no merit.

A physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005). Thus, contrary to Employer's argument, the ALJ was not required to reject Dr. Alam's opinion because it was based on non-qualifying objective testing.

Dr. Alam opined the Miner suffered from a disabling pulmonary impairment based on his symptoms of daily cough and sputum production, work history of thirty-four years in coal mine employment, positive chest x-ray, pulmonary function study that demonstrates moderate mixed airflow obstruction, and arterial blood gas study that shows moderate hypoxia. MC Claimant's Exhibit 3. The ALJ permissibly found Dr. Alam's opinion credible because it was supported by the objective testing and his assessment of the Miner's usual coal mine employment.[11] *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 15-16.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R.

Cir. 1989). Employer does not otherwise challenge the ALJ's crediting of Drs. Rosenberg's and Vuskovich's opinions. Decision and Order at 15-16. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[10] 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 718, respectively. A "non-qualifying" study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[11] We reject Employer's argument that Dr. Alam did not consider the Miner's usual coal mine employment. Employer's Brief at 13. He reported the Miner ran a locomotive, repaired equipment, shoveled and swept dust, and held jobs as a welder and grinder. MC Claimant's Exhibit 3. In a supplemental report, he stated the Miner's work required heavy labor and reiterated that the Miner was totally disabled. MC Claimant's Exhibit 8.

§718.204(b)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm his finding that Claimant invoked the Section 411(c)(4) presumption in the miner's claim. 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[12] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the Miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

[12] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This 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 pneumoconiosis, *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).

The ALJ found the opinions of Drs. Rosenberg and Vuskovich are insufficient to rebut the presumption of legal pneumoconiosis because both doctors conceded the Miner had the disease. Decision and Order at 21. Substantial evidence supports this finding.[13]

In his initial report, Dr. Rosenberg diagnosed the Miner with chronic airflow obstruction. Employer's Exhibit 4 at 3. Although he opined the pattern of the obstructive impairment indicates it was likely related to the Miner's cigarette smoking history, he also opined the Miner "could have [had] a degree of legal" coal workers' pneumoconiosis. *Id*. He concluded his report by stating again that the Miner "possibly ha[d] a degree of legal" coal workers' pneumoconiosis. *Id*. During his deposition, Employer's counsel asked Dr. Rosenberg if the Miner had legal pneumoconiosis. Employer's Exhibit 12 at 15-16. He testified the Miner "possibly had a degree of legal" pneumoconiosis. *Id*.

Dr. Vuskovich initially stated the Miner "heavily" smoked cigarettes on the day of his examination, and thus it was not possible to ascertain whether the Miner had a pulmonary impairment arising out of coal mine employment. Employer's Exhibit 5 at 8. Dr. Vuskovich reviewed Dr. Rosenberg's findings and issued a supplemental report. Employer's Exhibit 6. After noting Dr. Rosenberg's opinion that the Miner "possibly had a component of legal pneumoconiosis," Dr. Vuskovich agreed that this is a "medically reasonable determination based on information from [the Miner's] records." *Id*. at 3.

Employer argues the ALJ applied an improper standard by requiring Drs. Rosenberg and Vuskovich to "rule out" coal mine dust exposure as a causative factor for the Miner's obstructive impairment. Employer's Brief at 15, 18. The ALJ did not, however, apply a "rule out" standard.[14] Rather, he correctly found both doctors conceded the Miner had legal pneumoconiosis. The rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment." *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *see also Young*, 947 F.3d at 405.

Employer does not specifically challenge the ALJ's finding that Drs. Rosenberg and Vuskovich conceded that the Miner had legal pneumoconiosis. *See Cox v. Benefits Review*

[13] Both Dr. Rosenberg and Dr. Vuskovich opined the Miner's lung cancer was unrelated to coal mine dust exposure. MC Employer's Exhibits 4-7.

[14] The ALJ correctly recognized "[E]mployer must establish that [the Miner's] impairment was not 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" Decision and Order at 19, *citing* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A).

Board, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[15] Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Employer has not challenged the ALJ's finding that it failed to establish no part of the Miner's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 22-23. Thus we affirm this finding. *See Skrack*, 6 BLR at 1-711. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits in the miner's claim.

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge as to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[15] Because the ALJ's determination that Employer did not disprove legal pneumoconiosis precludes a finding that the Miner did not have pneumoconiosis, we need not address Employer's argument that the ALJ erred in finding it failed to disprove clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 13-14.

Accordingly, the ALJ's Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge