U.S. Department of Labor

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

BRB No. 21-0585 BLA

SANDRA G. ADKINS (Widow of ALONZO ADKINS)	)	
Claimant-Respondent	)	
v.	)	
EASTERN COAL CORPORATION	)	DATE ISSUED: 11/14/2022
Employer-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on a Request for Modification of a Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

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

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits on a Request for Modification of a Survivor's Claim (2019-BLA-05980) rendered on a claim filed on May 11, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

In a January 19, 2018 Decision and Order Denying Benefits, ALJ John P. Sellers, III, credited the Miner with 13.8 years of coal mine employment and thus found Claimant could not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, ALJ Sellers found the Miner had pneumoconiosis but denied benefits because Claimant failed to establish the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205.

Claimant filed a timely request for modification on January 4, 2019. In his July 20, 2021 Decision and Order, which is the subject of this appeal, ALJ Merck (the ALJ) found Claimant established the Miner had 16.99 years of qualifying coal mine employment and was totally disabled, and thus invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and, therefore, concluded Claimant established modification based on a mistake in a determination of fact. Additionally, the ALJ found that granting modification would render justice under the Act and awarded benefits. 20 C.F.R. §725.310.

On appeal, Employer asserts the ALJ erred in granting modification. It argues he erred in finding the Miner had at least fifteen years of qualifying coal mine employment and that Claimant invoked the Section 411(c)(4) presumption. It also argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of

[1] Claimant is the widow of the Miner, who died on December 11, 2008. Director's Exhibits 8-10. The Miner filed a claim for benefits on September 27, 1989, which was deemed abandoned. Decision and Order at 3; ALJ's Exhibit LM-1 at 47. Because the Miner never established entitlement to benefits during his lifetime, Claimant is not eligible for benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*).

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Modification

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). Moreover, a party need not submit new evidence on modification because an ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). In *Worrell*, the Sixth Circuit explained that:

> If a claimant merely alleges that the ultimate fact (disability due to pneumoconiosis [or death due to pneumoconiosis]) was wrongly decided, the deputy commissioner [or ALJ] may, if he chooses, accept this contention and modify the final order accordingly. "There is no need for a smoking-gun factual error, changed conditions, or startling new evidence."

27 F.3d at 230 (quoting *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993)).

Employer asserts "the ALJ recalculated [the] length of coal mining without identifying a judicial mistake of fact in the [prior] calculation of 13.8 years." Employer's Brief at 6. Employer further asserts the ALJ erred by relying on a change of law – namely, the Sixth Circuit's decision in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019) – to recalculate years of coal mine work. *Id.* at 6-7. We disagree.

Initially, we note that *Shepherd* does not constitute a change in law, but rather reflects the Sixth Circuit's interpretation of an existing regulation at 20 C.F.R. §725.101(a)(32). *Shepherd*, 915 F.3d at 401-07. Moreover, the ALJ's recalculation of the

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his last coal mine employment Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 26.

Miner's length coal mine employment was within his discretionary authority to reconsider the record and correct mistakes of fact on further reflection of the evidence in accordance with applicable law. Given the breadth of modification based on a mistake in fact, Claimant is entitled to seek modification of the ultimate fact of entitlement which encompasses the Miner's length of coal mine employment and eligibility for the Section 411(c)(4) presumption. *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008).[4]

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

Length of 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 in "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 if it is 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 ALJ noted Claimant's assertion the Miner had twenty-four years of coal mine employment and the district director's determination the Miner had fourteen years of coal mine employment. Decision and Order at 4-8; Director's Exhibits 32, 68. The ALJ also considered Claimant's testimony, the CM-911a Employment History Forms submitted by the Miner and by Claimant, and the Miner's Social Security Administration (SSA) earning records and tax records. Decision and Order at 4-8; 2020 Hearing Transcript at 17-19; 2017 Hearing Transcript at 14-17; Director's Exhibits 3, 5, 6; ALJ's Exhibit LM-1 at 419.

Because the ALJ found the "record does not clearly identify the beginning and ending dates of the Miner's work with each of his various coal mine employers," he applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[5] to determine the number of days that the

[4] Contrary to Employer's repeated assertion that the ALJ failed to identify all of the mistakes of fact in the prior denial, the ALJ was entitled to find a mistake of fact based on the ultimate fact of entitlement and thus nothing further is required. 20 C.F.R. § 725.310; *Worrell*, 27 F.3d at 230; Employer's Brief at 6-11.

[5] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less

Miner worked in coal mine employment from 1963 to 1968, 1973 to 1978, and 1980 to 1987. Decision and Order at 6-8. He divided the Miner's yearly earnings as reported in his SSA earning records and tax records by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. *Id*. at 6-8. For each year in which the Miner's earnings met or exceeded the Exhibit 610 average yearly earnings, the ALJ credited him with a full year of coal mine employment. *Id*. For the years in which the Miner's earnings fell short, he credited the Miner with a fractional year based on 125 working days. *Id*. at 6-7. Applying this method, the ALJ credited the Miner with sixteen full years of coal mine employment from 1963 to 1967, 1973 to 1977, 1980, 1982 to 1984, and 1986 to 1987, and with .99 partial years in 1968, 1978, and 1981, for a total of 16.99 years.[6] *Id*. at 6-8; *see Shepherd*, 915 F.3d at 401-02.

Employer contends the ALJ erred in crediting the Miner with a full year of employment in 1987 because the beginning and ending dates of his employment for that year are known and total 8.5 months. Employer's Brief at 7. We disagree. The Sixth Circuit made clear in *Shepherd* that, "[i]f the quotient from [the ALJ's] calculation [at 20 C.F.R. §725.101(a)(23)(iii)] yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year." *Shepherd*, 915 F.3d at 402. Because the ALJ found the Miner's income for 1987 exceeded the average yearly earnings for 125 days of coal mine employment set forth in Exhibit 610, [and Employer does not contest the Miner had at least 125 days of coal mine work that year], we affirm his finding that the Miner had a full year of coal mine employment for that year. *Id*.; Decision and Order at 6-7.

Employer also contends the ALJ improperly relied on non-coal mine employment in crediting Claimant with one year of coal mine employment in 1966. Employer's Brief at 7. We disagree. Contrary to Employer's contention, the ALJ noted the Miner received income from four employers in 1966, but solely relied on the Miner's earnings from Hunt

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> than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

[6] We affirm, as unchallenged, the ALJ's finding that all of the Miner's coal mine employment was qualifying. *See Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

Trucking to calculate his coal mine employment for 1966.[7] Decision and Order at 7; Director's Exhibit 6. Employer does not contest that Hunt Trucking constitutes coal mine employment and has not identified any other non-coal mine employment the ALJ relied upon in calculating the length of the Miner's coal mine employment. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Employer's Brief at 7.

Employer further argues that Claimant "signaled [] tacit" agreement that the record is insufficient to establish fifteen years of coal mine employment because she did not specifically argue that the Miner had fifteen years of coal mine employment in her 2017 and 2020 post-hearing briefs. Employer's Brief at 7-8. We disagree.

Claimant asserted the Miner had twenty-four years of coal mine employment in her initial application for benefits. Decision and Order at 4; Employer's Brief at 7; Director's Exhibit 4. The length of the Miner's coal mine employment was a contested issue when the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 66, 68. To the extent Claimant asserted in her post-hearing briefs that the Miner had "at least ten years" of coal mine employment, she did so in relation to whether she demonstrated sufficient coal mine employment to invoke the separate presumption at 20 C.F.R. §718.203 that the Miner's pneumoconiosis arose out of coal mine employment. Claimant's Post-Hearing Brief on Modification at 12.

Because the ALJ's calculations are based on a reasonable method, supported by substantial evidence, and in accordance with law, we affirm the ALJ's finding that Claimant established 16.99 years of qualifying coal mine employment. *Muncy*, 25 BLR at 1-27; *see Shepherd*, 915 F.3d at 401.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary

[7] The Miner earned $4,402.75 from Hunt Trucking in 1966. Director's Exhibit 6 at 4. While the ALJ stated the Miner earned $4,420.75 in 1966, this apparent typographical error does not impact his calculation that the Miner had one year of coal mine employment applying the regulatory formula and Exhibit 610. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 7.

function studies, qualifying arterial blood gas studies,[8] 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 consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the pulmonary function and blood gas studies, the treatment records, and the weight of the evidence as a whole.[9] 20 C.F.R. §718.204(b)(2); Decision and Order at 17.

Pulmonary Function Studies

Dr. Mettu's November 4, 2008 study produced qualifying pre-bronchodilator results. ALJ's Exhibit 2 at 911-12.[10] The ALJ noted that Dr. Vuskovich validated the results of this study in his September 17, 2017 and September 27, 2017 medical reports. Decision and Order at 11 n.30. Thus, the ALJ found that Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer contends that while Dr. Vuskovich validated the qualifying study, the ALJ failed to consider he attributed the Miner's disabling obstructive impairment to a lung tumor from cancer that was confirmed by a November 2, 2008 computed tomography (CT) scan and is mentioned in the Miner's treatment records. Employer's Brief at 13. However, Employer's argument conflates the issues of total disability and disability causation. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the evidence establishes the Miner had a totally disabling respiratory or pulmonary impairment, while the cause of that impairment (whether it is due to pneumoconiosis or another disease such as cancer) is

[8] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The ALJ found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 9. He also found Claimant did not establish complicated pneumoconiosis and thus she was unable to invoke the irrebuttable presumption that the Miner's death was due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 20 C.F.R. §718.304; Decision and Order at 9.

[10] Employer submitted Employer's Exhibits 11 and 12 after the hearing which the ALJ admitted as ALJ Exhibits 1 and 2, respectively. Decision and Order at 3; Employer's January 7, 2021 Letter.

addressed at 20 C.F.R. §718.204(c), or in consideration of whether the Section 411(c)(4) presumption is rebutted. As Employer raises no other contentions of error, we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i).

Blood Gas Studies

The ALJ considered the results of two arterial blood gas studies. Decision and Order at 11. Dr. Somasundaram's November 1, 2008 study produced qualifying values at rest. Director's Exhibit 13 at 15. The November 24, 2008 study conducted at Pikeville Medical Center produced non-qualifying values at rest. ALJ's Exhibit 2 at 18. However, the ALJ did not give weight to the November 24, 2008 study because the Miner was receiving supplemental oxygen when it was conducted. Decision and Order at 11-12. Thus, the ALJ found that Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

As we have affirmed the ALJ's findings that Claimant established total disability based on the November 4, 2008 pulmonary function study, Employer has not explained how its arguments with respect to the blood gas studies, if accepted, would make any difference.[11] *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*, 6 BLR at 1-1278; *see also Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984) (because blood gas studies and pulmonary function studies measure different types of impairment, the results of a qualifying pulmonary function study are not called into question by a contemporaneous normal blood gas study).

Medical Opinions and Treatment Records

The ALJ considered the medical opinions of Drs. Rosenberg, Vuskovich, and Tuteur.[12] Decision and Order at 12-14. He rejected Dr. Rosenberg's opinion that there is

[11] Moreover, contrary to Employer's argument, Dr. Vuskovich neither invalidated the qualifying November 1, 2008 blood gas study nor opined it was conducted while Claimant was suffering an acute respiratory illness. *See* Appendix C to 20 C.F.R. Part 718 (Blood gas studies "must not be performed during or soon after an acute respiratory or cardiac illness."). Rather, he relied on the study to diagnose hypoxemia which he attributed, at least in part, to lung cancer, a chronic disease. He also attributed it to a collapsed lung. While he generally identified various possible causes of a collapsed lung, he did not indicate Claimant's was acute. *See* Director's Exhibit 63a at 109-110.

[12] We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine work as a coal truck driver and end loader required moderate manual labor, including

no "verifiable data to assess" total disability because it is contrary to ALJ's finding that the November 4, 2008 qualifying pulmonary function study, which Dr. Rosenberg reviewed, is valid. *Id.* at 13., *quoting* Director's Exhibit 63a at 6. He further found that neither Dr. Vuskovich nor Dr. Tuteur discussed whether the Miner had "the respiratory or pulmonary capacity to work."[13] Decision and Order at 12-14. Thus, the ALJ found the opinions of Drs. Rosenberg, Vuskovich, and Tuteur entitled to little weight on the issue of whether the Miner was totally disabled. *Id.* at 12-14. We affirm these finding as they are unchallenged. *See Skrack*, 6 BLR at 1-711.

The ALJ also considered the Miner's treatment records from Drs. Somasundaram,[14] Ammisetty,[15] and Puram, and Pikeville Medical Center.[16] Decision and Order at 14-17; ALJ's Exhibits 1, 2. He noted they include diagnoses of chronic obstructive pulmonary disease (COPD), shortness of breath, chronic airway obstruction, dyspnea, cough, hypoxemia, chest pain, restrictive airway disease, and wheezing. Decision and Order at 14-17. He also noted that the records describe the Miner as experiencing exercise limitations with weakness and required the use of supplemental oxygen and

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loading and unloading coal and operating heavy equipment. *Skrack*, 6 BLR at 1-711; Decision and Order at 9-10.

[13] Dr. Vuskovich diagnosed a "pulmonary impairment" but did not indicate whether it was totally disabling. Director's Exhibit 63a at 17. Dr. Tuteur noted that the Miner's objective testing was "associated with a moderately severe obstructive abnormality and mild impairment of oxygen gas exchange." Employer's Exhibit 1 at 4. However, he found that there was "no way to assess what [the Miner's] baseline [lung] function [was] prior to the terminal malignancy by these data." *Id.*

[14] Over the course of treating the Miner, Dr. Somasundaram diagnosed the Miner with COPD, shortness of breath, moderate hypoxemia, and chronic airway obstruction. Director's Exhibit 13 at 3, 6-7, 15, 17-18, 20; ALJ's Exhibit 1 at 54.

[15] On November 3, 2008, Dr. Ammisetty noted that the Miner suffered from COPD. ALJ's Exhibit 2 at 904.

[16] On November 3, 2008, the Miner was admitted to Pikeville Medical Center for back pain and weakness in his legs. ALJ's Exhibit 2 at 898. Dr. Modur noted that the Miner "ha[d] shortness of breathing due to coal mine work[]." *Id.* at 899. On November 4, 2008, Dr. Mettu diagnosed a moderate restrictive airway disease. *Id.* at 910. The Miner was treated from November 24, 2008, to November 30, 2008, for "increasing lethargy, fever, and shallow respirations" and was diagnosed with COPD. *Id.* at 3.

bronchodilators. *Id*. The ALJ concluded that the treatment records support a finding that the Miner was totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17.

Employer contends the ALJ drew impermissible inferences from the Miner's treatment records and improperly substituted his opinion for that of a medical expert in finding the Miner totally disabled. Employer's Brief at 12-13. We disagree.

As the ALJ found, a physician need not phrase his or her opinion in terms of "total disability" in order to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985); Decision and Order at 14-15, 17. Treatment records may support a finding of total disability if they provide sufficient information from which the ALJ can reasonably infer a miner was unable to do his last coal mine job. *See Freeman*, 897 F.2d at 894. Even a mild pulmonary impairment may be totally disabling, depending on the exertional requirements of a miner's usual coal mine employment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000).

Finding the Miner's treatment records contained sufficient information about his pulmonary or respiratory impairments, including Dr. Somasundaram's notation that the Miner experienced exercise limitations and "worsening" shortness of breath, the ALJ determined the Miner would have been unable to perform his usual coal mine employment prior to his death. Decision and Order at 17. He further found the Miner's COPD, airway obstruction and restriction, hypoxemia, and need for supplemental oxygen and bronchodilators in treatment thereof would have prevented him from returning to his job, which required loading and unloading coal and performing a moderate level of exertion. *Id*.

Contrary to Employer's contention, we see no error in the ALJ's finding that the Miner's treatment records support a finding of total disability. Decision and Order at 17; Employer's Brief at 12-13. He permissibly relied upon statements from the Miner's treating physicians about the Miner's respiratory and pulmonary impairments, and his need for supplemental oxygen and medication, to conclude the treatment records support a finding of total disability. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Napier*, 301 F.3d at 713-14; Decision and Order at 17. The Board is not empowered to reweigh the evidence or substitute its judgment. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ drew reasonable inferences from the Miner's treatment records, we affirm his finding the Miner was totally disabled at the time of his death. 20 C.F.R. §718.204(b)(2)(iv); *see Banks*, 690 F.3d at 482-83; *Freeman*, 897 F.2d at 894. Moreover, Employer does not identify any aspect of the treatment records that detract from the finding of total disability based on the valid,

qualifying pulmonary function study evidence. 20 C.F.R. §718.204(b)(2) (a qualifying pulmonary function study "shall establish" total disability "in the absence of contrary probative evidence."); *Shinseki*, 556 U.S. at 413.

As Employer raises no further challenges, we affirm the ALJ's finding that the evidence as a whole establishes total disability, and therefore Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2).

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,[17] or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer rebutted the presumption that the Miner had clinical pneumoconiosis but did not rebut the presumption that he had legal pneumoconiosis or that no part of his death was caused by pneumoconiosis. Decision and Order at 19-26.

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)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit 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

[17] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Rosenberg, Vuskovich, and Tuteur, who opined the Miner's pulmonary condition was due to lung cancer that had been caused by smoking. Decision and Order at 23-25; Employer's Exhibit 1 at 4; Director's Exhibit 63a at 6, 48-49, 111-112. The ALJ found their opinions insufficient to satisfy Employer's burden of proof.[18] Decision and Order at 25.

Employer contends the ALJ improperly held it to a too stringent standard on rebuttal, contending that the ALJ found the mere existence of coal mine employment and COPD constitutes legal pneumoconiosis. Employer's Brief at 15. We disagree.

The ALJ found the Miner met the necessary conditions for his COPD to be presumed to be legal pneumoconiosis under Section 411(c)(4), which we have affirmed. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A). The ALJ accurately noted that to rebut the presumption Employer must affirmatively establish the Miner's respiratory or pulmonary impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 23; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A). The ALJ then permissibly found none of the physicians adequately explained why they excluded coal mine dust exposure as a causative factor for the Miner's respiratory condition. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 24-25. Thus, the ALJ rejected the opinions of Drs. Rosenberg, Vuskovich, and Tuteur because he found them to be inadequately reasoned and thus insufficient to satisfy Employer's burden to rebut the presumption of legal pneumoconiosis. Because Employer does not attempt to explain how the ALJ erred in making those determinations, we affirm the ALJ's discrediting of their opinions. *Skrack*, 6 BLR at 1-711; Decision and Order at 25. We therefore affirm his finding that Employer did not rebut the Section 411(c)(4) presumption by establishing the Miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(A).

Death Causation

The ALJ next addressed whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). Employer argues the ALJ erred in finding the opinions of Drs.

[18] We affirm, as unchallenged, the ALJ's findings that the Miner's treatment records do not support Employer's burden of proof. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25.

Rosenberg,[19] Vuskovich,[20] and Tuteur[21] insufficient to satisfy its burden. Employer's Brief at 13-16. Contrary to Employer's assertion, the ALJ permissibly discredited their death causation opinions because they did not diagnose legal pneumoconiosis, contrary to his determination that Employer failed to disprove the Miner had the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order 26; Employer's Brief at 15. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii).

Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and thereby also affirm that Claimant established a mistake in determination of fact for purposes of granting modification. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §725.310.

Justice under the Act

Employer next argues the ALJ erred in determining that granting modification renders justice under the Act because he "overlook[ed] weighty factors" such as due process, finality, and Employer's competing interests. Employer's Brief at 9-10. Employer also asserts Claimant's motive was improper in seeking modification and that her modification request thwarted a good faith defense regarding the length of the Miner's coal mine employment. *Id.* at 9. We disagree.

An ALJ has the authority to grant modification based on any mistake in fact. His exercise of that authority is discretionary and requires consideration of competing equities in order to determine whether modifying an order will render justice under the Act. *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327- 28 (4th Cir. 2012); *Kinlaw v. Stevens Shipping & Terminal Co*., 33 BRBS 68, 72 (1999). In making that determination, the ALJ must consider several factors, including the need for accuracy, the quality of the new evidence, the moving party's diligence and motive, and whether a

[19] Dr. Rosenberg determined that "[the Miner's] death from metastatic lung cancer was not caused, contributed to or hastened by past coal mine dust exposure and the presence of [coal workers' pneumoconiosis]." Director's Exhibit 63a at 5.

[20] Dr. Vuskovich opined the Miner's death was caused by his lung cancer and not his coal dust exposure. Director's Exhibit 63a at 17, 50, 112.

[21] Dr. Tuteur opined the Miner's death was caused by lung cancer due to smoking and not the inhalation of coal mine dust or the development of pneumoconiosis. Employer's Exhibit 1 at 4.

favorable ruling would be futile. *Sharpe v. Dir., OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007). His discretion in deciding whether to grant modification is broad. *Sharpe II*, 692 F.3d at 335. Thus, the party opposing modification, bears the burden of establishing the ALJ committed an abuse of discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

Citing the relevant factors, the ALJ found the interest in accuracy outweighs the interest in finality. Decision and Order at 27. He determined Claimant acted diligently in requesting modification and her request was not futile or moot because she established entitlement to benefits. *Id.* at 27-28. While Employer contends the modification request "thwarted a good faith defense" on the length of the Miner's coal mine employment, the ALJ permissibly concluded Claimant acted in "good faith" as "Employer has not offered any evidence that [] Claimant's motivation in requesting modification is anything other than to obtain benefits to which she is entitled."[22] *Id.*; Employer's Brief at 9.

As Employer has not shown the ALJ abused his discretion, we affirm his determination that granting modification renders justice under the Act and Claimant is entitled to benefits. *See O'Keeffe*, 404 U.S. at 255; *Sharpe II*, 692 F.3d at 330; Decision and Order at 27-28.

Commencement of Benefits

Finally, the ALJ determined that Claimant is entitled to benefits commencing in December 2008, the month of the Miner's death. Decision and Order at 28. However, Employer correctly points out the ALJ did not address its argument that Claimant is not entitled to receive benefits during the time she was remarried after the Miner's death.[23] Employer's Brief at 16-17; Employer's Post-Hearing Brief on Modification at 11. Thus, we vacate the ALJ's commencement findings and remand the case for him to reconsider the specific periods of Claimant's eligibility under 20 C.F.R. §§725.212, 725.213.[24]

[22] Having already rejected Employer's argument that the ALJ erred in granting modification based on a change in law, we also reject Employer's general contention that the ALJ "overlook[ed] . . . due process of law." Employer's Brief at 9.

[23] Subsequent to her divorce from the Miner and his death, Claimant remarried on May 28, 2016 but divorced her second spouse on March 14, 2017. Director's Exhibits 54, 46, 58.

[24] Employer also contends the ALJ failed to consider whether Claimant must file an application for re-instatement of benefits pursuant to 20 C.F.R. §725.213(c) given that benefits are terminated due to a subsequent marriage. Employer's Brief at 16-17;

Accordingly, the ALJ's Decision and Order Awarding Benefits on Request for Modification of a Survivor's Claim is affirmed but the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

Employer's Post-Hearing Brief on Modification at 11. However, Claimant was not awarded benefits prior to her second marriage, and Employer does not challenge Claimant's entitlement to benefits after her second marriage ended, so there was no need for her to file an application for reinstatement of benefits. Consequently, we reject Employer's argument.