



BRB Nos. 20-0373 BLA
and 20-0443 BLA

MARTHA A. JOHNSON (o/b/o and Widow)
of RAYMOND L. JOHNSON))

Claimant-Respondent)

v.)

CONSOLIDATION COAL COMPANY)

DATE ISSUED: 09/28/2021

Employer-Petitioner)

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

Party-in-Interest)

DECISION and ORDER

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

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decisions and Orders Awarding Benefits on Remand and Errata (2013-BLA-05790, 2015-BLA-

05770) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on August 27, 2012, and a survivor's claim filed on January 15, 2015.¹ The case is before the Benefits Review Board for a second time.

In an August 3, 2017 Decision and Order Awarding Benefits issued in the miner's claim, ALJ Thomas M. Burke found Claimant² invoked the rebuttable presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018). He further found Employer established the Miner did not have clinical pneumoconiosis but rather pulmonary fibrosis, but did not establish that the pulmonary fibrosis was not significantly related to or substantially aggravated by his coal dust exposure. Thus, ALJ Burke concluded Employer did not rebut the presumption of legal pneumoconiosis or total disability causation and awarded benefits.³ Claimant's survivor's claim was assigned to ALJ Richard A. Morgan, who issued a Decision and Order Awarding Benefits on October 27, 2017. He determined Claimant was entitled to derivative survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).⁴

¹ We have consolidated Employer's appeals of the awards in the miner's claim and the survivor's claim for decision purposes only. *Johnson v. Consolidation Coal Co.*, BRB Nos. 20-0373 BLA and 20-0443 BLA (Aug. 14, 2020) (Order) (unpub.).

² The Miner, Raymond L. Johnson, and his widow, Martha A. Johnson, are deceased. *Johnson v. Consolidation Coal Co.*, BRB Nos. 17-0634 BLA and 18-0054 BLA, slip op. at 2 n.1 (Mar. 15, 2019) (unpub.); Hearing Transcript at 49. Their daughters, Jennifer R. Bane, Donna L. Johnson, and Amy B. Haines, are pursuing both claims. Miner's Claim (MC) Director's Exhibit 2; Survivor's Claim (SC) Director's Exhibit 1.

³ Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the 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(b).

⁴ Under Section 422(l) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

In consideration of Employer's appeals, the Board affirmed, as unchallenged, ALJ Burke's finding that Claimant invoked the Section 411(c)(4) presumption but vacated his determination that Employer did not rebut it. *Johnson v. Consolidation Coal Co.*, BRB Nos. 17-0634 BLA and 18-0054 BLA, slip op. at 2 n.4, 3, 8 (Mar. 15, 2019) (unpub.). The Board held ALJ Burke erred in finding Employer did not disprove legal pneumoconiosis because he did not sufficiently explain his crediting of the Miner's treating physician, Dr. Veraldi, over Employer's experts, Drs. Bellotte and Ghio. *Id.* at 5-7. Thus, the Board remanded the case for further consideration of whether Employer established either the Miner's pulmonary fibrosis was not legal pneumoconiosis or that it played no part in his disability. *Johnson*, BRB Nos. 17-0634 BLA and 18-0054 BLA, slip op. at 8-9. As the miner's claim award was vacated, the Board also vacated ALJ Morgan's determination that Claimant was derivatively entitled to survivor's benefits pursuant to Section 422(l) of the Act. 30 U.S.C. §932(l); *Johnson*, BRB Nos. 17-0634 BLA and 18-0054 BLA, slip op. at 10.

On remand, both claims were consolidated and reassigned to ALJ Swank (the ALJ). In a Decision and Order issued on May 22, 2020, he found Employer did not rebut the Section 411(c)(4) presumption and awarded benefits in the miner's claim. In a separate Decision and Order issued on June 4, 2020, he found Claimant entitled to derivative survivor's benefits pursuant to Section 422(l) of the Act.

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Additionally, Employer challenges Claimant's entitlement to derivative survivor's benefits. Claimant responds, urging affirmance of both awards. Employer filed a reply brief, reiterating its arguments. The Director, Office of Workers' Compensation Programs, declined to file a substantive brief in either appeal.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.⁵ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

⁵ Because the Miner performed his last coal mine employment in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 51; *Johnson*, BRB Nos. 17-0634 BLA and 18-0054 BLA, slip op. at 3 n.5.

The Miner's Claim - Section 411(c)(4) Rebuttal

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,⁶ or “no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method. Employer argues the ALJ’s decision is not adequately explained and fails to satisfy the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); Employer’s Brief at 7-20. Employer’s arguments are without merit.

Legal Pneumoconiosis

To prove that the Miner did not have legal pneumoconiosis, Employer must establish he 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)(1)(i)(A). Employer argues the ALJ erred in his consideration of the pathology and medical opinion evidence.

Pathology Evidence

Dr. Yousem conducted the Miner’s biopsy and diagnosed “a subpleural pattern of interstitial scarring, associated with honeycomb change,” and “no evidence of coal workers['] pneumoconiosis including an absence of dust macules and anthracosilicotic nodules.” MC Claimant’s Exhibit 6. Dr. Landau conducted the Miner’s autopsy and diagnosed pulmonary fibrosis with usual interstitial pneumonia (UIP) and honeycombing. MC Claimant’s Exhibit 5. He noted a lymph node contained anthracotic pigment. *Id.* The ALJ found the pathology evidence insufficient to disprove legal pneumoconiosis because neither physician specifically addressed the etiology of the Miner’s fibrosis/UIP. MC Decision and Order on Remand at 7-8. As Employer raises no specific challenge to the

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 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).

ALJ's weighing of these opinions, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer's sole argument regarding the pathology evidence is that the ALJ failed to consider Dr. Oesterling's opinion on legal pneumoconiosis based on his review of the biopsy and autopsy slides. Employer's Brief at 9; Employer's Reply Brief at 2-4. We disagree, as Dr. Oesterling did not address whether Claimant has legal pneumoconiosis. Dr. Oesterling stated his findings are quite similar to Dr. Yousem who diagnosed UIP with "no evidence of coal workers pneumoconiosis including an absence of dust macules and anthracosilicotic nodules." MC Claimant's Exhibit 6; MC Employer's Exhibit 20 at 6. Dr. Oesterling explained that "current cigarette smokers and previous smokers have a much higher incidence of UIP and [the Miner] supposedly had a smoking history and was of an appropriate age for this process." MC Employer's Exhibit 20 at 6. He also noted the Miner's "clinical course" was typical for UIP as his disease progressed within five years of the diagnosis leading to his respiratory death. *Id.* As to whether the UIP was related to the Miner's coal dust exposure, Dr. Oesterling stated coal dust did not "produce" the Miner's UIP and "produced minimal change in [the Miner's] lung insufficient for a diagnosis of *coal worker's pneumoconiosis*." *Id.* (emphasis added). He also concluded coal dust did not "produce [the Miner's] lifetime disability." *Id.*

Dr. Oesterling's opinion that there is insufficient evidence to diagnose "coal workers' pneumoconiosis" goes to the issue of whether the Miner had clinical pneumoconiosis (which Employer has already disproven) and not to whether his pulmonary fibrosis constituted legal pneumoconiosis.⁷ MC Employer's Exhibit 20. While Dr. Oesterling's statement that coal dust exposure did not "produce" the Miner's UIP and respiratory disability addresses the direct cause of those conditions, it fails to address the relevant inquiry for whether those conditions constitute legal pneumoconiosis: whether the UIP or respiratory impairment were "significantly related to, or substantially aggravated by," his thirty years of coal mine dust exposure.⁸ 20 C.F.R. §718.201(b); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995) (Because Employer has the burden on

⁷ The term "coal workers' pneumoconiosis" is generally understood to address clinical, not legal, pneumoconiosis and is specifically included in the definition of clinical pneumoconiosis. *See* 718.201(a)(1); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995); *see also Kline v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 877 F.2d 1175, 1178-79 (3d Cir. 1989).

⁸ Dr. Oesterling's statement that coal dust "did not contribute to, hasten or cause his death," addresses the cause of the Miner's death, *see* 20 C.F.R. §718.205, but not whether the Miner had legal pneumoconiosis, 20 C.F.R. §718.201(a)(2).

rebuttal, “its failure to disprove aggravation of any of [the miner’s] conditions was fatal to its case.”). Because Dr. Oesterling’s opinion fails to address aggravation by or contribution from coal mine dust exposure, it is insufficient to meet Employer’s burden to disprove the Miner had legal pneumoconiosis. 20 C.F.R. §718.201(b). Thus, any error by the ALJ in not specifically weighing his opinion on rebuttal of legal pneumoconiosis is harmless. *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”).

Medical Opinion Evidence

We further reject Employer’s argument that the ALJ failed to consider the entire record and did not satisfy the APA in rejecting the opinions of Drs. Bellotte and Ghio that the Miner did not have legal pneumoconiosis. Employer’s Brief at 10-14; Employer’s Reply Brief at 4-7. Dr. Bellotte examined the Miner on January 31, 2013, and diagnosed obesity, asthma, allergies, hypertension, gastroesophageal reflux, and probable arteriosclerotic heart disease. MC Director’s Exhibit 18; MC Employer’s Exhibit 18. He opined the Miner’s pulmonary function studies showed a moderately severe restrictive impairment that he attributed to obesity and a markedly elevated right hemidiaphragm, which decreased the volume of the lung by fifty percent. *Id.* In addition, he felt the Miner’s responsiveness to bronchodilator medication was “suspicious for asthma” and opined the Miner’s elevated right diaphragm was unrelated to pneumoconiosis. *Id.* Instead, he stated the major contributor to the Miner’s pulmonary impairment was an “undiagnosed” mass in the right thoracic cavity. *Id.* Because the Miner’s x-rays revealed irregular small opacities (“t and “s”) in the lower lungs fields and not the rounded opacities (p, q, r) in the upper lung zones seen “customarily” in coal workers’ pneumoconiosis, Dr. Bellotte concluded the Miner did not have a chronic dust disease of the lung or the sequela caused by, contributed to, or substantially aggravated by coal mine dust exposure. *Id.*

At his deposition, Dr. Bellotte explained the Miner had a “very ground glass sort of appearance of the lung” characteristic of non-specific fibrosis or UIP. MC Employer’s Exhibit 8 at 9. He acknowledged coal dust may cause interstitial fibrosis, but noted that viral infections also are one of the causes of UIP and the Miner’s pneumonia developed after he retired. *Id.* at 11, 25. He stated that something “more definitive” happened to the Miner’s diaphragm in the two to three months before his examination because “very good physicians” who read previous x-rays did not document similar findings. *Id.* at 12-13. On the x-ray he obtained, he observed the Miner’s right diaphragm was “markedly elevated to 50 percent up the right chest” and “appeared paralyzed” due to an impinged phrenic nerve unrelated to pneumoconiosis. *Id.* at 12-13.

Dr. Bellotte further opined the Miner did not have chronic bronchitis and attributed the Miner’s history of a dry cough to interstitial fibrosis. *Id.* at 15-16. He noted the Miner

had “club nails,” which is also associated with interstitial fibrosis. *Id.* at 20. Furthermore, he opined the “much more rapid[]” decline in the Miner’s pulmonary function “isn’t the progression and the latency we would see with coal workers’ pneumoconiosis” and is instead seen “with advancing progressive interstitial fibrosis.” *Id.* at 22-23. Dr. Bellotte concluded that the Miner’s disabling pulmonary disease was not caused or aggravated by coal mine dust. *Id.* at 24. Instead, he stated interstitial fibrosis is “a genetic predisposition and a viral infection,” and coal dust is not a cause in this case “because we can see exactly what we see in nonspecific interstitial fibrosis and usual interstitial pneumonitis on his chest x-ray.” *Id.* at 25.

Dr. Ghio diagnosed severe idiopathic pulmonary fibrosis (IPF) unrelated to coal dust exposure based on a review of the Miner’s medical records, pulmonary function studies, blood gas studies, chest x-rays, and a CT scan. MC Employer’s Exhibit 6. Dr. Ghio subsequently reviewed additional evidence and reiterated his opinion that the Miner has the “classic presentation of [IPF] and not coal workers’ pneumoconiosis.” MC Decision and Order on Remand at 12, *quoting* MC Employer’s Exhibit 19. He noted that IPF or UIP has been described in the lungs of miners with coal workers’ pneumoconiosis and “manifest[s] as bridging fibrosis connecting the macular, nodular, or progressive massive fibrosis lesions of coal workers’ pneumoconiosis or silicosis, often with pigmented interlobular septal thickening.” MC Employer’s Exhibit 19. However, based on the pathology evidence indicating the absence of clinical pneumoconiosis, he concluded the Miner’s respiratory condition was idiopathic and unrelated to coal mine dust exposure. *Id.*

Contrary to Employer’s arguments, the ALJ accurately found Employer’s experts diagnosed the Miner with an idiopathic respiratory disease based on “on negative x-rays and CT scans as well as [the Miner’s] autopsy and biopsies, which note an absence of dust macules, nodules, and/or progressive massive fibrosis.”⁹ He permissibly found their explanations unpersuasive to rebut the presumption that coal dust aggravated or contributed to the Miner’s fibrosis, however, because legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313 (4th Cir. 2012); 20 C.F.R. §718.202(b); MC Decision and Order on Remand at 12-13. He further found that neither physician discussed how they determined coal dust did not contribute to or aggravate Claimant’s interstitial lung disease prior to determining it was idiopathic.¹⁰ MC Decision and Order on Remand at 13. We see no error in the

⁹ Dr. Bellotte did not review the biopsy or autopsy evidence. *See* MC Director’s Exhibit 18; MC Employer’s Exhibits 8 at 7-8, 18.

¹⁰ As the ALJ noted, Dr. Veraldi explained that “[e]xposure to silica and coal mine dusts may result in pulmonary fibrosis in a pattern that mimics [IPF] and the histopathology does not always demonstrate coal dust pigmentation,” and she cited to medical literature

ALJ's permissible conclusion that neither Dr. Bellotte nor Dr. Ghio "adequately explain how they eliminated [the Miner's] 30 years of exposure to coal dust" as a substantial aggravating factor in the Miner's pulmonary fibrosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Although Employer maintains its physicians gave adequate explanations for their conclusions, the ALJ has discretion to determine the persuasiveness of a medical opinion taking into consideration the record as a whole, which he did. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); *Hicks*, 138 F.3d at 533. Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm, as supported by substantial evidence, the ALJ's finding that Employer failed to disprove legal pneumoconiosis.¹¹ 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 17. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ found Employer failed to establish "no part of the [M]iner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); MC Decision and Order on Remand at 18-19. Contrary to Employer's contention, the ALJ rationally discounted the disability causation opinions of Drs. Bellotte and Ghio because neither physician diagnosed legal pneumoconiosis, contrary to his finding that Employer did not rebut that the Miner had the disease.¹² *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler*

to support her opinion. Decision and Order at 15, quoting MC Employer's Exhibit 7. Although Employer alleges Dr. Ghio relied on the same medical article as Dr. Veraldi in rendering his opinion, it does not point to any portions of Dr. Ghio's report that contradict Dr. Veraldi's assertion that the lack of coal dust pigmentation does not necessarily exclude coal mine dust as having contributed to the Miner's fibrosis. *See Employer's Brief* at 18.

¹¹ Because we affirm the ALJ's rationale for discrediting Employer's experts, we need not address Employer's argument that Dr. Veraldi's opinion overall is not reasoned.

¹² Relatedly, Dr. Oesterling's failure to address legal pneumoconiosis diminishes the relevance of his opinion on the cause of the Miner's disability. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995). Further, his statement that coal dust did not "produce" the

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”); *see also 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); MC Decision and Order on Remand at 19. We therefore affirm the ALJ’s determination that Employer failed to establish that no part of the Miner’s respiratory disability was due to legal pneumoconiosis, and we further affirm the award of benefits in the miner’s claim. 20 C.F.R. §718.305(d)(1)(ii).

The Survivor’s Claim - Derivative Entitlement

The ALJ found Claimant satisfied the eligibility requirements for derivative survivor’s benefits pursuant to Section 422(l) of the Act. 30 U.S.C. §932(l) (2018); SC Decision and Order on Remand at 3-4. Employer raises no specific error with that finding other than to assert the Miner was not entitled to benefits. Having affirmed the ALJ’s award of benefits in the miner’s claim, we affirm his determination that Claimant is derivatively entitled to survivor’s benefits. 30 U.S.C. §932(l) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); SC Decision and Order on Remand at 5.

Miner’s disability does not address whether it aggravated the disability or whether legal pneumoconiosis played “no part” in the disability. 20 C.F.R. §718.305(d)(1)(ii); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015).

Accordingly, the ALJ's Decisions and Orders Awarding Benefits on Remand in the miner's and survivor's claims are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge