

U.S. Department of Labor

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



BRB No. 20-0382 BLA

LINDA S. GUMM)
(Widow of GARY M. GUMM))
)
Claimant-Respondent)

v.)

MOLLOY MINING, INCORPORATED)
)
and)

WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
Petitioners)

DATE ISSUED: 09/24/2021

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order on Remand Awarding Benefits (2017-BLA-05206) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim¹ filed on November 26, 2015, and is before the Benefits Review Board for the second time.

In a Decision and Order Awarding Benefits dated March 29, 2018, the ALJ found Claimant established the Miner had thirty years of coal mine employment, including more than fifteen in underground mining, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

Considering Employer's appeal, the Board affirmed the ALJ's finding that Claimant established the Miner had at least fifteen years of underground coal mine employment. The Board vacated, however, the ALJ's findings that the pulmonary function study and arterial blood gas study evidence established total disability. 20 C.F.R. §§718.204(b)(2)(i), (ii). Therefore, the Board vacated the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and remanded the case for further consideration at 20 C.F.R. §718.204(b)(2). The Board declined to address Employer's challenge to the ALJ's finding that it failed to rebut the presumption, but noted it may challenge his rebuttal findings should he find invocation of the Section 411(c)(4) presumption on remand. *Gumm v. Molloy Mining, Inc.*, BRB No. 18-0354 BLA, slip op. at 5 n.10 (May 15, 2019) (unpub.).

On remand, the ALJ found the pulmonary function study and blood gas study evidence did not establish total disability, but found the medical opinion evidence

¹ Claimant is the widow of the Miner, who died on September 5, 2015. Director's Exhibits 3, 13. The Miner never successfully established a claim for benefits during his lifetime. Thus Claimant is not entitled to benefits under Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

² Section 411(c)(4) 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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

established the Miner had a totally disabling respiratory impairment at the time of his death. 20 C.F.R. §718.204(b)(2)(i), (ii), (iv). He therefore found Claimant invoked the Section 411(c)(4) presumption. He further reinstated his prior determination that Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.³ Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption⁵

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis in her survivor's claim, the burden shifted to Employer to establish that the Miner had neither legal nor clinical pneumoconiosis,⁶ or that "no part of [his] death

³ We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established the Miner had a totally disabling respiratory impairment at the time of his death and thus invoked the Section 411(c)(4) presumption that his death was due to pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); June 18, 2020 Decision and Order on Remand at 3-4.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant 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 4.

⁵ The ALJ found Employer did not rebut the Section 411(c)(4) presumption based on the reasons set forth in his March 29, 2018 Decision and Order. *See* June 18, 2020 Decision and Order on Remand at 5; March 29, 2018 Decision and Order at 16-29. Thus all references regarding his rebuttal findings cite to that decision.

⁶ "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 pneumoconiosis, *i.e.*, the conditions

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 did not establish rebuttal by either method.⁷

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.” See 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). Employer argues the ALJ erred in discrediting the opinions of Drs. Spagnolo and Castle that the Miner did not have legal pneumoconiosis.⁸ Employer’s Brief at 14-19. We disagree.

Dr. Spagnolo opined the Miner had a mild restrictive defect caused by morbid obesity and severe heart disease from which he developed congestive heart failure. Employer’s Exhibits 5, 13 at 20-21, 31. He further opined there is no evidence the Miner’s coal mine dust exposure caused his restrictive defect. Employer’s Exhibits 5, 13 at 21. He stated that while coal mine dust can cause a reduction in total lung capacity by developing lung fibrosis that scars the lung, “[t]here’s no evidence of any coal dust nodules, or changes on the CT scan.” Employer’s Exhibits 5, 13 at 21.

Dr. Castle opined the Miner had a moderately severe restriction due to his morbid obesity.⁹ Employer’s Exhibits 10 at 35, 12 at 58-59, 64. He further stated “[the Miner]

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).

⁷ The ALJ found Employer disproved the existence of clinical pneumoconiosis. March 29, 2018 Decision and Order at 17-20.

⁸ The ALJ also considered the treatment records of Dr. Keith and hospital records from Charleston Area Medical Center and Thomas Memorial Hospital that contain diagnoses of chronic obstructive pulmonary disease (COPD) and emphysema. Employer’s Exhibits 7-9. The ALJ found the treatment records support the presence of legal pneumoconiosis. March 29, 2018 Decision and Order at 26.

⁹ Dr. Castle attributed the Miner’s respiratory insufficiency to “obesity alveolar hypoventilation syndrome” based on the results of his blood gas studies. Employer’s Exhibit 12 at 32-33.

had no evidence of large airway obstruction or diffusion abnormality after correction for alveolar volume.” Employer’s Exhibits 10 at 35. Thus he opined the Miner did not have any physiologic abnormalities or impairment related to coal mine dust exposure. *Id.*

The ALJ permissibly discredited the opinions of Drs. Spagnolo and Castle because neither adequately explained why the Miner’s “30 years of coal mine employment, 20-25 of which were underground,” did not significantly contribute, along with his morbid obesity and severe heart disease, to his restrictive respiratory impairment.¹⁰ *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74, n.4 (4th Cir. 2017) (ALJ permissibly discredited 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”); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313-14 (4th Cir. 2012); 20 C.F.R. §718.201(b); March 29, 2018 Decision and Order at 22-23. Employer restates the physicians’ opinions on appeal and argues that not every miner exposed to coal dust develops pneumoconiosis, but it has not otherwise identified any error in the ALJ’s rationale.

We therefore consider Employer’s arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited the opinions of Drs. Spagnolo and Castle that Claimant does not have legal pneumoconiosis, we affirm his finding that Employer did not disprove the existence of the disease. March 29, 2018 Decision and Order at 26. Employer’s failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The ALJ next considered whether Employer established “no part of the Miner’s death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R.

¹⁰ Because the ALJ provided a valid reason for discrediting the opinions of Drs. Spagnolo and Castle, any error in discrediting their opinions for other reasons is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer’s Brief at 15-16.

§718.305(d)(2)(ii). Employer argues the ALJ erred in finding the opinions of Drs. Spagnolo and Castle¹¹ insufficient to satisfy its burden.¹² Employer's Brief at 10-14.

Contrary to Employer's assertion, the ALJ permissibly found the same reason for discrediting the opinions of Drs. Spagnolo and Castle that the Miner did not have legal pneumoconiosis also undercut their opinions that the Miner's death was unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an ALJ "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); March 29, 2018 Decision and Order at 32-34. We therefore affirm the ALJ's finding that Employer failed to establish that no part of the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); March 29, 2018 Decision and Order at 34.

In view of the foregoing, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits. *See* 30 U.S.C. §921(c)(4).

¹¹ Dr. Spagnolo opined there is no evidence that coal dust exposure played any role in the Miner's death. Employer's Exhibit 5. Dr. Castle opined the Miner died as a result of cardiac failure due to diastolic cardiac dysfunction; he believed this dysfunction was due to hypertension and morbid obesity with obesity hypoventilation syndrome. Employer's Exhibits 10 at 35-36, 12 at 64-65. He further opined the Miner's death was not caused, contributed to, or hastened in any way by coal workers' pneumoconiosis or any chronic lung disease arising out of coal mining employment. Employer's Exhibits 10 at 36, 12 at 65.

¹² The ALJ accurately noted the death certificate listed chronic respiratory failure due to COPD, chronic heart failure, and coal workers' pneumoconiosis. March 29, 2018 Decision and Order at 27; Director's Exhibit 13.

Accordingly, the ALJ's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge