U.S. Department of Labor

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

BRB Nos. 21-0292 BLA
and 21-0293 BLA

VIRGINIA WORKMAN (o/b/o and Widow of LEE R. WORKMAN) Claimant-Petitioner v. FLAT GAP MINING COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/10/2023 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Virginia Workman, Kingsport, Tennessee.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

BOGGS and JONES, Administrative Appeals Judges:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Denying Benefits (2017-BLA-05176 and 2018-BLA-05756) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2] This case involves a miner's subsequent claim[3] filed on May 13, 2014, and a survivor's claim filed on July 30, 2015.

The ALJ credited the Miner with 30.48 years of coal mine employment, at least fifteen of which were underground. However, he found Claimant did not establish the Miner had a totally disabling respiratory impairment and therefore could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). He found Claimant's failure to establish total

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant is the widow of the Miner, who died on June 11, 2015. Widow's Claim (WC) Director's Exhibit 6. Claimant is pursuing the miner's claim on her husband's behalf.

[3] The Miner's prior claim, filed on August 2, 1978, was denied by ALJ Frederick D. Neusner on December 30, 1983, for failure to establish total disability. Miner's Claim (MC) Director's Exhibit 1. The Board subsequently affirmed the denial of benefits. *Workman v. Flat Gap Mining*, BRB No. 84-0347 BLA (Mar. 11, 1987) (unpub.). When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the subsequent claim must also be denied unless the ALJ finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner's prior claim was denied for failure to establish total disability, Claimant had to submit new evidence to establish this element in order to obtain a review of the miner's claim on the merits. 20 C.F.R. §725.309(c).

[4] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner was totally disabled due to pneumoconiosis, and that the Miner's death was due to pneumoconiosis, if he had at least fifteen years of underground

disability, a necessary element of entitlement, precluded benefits in the miner's claim. In the survivor's claim, the ALJ found Claimant established the Miner had clinical pneumoconiosis. However, he found Claimant failed to establish the Miner's death was caused or hastened by pneumoconiosis, and denied benefits in the survivor's claim.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.

Because Claimant is unrepresented, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[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).

Miner's Claim

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). 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). The ALJ found Claimant failed to establish the Miner was totally disabled by any means. Decision and Order at 19-27.

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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.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 4.

Pulmonary Function Studies

When considering pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence supporting an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

The ALJ considered three new pulmonary function studies dated April 28, 2014, July 2, 2014, and November 18, 2014.[6] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11, 20; Miner's Claim (MC) Director's Exhibit 11; MC Claimant's Exhibit 3. The April 28, 2014 and July 2, 2014 studies both produced qualifying[7] values while the November 18, 2014 study produced non-qualifying results. Decision and Order at 20-21. However, the ALJ found all of the new pulmonary function studies to be invalid for establishing total disability, and therefore determined Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

The technician who conducted the April 28, 2014 study[8] noted good effort and cooperation. MC Claimant's Exhibit 3. However, the study also notes that American Thoracic Society reproducibility was not met as there were less than three "acceptable efforts" and that the Miner needed to "[b]last out faster" and "not hesitate." *Id.* The study also states it is an "unconfirmed interpretation – MD should review." *Id.* Dr. Rosenberg reviewed the April 28, 2014 study and concluded it was invalid based on "totally

[6] The ALJ permissibly gave no weight to the pulmonary function studies that were generated in the prior claim. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than that submitted with a prior claim because of the progressive nature of pneumoconiosis); Decision and Order at 20; MC Director's Exhibit 1; WC Employer's Exhibits 2, 11.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are 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 exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The ALJ refers to an April 8, 2014 study. Decision and Order at 20. This appears to be a typographical error, as later in the same paragraph he refers to the April 28, 2014 study. *Id.* Further, there are no studies of record dated April 8, 2014.

incomplete efforts." MC Employer's Exhibit 4. He pointed to the flow-volume curves which demonstrated "completely poor" efforts, as well as an inadequate expiratory time of two seconds, when six seconds or greater is required. *Id*. As the only physician of record to review the study opined it was invalid, the ALJ permissibly found it was invalid. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *see also* 20 C.F.R Part 718, Appendix B(2); Decision and Order at 20.

The July 2, 2014 pulmonary function study was conducted as part of the Department of Labor (DOL) sponsored complete pulmonary evaluation of the Miner. MC Director's Exhibit 11. The technician who conducted the study noted good cooperation and understanding, but also noted the Miner trembled throughout the test and was unable to exhale for six seconds. *Id*. Dr. Ajjarapu also acknowledged that the Miner "was not able to perform the test." MC Director's Exhibit 14. Dr. Ranavaya reviewed the study on behalf of the DOL and opined it was suboptimal based on less-than-optimal effort, cooperation, and comprehension. MC Director's Exhibit 11. He noted the Miner likely had difficulty performing the test given his advanced age and tremors. *Id.* Dr. Castle also opined the study was "invalid for accurate interpretation" because of variability in the flow-volume loops, volume-time curves showing less than maximal effort, and hesitation on exhalation on several instances. Decision and Order at 20-21; MC Director's Exhibit 13. The ALJ rationally found the July 2, 2014 pulmonary function study invalid based on the uncontradicted opinions of the reviewing physicians. *Compton*, 211 F.3d at 211; *Hicks*, 138 F.3d at 528.

As the ALJ permissibly found there was no valid and qualifying pulmonary function study of record,[9] he rationally found Claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Hicks*, 138 F.3d at 528; Decision and Order at 21.

Arterial Blood Gases

The ALJ considered two arterial blood gas studies, dated June 9, 1980, and July 2, 2014. Decision and Order at 21; MC Director's Exhibits 1, 11. As neither study is qualifying, the ALJ rationally found Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 21.

[9] The Miner performed a repeat pulmonary function study for his DOL-sponsored evaluation on November 18, 2014. MC Director's Exhibit 22 (MC Director's Exhibit 11 before the ALJ). The ALJ also found this pulmonary function study invalid; however, it was non-qualifying and thus does not support total disability. Decision and Order at 21.

Cor Pulmonale

The ALJ accurately found there is no evidence the Miner had cor pulmonale with right-sided congestive heart failure, and therefore Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 20.

Usual Coal Mine Employment

In assessing total disability, an ALJ must determine the exertional requirements of a miner's usual coal mine work and then consider them in conjunction with the medical opinions. *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time, *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of respiratory inability to do his usual coal mine work. *Pifer* v. *Florence Mining* Co., 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984). The determination will vary on a case by case basis, depending upon the individual's employment history. *Brown v. Cedar Coal Co.*, 8 BLR 1-86, 1-87 (1985); *Shortridge*, 4 BLR at 1-539.

In this case, the Miner's last coal mine employment was working as a lighthouse attendant for approximately eight to nine months, requiring light physical exertion. Decision and Order at 7; MC Director's Exhibit 1 (1983 Hearing Transcript at 24-25, 34); MC Director's Exhibit 4. Prior to that, he worked as a roof bolter for a number of years, which required significantly harder work. MC Director's Exhibit 1 (1983 Hearing Transcript at 20-21); MC Director's Exhibit 4. The Miner initially indicated he transferred to less dusty conditions for his "health."[10] MC Director's Exhibit 1 (Application for Benefits). However, he testified that he was offered the new position because the prior employee in the position was retiring and he had seniority. Decision and Order at 7; MC Director's Exhibit 1 (1983 Hearing Transcript at 24, 37-38). He decided to take the position because it was easier work, it was getting "hard to keep up" with the bolting machine work, and he wanted to "get out" of the mines. *Id.*

As the fact-finder, an ALJ is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Westmoreland Coal Co. v.*

[10] The Miner was informed on February 3, 1982, that he was eligible to move to a less dusty area due to evidence of simple pneumoconiosis on an x-ray conducted in October of 1981. MC Director's Exhibit 1. However, he had already transferred to the new position with "less dusty" conditions in September of 1981 as it would be "better for my health." *Id.*

Stallard, 876 F.3d 663, 670 (4th Cir. 2017); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his or her findings unless they are inherently unreasonable). While the Board might find differently than the ALJ if it were the fact-finder or could conduct a de novo review, our authority is circumscribed by law. 20 C.F.R. §802.301(a); *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Here, the ALJ permissibly found the Miner's job as a lighthouse attendant for eight to nine months was his most recent coal mine employment that he performed regularly over a substantial period of time. *Brown*, 8 BLR at 1-87; *Shortridge*, 4 BLR at 1-539. Decision and Order at 7. He further permissibly determined the evidence does not establish the Miner transferred jobs because of respiratory inability to do the work of a roof bolter, given that the Miner stated only that it was "hard to keep up" with that job, it was better for his health, and he was offered the position based on seniority. *Pifer*, 8 BLR at 1-155; *Daft*, 7 BLR at 1-127; Decision and Order at 7. Because it is supported by substantial evidence, we affirm the ALJ's determination that the Miner's usual coal mine employment was as a lighthouse attendant. *Pifer*, 8 BLR at 1-155 (mere fact that a miner changed jobs recently does not establish his latest job is not his usual coal mine work, unless he changed jobs because of respiratory inability to do previous work); *Daft*, 7 BLR at 1-127; *Shortridge*, 4 BLR at 1-539; Decision and Order at 7.

The Miner testified the lighthouse attendant job was not "hard" work and primarily required him to maintain the miners' headlamps, watering the batteries and changing the bulbs. MC Director's Exhibit 1 (1983 Hearing Transcript at 35, 44-45). The ALJ compared the Miner's description of his job duties to positions provided in the Dictionary of Occupational Titles (DOT)[11] and found them similar to those provided for a safety-lamp keeper. Decision and Order at 7-8. The DOT provides this position requires a light level of exertion. *Id*. at 8. Based on the Miner's testimony[12] and descriptions of duties in the

[11] The ALJ advised in his Notice of Hearing that he may take notice of the Dictionary of Occupational Titles. *See* Decision and Order at 7, n. 37; *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989).

[12] Although the ALJ did not specifically address other, documentary evidence regarding the Miner's last coal mine employment, it is consistent with the Miner's testimony. On the Miner's current CM-911a, he listed various jobs as his last employment, including "bolt machine, light house, tipple." MC Director's Exhibit 4. He provided "lamphouse man" as his most recent job on his CM-913 application. MC Director's Exhibit 1. Claimant provided "bolt machine, light house" for the Miner's last job in her

DOT, the ALJ found the Miner's usual coal mine employment required light labor. *Id*. Thus, the ALJ's finding that the Miner's usual coal mine employment of lighthouse attendant required light exertional labor is affirmed as supported by substantial evidence. *Hicks*, 138 F.3d at 528.

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Ajjarapu, McSharry, and Sargent. Decision and Order at 22-26. Dr. Ajjarapu opined the Miner had a totally disabling pulmonary impairment. MC Director's Exhibits 11, 14. Drs. McSharry and Castle opined he was not totally disabled. MC Director's Exhibit 13; MC Employer's Exhibits 5, 6. The ALJ found Dr. Ajjarapu's opinion inconsistent and not well-reasoned, and accorded it no weight. Decision and Order at 26. Conversely, he found the opinions of Drs. McSharry and Sargent well-reasoned and documented. *Id*. He therefore found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Dr. Ajjarapu initially opined the Miner was totally disabled based on symptoms of chronic bronchitis, legal pneumoconiosis, or both, the qualifying July 2, 2014 pulmonary function study, mild hypoxemia at rest, and use of supplemental oxygen. Director's Exhibit 11. After reviewing the November 18, 2014 pulmonary function study, she opined the Miner was totally disabled based on his mild hypoxemia even with supplemental oxygen and respiratory acidosis. *Id*. After consideration of additional evidence, Dr. Ajjarapu again opined the Miner was totally disabled based upon his mild hypoxemia even with supplemental oxygen, and the findings of pneumoconiosis and emphysema from the Miner's autopsy. Director's Exhibit 14.

The ALJ permissibly found that the reliability of Dr. Ajjarapu's opinion was called into question by internal inconsistencies that she did not resolve. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 23-24. Specifically, while Dr. Ajjarapu opined that the Miner was totally disabled based on his "respiratory acidosis," she did not mention this condition in her earlier and later reports. Decision and Order at 24, *citing* MC Director's Exhibits 11, 14. Moreover, in her initial report, Dr. Ajjarapu described the Miner's impairment on

application and indicated in deposition testimony that the Miner's last coal mine job was at the lighthouse. WC Director's Exhibit 2; MC Director's Exhibit 17 at 25-26.

pulmonary function study as moderate but then referred to the results as showing a severe impairment within the same paragraph.[13] *Id.* at 23, *citing* MC Director's Exhibit 11.

Furthermore, Dr. Ajjarapu's diagnosis of a totally disabling respiratory impairment was based on a coal mine employment history of roof bolter, general inside laborer, and truck driver. MC Director's Exhibit 11. The ALJ permissibly found the physician's opinion was called in to question by her inaccurate understanding of the Miner's usual coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); Decision and Order at 26.

The ALJ further considered Dr. Ajjarapu's opinion that the Miner was totally disabled based upon his mild hypoxemia even with supplemental oxygen per the July 2, 2014 resting arterial blood gas study. Decision and Order at 24; MC Director's Exhibit 11, 14. Dr. Ajjarapu opined that, although the study was above the disability standards, the Miner's oxygen levels were artificially elevated by his use of supplemental oxygen twenty to thirty minutes prior to the test. MC Director's Exhibit 11. The ALJ noted that both Drs. McSharry and Sargent contradicted this statement, opining that the study itself was normal and the results of the test would not have been affected by the use of supplemental oxygen twenty to thirty minutes earlier, as that was sufficient time to allow for accurate testing. Decision and Order at 24; MC Director's Exhibit 13; MC Employer's Exhibits 5, 6. The ALJ permissibly found the opinions of Drs. McSharry and Sargent more persuasive because they are Board-certified pulmonologists, and therefore would be expected to understand the specific issue of the effect of oxygen use on pulmonary testing, while Dr. Ajjarapu is Board-certified in family practice. *See Compton*, 211 F.3d at 211; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 24.

Finally the ALJ considered the Miner's treatment records. Decision and Order at 25. He noted a treatment record in which the Miner's oxygen saturation was eighty-four percent, at which time the Miner's treating physician prescribed his supplemental oxygen. Decision and Order at 25, *citing* MC Claimant's Exhibit 4. However, the ALJ found it is unclear if this was an aberration, as other treatment records are inconsistent, showing higher saturations. Decision and Order at 25. He further indicated it is unclear why the Miner was placed on supplemental oxygen or if it was used continuously or as needed. *Id.* Thus, the ALJ found the treatment records, taken as a whole, do not establish total disability. *Id.* at 27. As the ALJ's findings are rational and supported by substantial

[13] The physician also accurately noted in her first two reports the Miner never smoked, but then in her final report stated he had a smoking history that contributed to his impairment. Decision and Order at 24, *citing* MC Director's Exhibits 11, 12.

evidence, they are affirmed. *Compton*, 211 F.3d at 211; *Hicks*, 138 F.3d at 528; *Anderson*, 12 BLR at 1-113 (Board is not authorized to reweigh the evidence or substitute its inferences for those of the ALJ).

Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence and the Miner's treatment records do not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 26. We further affirm the ALJ's conclusion that the evidence, when weighed together, fails to establish total disability and thus Claimant failed to establish a required element of entitlement in the miner's claim. 20 C.F.R. §§718.204(b)(2); *Anderson*, 12 BLR at 1-112; *Rafferty*, 9 BLR at 1-232; Decision and Order at 27. Consequently Claimant is unable to establish a change in a condition of entitlement since the denial of the Miner's prior claim. 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

Survivor's Claim

As the parties submitted the same evidence relative to total disability in both claims, Claimant also cannot establish total disability in the survivor's claim and therefore cannot invoke the rebuttable presumption of death due to pneumoconiosis.[14] 20 C.F.R. §718.305.

Without the Section 411(c)(3) or Section 411(c)(4) presumptions,[15] Claimant must establish the Miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis cause a 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 a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Collins v. Pond Creek*

[14] The parties designated substantially the same evidence in both claims. *See* MC Employer's Evidence Summary Form (ESF); WC Employer's ESF; MC Claimant's ESF; WC Claimant's ESF. Claimant submitted Dr. Kulbacki's pathology report in the survivor's claim, but not the miner's claim; however, the report did not address total disability. WC Claimant's Exhibit 6.

[15] The ALJ accurately found there is no evidence of complicated pneumoconiosis, and Claimant therefore is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 19-20.

Mining Co., 751 F.3d 180, 184 (4th Cir. 2014). Failure to establish any one of the required elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

The ALJ found that while Claimant established simple clinical pneumoconiosis, she failed to establish that pneumoconiosis[16] contributed to or hastened the Miner's death. Decision and Order at 28-32. The ALJ accurately found the only evidence[17] pointing to pneumoconiosis as a contributor to the Miner's death was his death certificate, which indicated his immediate cause of death was "acute coronary insufficiency," and listed coronary artery disease and "simple coal workers' pneumoconiosis" as additional causes. Decision and Order at 32; Widow's Claim Director's Exhibit 6. The ALJ rationally found that the death certificate alone is insufficient to establish death causation. Decision and Order at 32; *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000) (death certificate stating that pneumoconiosis contributed to death, without some further explanation, is insufficient to support a finding of death due to pneumoconiosis).

Thus, we affirm the ALJ's determination that Claimant failed to establish the Miner's death was due to pneumoconiosis and thus failed to establish entitlement to benefits in her survivor's claim. 20 C.F.R. §718.205(b); *Trumbo*, 17 BLR at 1-87; Decision and Order at 32.

[16] While the ALJ failed to consider whether legal pneumoconiosis was established, this error is harmless because there is no evidence of record which opines that legal pneumoconiosis caused or hastened the Miner's death. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[17] Dr. Caffrey reviewed the pathology slides and found simple clinical pneumoconiosis and emphysema, but opined pneumoconiosis did not "cause or accelerate" the patient's coronary artery disease or "cause, contribute to, or hasten" the Miner's death. WC Director's Exhibit 10. Dr. Kulbacki's pathology report also noted findings of mild pneumoconiosis and emphysema, but did not opine whether either contributed to or hastened the Miner's death. WC Claimant's Exhibit 6. Drs. McSharry and Sargent opined that while the Miner had clinical pneumoconiosis pathologically, it did not contribute to his coronary death. MC Director's Exhibit 13; WC Employer's Exhibits 7-8. Finally, while Dr. Ajjarapu opined both clinical and legal pneumoconiosis were present and noted the immediate cause of the Miner's death was "relat[ed] to his coronary artery," she did not opine whether either form of pneumoconiosis caused or hastened the Miner's death. MC Director's Exhibits 11, 14.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Chief Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues that the ALJ rationally found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(i)-(iii) and failed to establish the Miner's death was due to pneumoconiosis on the merits in her survivor's claim pursuant to 20 C.F.R. §718.205(b). I must dissent, however, from the majority's decision to affirm his determination of the Miner's usual coal mine employment in determining whether Claimant established total disability through the medical opinion evidence.

As a matter of law, the nearly three decades that the Miner labored as a roof bolter throughout his entire career of 30.48 years of coal mine employment, rather than the Miner's last makeshift work that he performed for merely eight to nine months as a lighthouse attendant at the very end of his career, requiring light physical exertion, constitutes his "regular" and "substantial" employment for the purposes of determining disability. The majority's decision otherwise endorses a limitless exercise of ALJ discretion and turns a blind eye to the only conclusion that the law (and common sense) compel.

As Claimant has appealed without representation by counsel, the Board addresses those findings of the ALJ which are adverse to Claimant. Thus, the Board must review the ALJ's finding that the Miner's usual coal mine employment was the last job he performed for eight to nine months as a lighthouse attendant at the end of his coal mine employment career and, therefore, his finding that the exertional requirements of the Miner's usual coal mine employment were light.

A miner's usual coal mine employment is the most recent job he performed regularly and over a "substantial period of time," *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of a respiratory inability to do his usual coal mine work. *Pifer* v. *Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984). The determination of coal mine

employment will vary on a case-by-case basis, depending upon the individual's employment history. *Brown v. Cedar Coal Co.*, 8 BLR 1-86, 1-87 (1985); *Shortridge*, 4 BLR at 1-539. Notably, "the work performed by [the miner] at the time he retires is not necessarily his usual coal mine work[,]" particularly where the job is "of short duration" and "not intended to be a permanent position." *Brown*, 8 BLR at 1-87. In *Brown*, the Board affirmed an administrative law judge's finding that a miner's last work as a general inside laborer for three and one-half months was a temporary, short-term job and thus was not his usual coal mine employment or "most recent regular position of substantial duration." "Further, [usual coal mine work] cannot be 'favored' work; that is, work designed to accommodate an already debilitated miner." *Bowling v. Director, OWCP*, 920 F.2d 342, 344 (6th Cir. 1990). Thus, in *Bowling*, the Court stated: "If, for example, a miner had worked for 18 years at a very arduous underground job and spent his last two years at a desk job, we would be hard pressed to classify the desk job as the usual mine work." *Bowling*, 920 F.2d at 345 n.4.

In similar circumstances, the Board has held that where the "claimant was a groundman for several years and a dozer operator 'for only three months,' the administrative law judge permissibly determined that claimant's usual coal mine work was as a groundman." *Jarvis v. Peabody Coal Co.*, 14-0233 BLA, slip op. at 7 (Oct. 2, 2014) (unpub.) (citing *Bowling*, 920 F. 2d at 345); *see also Smith v. Drummond Co.*, BRB No. 03-0784 BLA, slip op. at 4 (Sept. 29, 2004) (unpub.), (the claimant's usual coal mine employment was as a "face boss" that he held for the twenty years prior to his later employment that was only for eighteen months).

All of the above-cited cases rely solely on the substantial period of time (years performing a prior job over mere months performing a more recent, lighter duty job) to determine usual coal mine employment, not on the additional consideration of whether the miner had changed jobs because of a respiratory inability to perform his prior, more arduous job. And they all unambiguously establish that years performing a prior job over mere months performing a more recent and less arduous job is determinative.

This unbroken line of binding and persuasive authority similarly compels only one plausible conclusion here: the Miner's career-spanning work as a roof bolter was his usual coal mine employment. The Miner's employment history and reason for taking the light duty lighthouse attendant position make the only alternative patently unreasonable. The Miner worked as a roof bolter for nearly all three decades (over 350 months) of his 30.48 year career and as a lighthouse attendant for merely the last eight to nine months of his career. If a difference in *Brown* of under two years and the "short duration" of the second job justified the decision to use the prior job, it defies logic that a difference of almost thirty years and a similarly short duration for the second job somehow does not mandate a similar conclusion here. *Brown*, 8 BLR at 1-87. Further, the Miner took the lighthouse position

as it was "hard to keep up" with his prior job working underground as a roof bolter and as it was better for his health. MC Director's Exhibit 1 (Application for Benefits; 1983 Hearing Transcript at 24, 37-38). Ignoring the Miner's nearly thirty years of harder labor working as a roof bolter in favor of a fleeting makeshift position thus punishes Claimant and further encourages employers to transfer miners to similar lighter work at the end of their careers to avoid liability. *Bowling*, 920 F.2d at 344.[18]

By upholding the ALJ's finding that the Miner's last job constitutes his "usual" coal mine employment as somehow a permissible exercise of boundless ALJ discretion under these extreme circumstances, the majority's holding ignores clear precedent and instead pins the outcome entirely on the random circumstances of which ALJ is assigned to a case. Such a result further ignores the purpose and intent of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, which especially recognizes the jobs of those coal miners who spend practically their entire careers working in underground coal mine employment. 30 U.S.C. §921(c)(4) (2018). Indeed, the majority's result misses the proverbial forest for the trees and is a textbook example of "arbitrary and capricious" agency action, which is defined as "willful and unreasonable" actions taken "without consideration or in disregard of facts or law." *Sch. Bd. of City of Norfolk v. Wescott*, 254 Va. 218, 222 (1997), citing Black's Law Dictionary 105 (6th ed. 1990).

Moreover, contrary to the majority's affirmance of the ALJ's determination that the evidence does not to establish that the Miner transferred jobs because of respiratory inability to do the work of a roof bolter, Claimant does not have to prove that a respiratory impairment, standing alone, prevented the Miner from performing his prior job to qualify for the exception. That inquiry is relevant to determining whether a miner is unable to perform his usual coal mine work (and is thus disabled), not for the preliminary determination as to what his usual coal mine work is or was. 20 C.F.R. §718.204(b)(1). It follows that not all of the evidence relevant to that second inquiry needs to be considered at the first step, as the majority mistakenly holds. *Id.*

Yet the majority cites to *Pifer* v. *Florence Mining* Co., 8 BLR 1-153, 1-155 (1985) and *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984). In *Pifer*, 8 BLR at 1-155, the Board stated: "Only if the miner's most recent job was obtained because of the miner's inability, from a respiratory standpoint, to perform his prior job should his most recent job

[18] The exertional requirements of both positions are not in dispute: the bathhouse position required light physical exertion; the roof bolter position required significantly harder work. *See* Decision and Order at 7; MC Director's Exhibit 1 (1983 Hearing Transcript at 20-21, 24-25, 34); MC Director's Exhibit 4.

not be considered his usual coal mine employment," citing *Daft*, 7 BLR 1-124. But that statement entails only the second inquiry in determining usual coal mine employment, and ignores the first step that a miner's usual coal mine employment is his most recent job only if it was performed "over a substantial period of time." And in *Pifer*, the miner worked in his most recent job "for a substantial period of time," *four years*. By contrast, the mere eight to nine months the Miner in this case spent in his most recent job in an over thirty year coal mine employment career simply cannot reasonably be considered a "substantial period of time," as the other Board cases cited above unambiguously hold.

Daft is also unavailing, as in that case "[t]he administrative law judge failed to determine which of claimant's jobs was his "usual coal mine work" and it cites to 20 C.F.R. §727.205(a) (which held that if the ALJ determines that a job was claimant's usual coal mine work, he must consider whether there were any changed circumstances of employment indicative of a reduced ability to perform that job), which has been repealed and is not applicable in this case.

I would therefore reverse the ALJ's finding regarding the Miner's usual coal mine employment, and therefore his finding that the exertional requirements of the Miner's usual coal mine employment were light, as a matter of law. Consequently, I would vacate the ALJ's weighing of the medical opinion evidence (specifically, his finding that Dr. Ajjarapu based her opinion on an inaccurate understanding of the Miner's usual coal mine employment) and the Miner's treatment records, and his findings that they do not establish total disability under 20 C.F.R. §718.204(b)(2)(iv) and therefore that the evidence, when weighed together, fails to establish total disability in both the miner's and the survivor's claims. Thus, I would also vacate the ALJ's findings that Claimant did not establish a change in an applicable condition of entitlement since the denial of the Miner's prior claim pursuant to 20 C.F.R. §725.309(c) and that Claimant cannot invoke the rebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.305 in the survivor's claim. I would therefore remand the case for the ALJ to reconsider those determinations in accordance with the precedential case-law set out above.

DANIEL T. GRESH, Chief
Administrative Appeals Judge