U.S. Department of Labor

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

BRB No. 21-0603 BLA

WANDA A. BAILEY (Widow of RONALD D. BAILEY) Claimant-Petitioner v. EASTERN ASSOCIATED COAL and PEABODY ENERGY CORPORATION Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/22/2022 DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Cameron Blair (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Modification (2019-BLA-06264) rendered on a survivor's claim filed on April 24, 2017,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established the Miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). Considering rebuttal of the presumption, the ALJ found Employer failed to disprove the presumed existence of pneumoconiosis and disability causation, but further found Claimant failed to establish that the Miner's death was due to

[1] Claimant is the widow of the Miner, who died December 24, 2016. Director's Exhibits 3, 13. Because the Miner did not establish entitlement to benefits during his lifetime, 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, is not applicable in this case.

[2] This case involves a request for modification of a district director's denial of benefits. Director's Exhibit 40. In cases involving modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

[3] In a survivor's claim, Section 411(c)(4) of the Act provides a rebuttable presumption that a 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. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. As we will discuss below, the ALJ erred in applying a presumption of disability due to pneumoconiosis in this case.

pneumoconiosis. 20 C.F.R. §§718.205(b), 718.305(d)(1). Thus, she found Claimant failed to establish an essential element of entitlement and denied benefits.

On appeal, Claimant asserts the ALJ erred in finding the Miner's death was not due to pneumoconiosis. Employer responds in support of denial but argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it did not rebut the presumption.[4] The Director, Office of Workers' Compensation Programs (the Director), filed a response agreeing with Claimant that, having found the Section 411(c)(4) presumption invoked, the ALJ erroneously placed the burden of proof on Claimant to establish death causation.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, Claimant must establish he "had, at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented

[4] Employer's merits arguments in its response brief are in support of other methods by which the ALJ may reach the same result and deny benefits. Employer's Response at 4-12. Therefore, these arguments are properly before the Board, and no cross-appeal was required. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc). Employer also argued it is not liable for benefits if they are awarded. Employer's Brief at 14-17. However, the Board granted the Director's motion to strike that portion of Employer's brief because it is not responsive to the arguments raised in Claimant's brief. *Bailey v. E. Assoc. Coal Corp.*, BRB No. 21-0603 BLA (May 18, 2022) (Order) (unpub.).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 24-25.

him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §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 noted the record contains no pulmonary function studies or evidence of cor pulmonale with right-sided congestive heart failure and thus found Claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). Decision and Order at 6-7. She considered two arterial blood gas studies contained in the Miner's treatment records, dated January 20, 2012 and February 5, 2012. Decision and Order at 6-7; Claimant's Exhibit 1 at 2, 36 (unpaginated). Because both studies produced qualifying values,[7] she found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 7. The ALJ further found no medical opinion of record addressed whether the miner was totally disabled. Decision and Order at 7; 20 C.F.R. §718.204(b)(2)(iv). Based on the blood gas studies, the ALJ found the Miner was totally disabled.

Employer initially argues the ALJ erred in finding the January 20, 2012 and February 5, 2012 blood gas studies establish total disability because they were obtained during hospitalizations for what Employer alleges were acute cardiopulmonary conditions. Employer's Brief at 4-5. Because Employer challenges the reliability of this evidence for the first time on appeal, we decline to consider its argument.[8] *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986).

Employer further asserts the ALJ failed to consider other, non-qualifying blood gas studies contained in the Miner's treatment records. Employer's Brief at 5-6. We agree

[7] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[8] Claimant submitted the January 20, 2012 and February 5, 2012 blood gas studies as part of the Miner's treatment records. Claimant's Exhibit 1. Employer did not assert before the ALJ that either study was unreliable, nor did it provide the studies to its medical experts, Drs. Swedarsky and McSharry, for review. *See* Employer's Closing Brief at 4-5; Employer's Exhibit 2 at 2-3.

with Employer's argument that the ALJ erred in not considering the non-qualifying July 15, 2016 and July 20, 2016 blood gas studies, also obtained during the Miner's treatment. Employer's Exhibit 3 at 17-18 (unpaginated); *see* 20 C.F.R. Part 718, Appendix C. We further note the record contains five additional blood gas studies dated between October 23, 2016 and October 26, 2016,[9] which were also obtained during the course of treatment. Director's Exhibit 16 at 14, 46-50. Because the ALJ failed to consider all relevant evidence in finding the arterial blood gas studies establish total disability, we vacate her finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See* 30 U.S.C. §923(b); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-988 (1984) (ALJ's failure to discuss relevant evidence requires remand).

In addition, Employer contends the ALJ erred in finding none of the medical opinion evidence is relevant to total disability. Employer's Brief at 7-12. We agree.

Dr. McSharry stated the July 15, 2016 and July 20, 2016 blood gas studies showed "relative hypoxia for the Miner's age," but were "well outside the disability standard." Employer's Exhibit 2 at 4. He further opined the Miner's treatment records did not suggest that his "treating physicians felt he had pulmonary disease." *Id.* When the ALJ fails to consider relevant evidence, and thereby fails to make appropriate factual findings and credibility determinations, the proper course for the Board is to remand the case for such determinations. *See* 30 U.S.C. §923(b) (the fact finder must address all relevant evidence); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *McCune*, 6 BLR at 1-988. Thus, we vacate the ALJ's determination that the record contains no medical opinion relevant to total disability at 20 C.F.R. §718.204(b)(2)(iv).

Employer further argues the ALJ did not adequately address certain treatment records it contends demonstrate the Miner did not have a chronic respiratory impairment but was instead being treated for acute cardiac and respiratory conditions.[10] Employer's Brief at 7-12 (citing and discussing Director's Exhibits 15-17; Claimant's Exhibit 1; Employer's Exhibits 3-4). The ALJ did not discuss or weigh these treatment records. As

[9] The blood gas studies dated from October 23, 2016 through October 26, 2016 each produced non-qualifying results. Director's Exhibit 16 at 14, 46-50. We note, however, that the reports dated October 25, 2016 and October 26, 2016 suggest Claimant may have been using supplemental oxygen at the time the studies were performed. *Id.* at 14, 46-47.

[10] We note, however, Employer acknowledges some of the Miner's treatment records reflect hospitalizations for acute exacerbations of chronic conditions, including chronic congestive heart failure and chronic obstructive pulmonary disease (COPD). Employer's Brief at 4-5.

it is the ALJ's function to weigh the evidence, the ALJ on remand must consider whether the Miner's treatment records support a finding of total disability. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314 (4th Cir. 2012); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995).

Based on the foregoing, we vacate the ALJ's finding that Claimant established the Miner was totally disabled. 20 C.F.R. §718.204(b)(2). We therefore also vacate the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. However, in the interest of judicial efficiency, we will address the parties' arguments regarding rebuttal of the Section 411(c)(4) presumption.

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

Once the Section 411(c)(4) presumption is invoked in a survivor's claim, the burden shifts to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[11] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2). The ALJ found the evidence establishes both clinical and legal pneumoconiosis and therefore Employer did not rebut either form of the disease.[12] Decision and Order at 8-9. She further found Employer failed to establish that no part of the Miner's total disability was caused by pneumoconiosis. *Id.* at 10. Then, proceeding as if Claimant were not aided by a presumption, the ALJ found she failed to establish pneumoconiosis was a substantially contributing cause of the Miner's death under 20 C.F.R. §718.205(b).[13] *Id.* at 10-11.

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

[12] We affirm, as unchallenged, the ALJ's finding that the evidence establishes clinical pneumoconiosis and therefore Employer failed to rebut the disease. *See Skrack*, 6 BLR at 1-711; Decision and Order at 8.

[13] In a survivor's claim where a claimant cannot invoke any statutory presumptions, the claimant must establish by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and his death was due to

As Claimant and the Director contend, the ALJ applied the wrong legal standard. Claimant's Brief at 10-11; Director's Brief at 2. Assuming arguendo the Section 411(c)(4) presumption was properly invoked, it is presumed (subject to rebuttal) that the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.305(c)(2). Thus, it was not Claimant's burden to establish he had pneumoconiosis or pneumoconiosis was a substantially contributing cause of the Miner's death; it was Employer's burden to establish the Miner had neither legal nor clinical pneumoconiosis or that no part of his death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Therefore, we vacate the ALJ's finding Claimant did not establish the Miner's death was due to pneumoconiosis and vacate the denial of benefits.

Rebuttal of Legal Pneumoconiosis[14]

Employer correctly contends the ALJ did not adequately explain her finding that Dr. Swedarsky's opinion supports a finding of legal pneumoconiosis.[15] Employer's Brief at 12. After simply summarizing Dr. Swedarsky's diagnoses of COPD and clinical pneumoconiosis, the ALJ found that based on Dr. Swedarsky's opinion, the Miner "suffered from legal pneumoconiosis." Decision and Order at 9. To the extent the ALJ relied on Dr. Swedarsky's diagnosis of clinical pneumoconiosis to find the Miner had legal pneumoconiosis, she erred, as the two diseases are differently defined, and the presence of one does not automatically demonstrate the presence of the other. 20 C.F.R. §718.201(a)(1)-(2); *see Looney*, 678 F.3d at 314; 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). In addition, a physician's diagnosis of COPD or emphysema, standing alone, does not automatically equate to a diagnosis of legal pneumoconiosis. For such a disease to constitute legal pneumoconiosis, it must arise out of coal mine employment. 20 C.F.R.

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pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

[14] Although the ALJ initially correctly acknowledged that it is Employer's burden to disprove legal pneumoconiosis, her subsequent analysis reflects that she incorrectly considered whether the evidence "establishes" the disease, rather than whether Employer disproved it. Decision and Order at 7-9. That said, her finding that the evidence establishes legal pneumoconiosis, if affirmable, necessarily precludes rebuttal by Employer. We therefore consider Employer's allegations of error with respect to that finding.

[15] Employer does not challenge the ALJ's reasons for finding that the opinion of its other medical expert, Dr. McSharry, was not sufficiently credible to rebut legal pneumoconiosis. Decision and Order at 9. We therefore affirm those findings. *See Skrack*, 7 BLR at 1-711.

§718.201(a)(2), (b); *see* 65 Fed. Reg. at 79,938; *Looney*, 678 F.3d 305, 314-16 (4th Cir. 2012); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002).

Nonetheless, remand for further consideration of whether Dr. Swedarsky's opinion rebuts the presence of legal pneumoconiosis (if invoked) is unnecessary as his opinion is insufficient to support Employer's burden to rebut the disease. Dr. Swedarsky diagnosed the Miner with "mild to moderate emphysema." It thus would be Employer's burden to prove, that the emphysema, and any other chronic respiratory condition or impairment, Claimant had, is not significantly related to, or substantially aggravated by coal mine dust exposure. 20 C.F.R. §§718.201(A)(2), 718.305(d)(2). Although Dr. Swedarsky opined the Miner's "heavy" cigarette smoking and exposure to secondhand smoke were the "major proximate cause[s]" of his emphysema, he did not offer an opinion on the relevant inquiry of whether coal mine dust was a significant contributing cause, along with smoking. Employer's Exhibit 1 at 29. His opinion thus cannot support Employer's burden to rebut legal pneumoconiosis. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017) (medical opinions that "solely focused on smoking" as a cause of obstruction, and "nowhere addressed why coal dust could not have been an *additional* cause," fail to consider "a fundamental aspect of the legal inquiry") (emphasis in original). Therefore, any error in the ALJ's finding that Dr. Swedarsky's opinion establishes legal pneumoconiosis is harmless as it relates to the question of whether his opinion rebuts the disease. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Remand Instructions

On remand, the ALJ must first consider all of the arterial blood gas studies in the record. *See* 30 U.S.C. §923(b); *Looney*, 678 F.3d at 316-17; 20 C.F.R. §718.204(b)(2)(ii). The ALJ must further evaluate Dr. McSharry's opinion and the Miner's treatment records to determine whether the evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Raines*, 758 F.2d at 1534; *Cornett*, 277 F.3d at 578. The ALJ must weigh together all of the evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, resolve conflicts in the evidence, and properly explain her findings on the issue of total disability. *See* 30 U.S.C. §923(b); *Looney*, 678 F.3d at 316-17; *see also* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2).

If the ALJ determines Claimant established the Miner was totally disabled at the time of his death, Claimant will have invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis at 20 C.F.R. §718.305(b), (c). As we have determined the ALJ's finding that Employer did not rebut clinical or legal pneumoconiosis is affirmable, if she finds the presumption invoked, she must then evaluate whether Employer can establish that no part of the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2); *see* Scott *v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002) (where physicians fail to diagnose pneumoconiosis, contrary to the ALJ's finding that the diseases are present, "the ALJ could only give weight to those opinions [on causation] if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most").

If, however, the ALJ finds Claimant has not established total disability and the presumption is not invoked, then the ALJ must determine if Claimant has met her burden to establish the existence of pneumoconiosis[16] and that the Miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202(a), 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

In rendering her credibility findings, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). She must also explain her findings in accordance with the Administrative Procedure Act.[17] *See Wojtowicz*, 12 BLR at 1-165.

[16] As noted, we have affirmed as unchallenged the ALJ's finding that the evidence affirmatively establishes the Miner had clinical pneumoconiosis. The ALJ must, however, consider whether Claimant also established the Miner had legal pneumoconiosis.

[17] The Administrative Procedure Act provides that every adjudicatory decision must include "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).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge