U.S. Department of Labor

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

BRB Nos. 21-0533 BLA, 21-0533 BLA-A,
21-0534 BLA, and 21-0534 BLA-A

WANDA J. WOODARD (o/b/o and Widow of EDWARD C. WOODARD)	)	
Claimant-Petitioner	)	
v.	)	
STONE MOUNTAIN TRUCKING COMPANY	)	
and	)	
	)	DATE ISSUED: 03/17/2023
TRAVELERS	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits Upon Remand of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Wanda J. Woodard, Jonesville, Virginia.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,[1] and Employer and its Carrier (Employer) cross-appeal, the Decision and Order Denying Benefits Upon Remand (2021-BLA-05532 and 2021-BLA-05533) of Administrative Law Judge (ALJ) Dana Rosen, 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 subsequent claim filed on May 20, 2011, and a survivor's claim filed on December 29, 2015,[2] and is before the Board for the second time.[3]

The Board previously vacated the ALJ's award of benefits in both claims and remanded the case for her to reconsider the location of the Miner's last coal mine employment, whether Employer is the responsible operator because the Miner worked for it for at least one year, and the length of the Miner's qualifying coal mine employment for

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

[2] The Miner filed a prior claim on October 28, 1998. The district director denied the claim on March 5, 1999, for failure to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1; Decision and Order on Remand at 2. The Miner died on December 6, 2015, while his subsequent claim was pending. Survivor's Claim (SC) Director's Exhibit 4. Claimant, the Miner's widow, is pursing the miner's claim on his behalf and her survivor's claim.

[3] We incorporate the procedural history of this case as set forth in *Woodard v. Stone Mountain Trucking Co.*, BRB Nos. 19-0284 BLA and 19-0285 BLA (Aug. 27, 2020) (unpub.).

purposes of invoking the Section 411(c)(4) presumption.[4] *Woodard v. Stone Mountain Trucking Co.*, BRB Nos. 19-0284 BLA and 19-0285 BLA, slip op. at 7-18 (Aug. 27, 2020) (unpub.). Additionally, the Board vacated the ALJ's reliance on Dr. Alam's opinion to find the Miner was totally disabled, as she failed to reconcile her credibility determination with her finding that Dr. Alan's pulmonary function study was invalid. *Id*. at 19.

On remand, the ALJ found Claimant last worked in Kentucky for Employer for at least one year and that it is the responsible operator. Although the ALJ found the Miner had 17.99 years of qualifying coal mine employment, she concluded he was not totally disabled. Therefore, Claimant could not invoke the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act or establish entitlement to benefits under 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2). Accordingly, the ALJ denied benefits in the miner's claim and therefore found Claimant was not entitled to derivative survivor's benefits under Section 422(*l*) of the Act.[5] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. The ALJ further found Claimant did not establish the Miner's death was due to pneumoconiosis under 20 C.F.R. §718.205 and denied benefits in the survivor's claim. 20 C.F.R. §718.205.

On appeal, Claimant generally challenges the ALJ's denial of the miner's and survivor's claims. Employer responds, urging affirmance of the denial of benefits. Employer also filed a cross-appeal, asserting the ALJ erred in finding the Miner's last coal mine employment occurred in Kentucky, and thereby erred in determining that it is the responsible operator and in calculating the length of the Miner's coal mine employment as 17.99 years. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asserting the ALJ's findings that the Miner last worked in Kentucky

[4] 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); 20 C.F.R. §718.305. The Board previously affirmed the ALJ's finding that all of the Miner's coal mine employment was qualifying because he worked in underground mines or conditions substantially similar to those found in underground mines. *Woodard*, BRB Nos. 19-0284 BLA and 19-0285 BLA, slip op. at 12 n.17. Thus, Claimant need only establish at least fifteen years of coal mine employment and total disability to invoke the presumption.

[5] Section 422(*l*) of the Act provides that the survivor of a miner determined to be 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).

and that Employer is the responsible operator should be affirmed. The Director however has declined to address the merits of entitlement in the miner's and survivor's claims.

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. 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); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994) (in appeal filed by an unrepresented Claimant, the Board also addresses whether the decision is supported by substantial evidence).

Employer's Cross-Appeal

Location of Last Coal Mine Employment

The ALJ found the Miner's last coal mine employment occurred in Kentucky and, therefore, she applied the law of the United States Court of Appeals for the Sixth Circuit in deciding the relevant issues on remand. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 7-10. Employer argues the law of the United States Court of Appeals for the Fourth Circuit applies because it alleges the Miner last worked in in Virginia. Employer's Brief at 11-17. The Director maintains the ALJ acted permissibly in finding Claimant's last coal mine employment occurred in Kentucky. Director's Brief at 3. We agree with the Director's position.

The Miner testified by deposition that his last coal mine job with Employer involved loading coal from a deep mine in Kentucky and then hauling the coal by truck to a load out facility in Virginia, where it was loaded onto railroad cars for shipment. MC Director's Exhibit 24 at 19-31. Employer's expert, Dr. Rosenberg, described in his report that the Miner's "last job was working at the load out [facility] loading cars," where the Miner used an end loader to fill hoppers with coal. MC Director's Exhibit 30 at 3-4.

Employer contends the Miner's deposition testimony and Dr. Rosenberg's report establish the Miner's last coal mine employment occurred in Virginia because they each describe that the Miner hauled raw coal from a coal mine site in Kentucky to a load out facility in Virginia, where the raw coal was placed onto railroad cars for transport to a location for it to be prepared for market. Employer's Brief at 14, 16. Employer's contention is unpersuasive.

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of

such employment." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of "miner" comprises a "situs" requirement (i.e., the work must take place in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., the work must be integral or necessary to the extraction or preparation of coal). *Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991).

Here, the ALJ permissibly found the Miner's work in Virginia did not satisfy the situs requirement test because she could not determine what activities occurred at the Virginia load out facility besides the loading of coal onto railroad cars by trucks and end loaders, and she reasonably found the record lacked sufficient information regarding whether any washing or preparation work occurred at the Virginia location. *See Ray v. Brushy Creek Trucking, Inc.*, 50 Fed. Appx. 659, 662 (6th Cir. 2002) (work on a barge at a coal transfer station located away from a mine is not coal mine employment); *Eplion v. Director, OWCP*, 794 F.2d 935, 937 (4th Cir. 1986) (employment at a river loading facility located away from a mine is not covered coal mine employment); *Krushansky*, 923 F.2d at 41 (work at a dock house loading facility located away from a coal preparation plant is not covered); Decision and Order on Remand at 9; Director's Brief at 3. The ALJ also reasonably found the Miner's work in Kentucky satisfied the situs test as the Miner testified he loaded raw coal into a truck at an active coal mine site. Decision and Order on Remand at 9; MC Director's Exhibit 24 at 19-31. Thus, we affirm the ALJ's finding that the Miner's last coal mine employment occurred in Kentucky and therefore her application of Sixth Circuit law. *See Shupe*, 12 BLR at 1-202.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for at least one year.[6] 20 C.F.R. §§725.494(c), 725.495(a)(1). The Director bears the burden of proving the responsible operator is a potentially liable operator. 20 C.F.R. §725.495(b). Once designated, that operator may be relieved of liability only if it proves either it is

[6] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. *See* 20 C.F.R. §725.495(c).

Employer does not challenge the ALJ's calculation that the Miner worked for it in 1983 for 128.95 days. Nor does Employer allege it fails to otherwise satisfy the regulatory criteria for a potentially liable operator.[7] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 9-10. Rather, Employer only argues the ALJ erred in finding the Miner worked at least one year for it based on Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedural Manual* and the holding in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019) that one year of coal mine employment is established if the miner worked for 125 days, "regardless of how long the miner actually was employed by the mining company in any one calendar year, or partial periods totaling one year." Employer's Brief at 17-21. Having affirmed the ALJ's determination that Sixth Circuit law applies, we reject Employer's contention of error and affirm the ALJ's finding that Employer is the responsible operator.

Length of Coal Mine Employment

Claimant bears the burden of establishing the length of coal mine employment. *See Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *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 if it is based on a reasonable method of calculation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered the Miner's Form CM-911(a) (Employment History Form), his Social Security Earnings Record (SSER), and his Kentucky Workers' Compensation

[7] The ALJ stated:

> Applying the precedent of the Sixth Circuit, including Shepherd v. Incoal, Inc., 915 F.3d 392, 406-07 (6th Cir. 2019), the court notes that [the] Miner's yearly earnings with Employer in 1983 were $14,153.63. The daily average earnings as reported by [Exhibit] 610 of the [*Coal Mine (Black Lung Benefits Act) Procedure Manual*] in 1983 was $109.76. Dividing $14,153.63 by $109.76, the court finds that [the] Miner established at least 128.95 days of qualifying coal mine employment with [E]mployer in 1983.

Decision and Order on Remand at 9.

records. Decision and Order on Remand at 12; MC Director's Exhibits 4, 6-7. Because the start and end dates of the Miner's employment were not ascertainable, the ALJ determined the length of the Miner's coal mine employment by comparing his yearly SSER earnings with the yearly earnings for miners who worked 125 days in coal mine employment as set forth in Exhibit 610 of the *Black Lung Benefits Act Procedural Manual*. Decision and Order on Remand at 12-13. Where the Miner's earnings exceeded the annual average for 125 working days, the ALJ credited the Miner with a full year of employment. *Id*. Where the earnings fell short, she credited him with a fractional year based on the ratio of the actual days worked to 125 days. *Id*. Based on this method, the ALJ concluded the Miner had 17.99 years of coal mine employment from 1971 through 1994.[8] *Id., citing Shepherd*, 915 F.3d at 401-02.

Employer challenges the ALJ's method of calculation only to the extent it maintains she erred in applying the method of calculation set forth in *Shepherd*. Employer's Brief at 21-23. Because we have affirmed the ALJ's finding that Sixth Circuit law controls, we affirm her reliance on *Shepherd,* and therefore affirm the ALJ's finding that Claimant established 17.99 years of coal mine employment as it is reasonable, supported by substantial evidence, and complies with Sixth Circuit case law. *Shepherd*, 915 F.3d at 401-02; Decision and Order on Remand at 10-13; MC Director's Exhibit 7. Consequently, we affirm the ALJ's finding that Claimant established at least fifteen years of qualifying employment. Decision and Order on Remand at 14.

Claimant's Appeal – Invocation of the Section 411(c)(4) Presumption – Total Disability in the Miner's Claim

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total

[8] The ALJ credited the Miner with a full year of coal mine employment in the years 1971, 1977 to 1979, and 1981 to 1990 because his earnings in each of these years exceeded the yearly earnings for 125 days set forth in Exhibit 610. Decision and Order on Remand at 12-13. In 1973 to 1975, there were no earnings reflected on the Miner's SSER and so she did not credit him with any coal mine employment in those years. *Id*. at 12. For the remaining years 1972, 1976, 1980, and 1991 to 1994, she divided the Miner's yearly earnings by the yearly earnings for miners who worked 125 days in Exhibit 610 and credited the Miner with partial years because the Miner's earnings did not establish a full year of employment. *Id*. at 12-13.

disability based on qualifying[9] 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).[10] The ALJ must weigh all relevant evidence supporting total disability against all relevant contrary evidence and must determine whether Claimant established total disability by a preponderance of the 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).

Pulmonary Function Studies

The ALJ considered four pulmonary function studies. *Id*. at 15. Studies dated November 30, 2011, and May 17, 2012, produced qualifying values, but the ALJ found them invalid.[11] Crediting the remaining studies dated July 10, 2012, and August 29, 2013, which produced non-qualifying values, the ALJ found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order on Remand at 15; MC Director's Exhibits 11, 30; MC Employer's Exhibits 1, 6.

When addressing a pulmonary function study conducted in anticipation of litigation, an ALJ must determine whether it is in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R.

[9] A "qualifying" pulmonary function study or arterial 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. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The ALJ accurately found the three blood gas studies dated November 30, 2011, May 17, 2012, and August 29, 2013, are non-qualifying. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order on Remand at 15; MC Director's Exhibits 11, 30; MC Employer's Exhibit 6. She also correctly noted there is no evidence the Miner suffered from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order on Remand at 16.

[11] The ALJ assigned no weight to the May 17, 2012 pulmonary function study because both Drs. Rosenberg and Castle concluded it was invalid and there was no contrary evidence. MC Employer's Exhibit 26; MC Director's Exhibit 30 at 4-5. Because we see no error in the ALJ's finding, we affirm it. Decision and Order on Remand at 15.

§718.103(c); *see also* 20 C.F.R. Part 718, Appendix B. If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in her role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable).

The ALJ found the November 30, 2011 study was invalid based on the opinions of Drs. Long and Castle. Decision and Order on Remand at 15; *see* MC Director's Exhibit 32 (Dr. Long invalidated the study because the tracings are "recorded at too rapid paper speed"); MC Employer's Exhibit 25 (Dr. Castle invalidated the study because the flow volume loops and volume time curves show less than maximal effort, the pre-bronchodilator FEV1s were not reproducible within the requisite five percent range, and the studies were performed with an obstructed mouthpiece). However, the ALJ did not address that the technician who administered the November 30, 2011 study reported it was performed with good cooperation and understanding by the Miner and Dr. Alam, the physician who ordered the study as part of the Miner's complete pulmonary evaluation, also signed off on the study. MC Director's Exhibit 11. While the ALJ acknowledged Dr. Michos, a Department of Labor consultant, specifically validated the study, she did not explain why she gave his validation less weight than the opinions of Employer's experts. MC Director's Exhibit 13. Moreover, the ALJ did not render any findings as to whether the study is in substantial compliance with the quality standards even if it is not entirely conforming.

Because the ALJ did not discuss all the evidence relevant to the validity of the November 30, 2011 study, nor explain how she resolved the conflicts in the relevant evidence and the bases for her credibility determinations, her decision does not satisfy the Administrative Procedure Act (the APA).[12] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir.1984) (finding which does not encompass discussion of contrary evidence does not warrant affirmance); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989);

[12] The Administrative Procedure Act requires that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

McCune v. Central Appalachian Coal Co., 6 BLR 1-996, 1-998 (1984) (factfinder's failure to discuss relevant evidence requires remand).

Additionally, as the Miner is now deceased, the ALJ failed to properly consider 20 C.F.R. §718.103(c). The regulation states that "[i]n the case of a deceased miner, where no pulmonary function tests are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner." 20 C.F.R. §718.103(c).

For all of these reasons, we vacate the ALJ's determinations that the November 30, 2011 study is invalid and therefore that the pulmonary function study evidence is insufficient to support a finding the Miner was totally disabled at 20 C.F.R §718.204(b)(2)(i). Decision and Order on Remand at 15.

Medical Opinions

The ALJ considered three medical opinions. Dr. Alam opined the Miner was totally disabled, while Drs. Rosenberg and Sargent opined he is not.[13] MC Director's Exhibits 11, 30, 45; MC Employer's Exhibits 1, 6, 21, 22, 28. The ALJ gave little weight to Dr. Alam's opinion because he relied on the November 30, 2011 pulmonary function study, which the ALJ found invalid. Decision and Order on Remand at 16-17. She discredited Dr. Sargent's opinion as not well reasoned but found Dr. Rosenberg's opinion supported by the non-qualifying pulmonary function study results. *Id*. at 17-18.

Because we have vacated the ALJ's weighing of the pulmonary function studies, which influenced her weighing of the medical opinions, we also vacate her finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 18.

Claimant's Appeal - Survivor's Claim

Because she denied benefits in the miner's claim, the ALJ concluded Claimant was not eligible for derivative benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). Having vacated the denial of benefits in the miner's claim, we also vacate her determination

[13] The ALJ found Drs. Alam, Rosenberg, and Sargent each indicated the Miner's last coal mine work required heavy labor. Decision and Order on Remand at 16; MC Director's Exhibits 11, 30; MC Employer's Exhibit 6.

that Claimant is not eligible for derivative benefits in her survivor's claim. Decision and Order on Remand at 19.

The ALJ further found Claimant failed to establish the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). In the interest of judicial economy, we affirm the ALJ's determination that there is no evidence to establish the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). The Miner's death certificate lists liver cancer, hepatic encephalopathy (altered brain function due to liver failure), and deep vein thrombosis (a blood clot in a vein, usually the leg) as the causes of the Miner's death, but not any pulmonary condition. SC Director's Exhibit 4. Dr. Alam did not address the cause of the Miner's death and Drs. Rosenberg and Sargent attributed the Miner's death to liver cancer unrelated to coal mine dust exposure. SC Employer's Exhibits 20 at 2; 21 at 6. We therefore affirm the ALJ's finding that Claimant failed to establish the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b). Decision and Order on Remand at 19.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant established total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). She must determine whether the November 30, 2011 pulmonary function study is in substantial compliance with the quality standards or sufficiently reliable under 20 C.F.R. §718.103(c).[14] In addition, she must consider the reliability of the remaining pulmonary function studies, including those contained in the Miner's treatment records dated May 2, 2011, January 25, 2010, May 15, 2008, and April 23, 2007.[15] MC Director's Exhibit 29.

As the Miner is now deceased, the ALJ should also consider the applicability of 20 C.F.R. §718.103(c). This regulation states that "[i]n the case of a deceased miner, where

[14] If, on remand, the ALJ finds the November 30, 2011 pulmonary function study invalid, she should consider whether it is appropriate to remand this case to the district director "to develop only such additional evidence as is required" to remedy the defect. 20 C.F.R. §725.456(e).

[15] On remand, the ALJ should consider that Drs. Rosenberg and Sargent invalidated the July 10, 2012 and August 29, 2013 non-qualifying pulmonary function studies. *See* MC Employer's Exhibit 6 at 2; MC Employer's Exhibit 28 at 14-16. Dr. Rosenberg stated all of the Miner's treatment pulmonary function studies are unreliable because the efforts were not maximal or were incomplete. MC Director's Exhibit 30 at 2-3; MC Employer's Exhibit 22 at 2-3. Dr. Sargent stated the treatment pulmonary function studies do not reflect minimum reproducibility criteria and indicate less than optimal effort. MC Employer's Exhibit 6 at 2. However, the ALJ must specifically determine if the treatment

no pulmonary function tests are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner." 20 C.F.R. §718.103(c).

After reconsidering the pulmonary function study evidence, the ALJ should reconsider the medical opinion evidence to determine whether Claimant has established total disability under 20 C.F.R. §718.204(b)(2)(iv). She must also weigh the evidence as a whole and determine whether Claimant satisfied her overall burden to prove the Miner was totally disabled at the time of his death. 20 C.F.R. §718.204(b)(2). If Claimant establishes the Miner was totally disabled, she invokes the Section 411(c)(4) presumption, and the ALJ must consider whether Employer has rebutted it. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). If the ALJ finds the presumption unrebutted, she must award benefits in the miner's claim and award Claimant derivative benefits based on her survivor's claim.[16] 30 U.S.C. §932(*l*). If Claimant is unable to establish total disability and invocation of the Section 411(c)(4) presumption, benefits are precluded in the miner's and survivor's claims. In rendering her determinations on remand, the ALJ must explain her rationale and conclusions as the APA requires. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165.

studies are sufficiently reliable. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000) (ALJ must determine if the results of treatment studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards).

[16] If, on remand, the ALJ awards benefits in the miner's claim, Claimant will be entitled to derivative benefits under 30 U.S.C. §932(*l*) because she filed her survivor's claim after January 1, 2005 (on December 29, 2015), her claim was pending on March 23, 2010, and the Miner was determined to be eligible to receive benefits under a final award at the time of his death. Employer does not identify any reasons as to why Claimant does not meet the eligibility requirements for automatic entitlement if the miner's claim is awarded. 30 U.S.C. §932(*l*).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits Upon Remand, and we remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge