U.S. Department of Labor

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

BRB Nos. 21-0419 BLA
and 21-0419BLA-A

BEVERLY HOLT (o/b/o THOMAS D. HOLT, deceased) Claimant-Respondent Cross-Petitioner v. CONSOLIDATION COAL COMPANY Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 9/30/2022 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.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer.

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

GRESH and JONES, Administrative Appeals Judges:

Employer appeals, and Claimant cross-appeals, Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order on Remand Awarding Benefits (2017-BLA-05314) 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 miner's subsequent claim[1] filed on August 4, 2014[2] and is before the Benefits Review Board for the second time.[3]

In his initial Decision and Order Awarding Benefits, the ALJ accepted the parties' stipulations that the Miner had at least twenty-one years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, Claimant invoked the 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)[4] and established a change in an applicable condition of entitlement.[5] 20 C.F.R. §§718.305,

[1] The district director denied the Miner's prior claim on June 12, 2009, because the evidence did not establish any element of entitlement. Director's Exhibit 1.

[2] As discussed later, the parties dispute the filing date of the Miner's claim for purposes of determining the date for the commencement of benefits.

[3] Claimant is the widow of the miner, who died on July 17, 2019, and she is pursuing the Miner's subsequent claim on his behalf. *Holt v. Consolidation Coal Co.*, BRB No. 18-0351 BLA, slip op. at 3 n.6 (Jan. 16, 2020) (unpub.).

[4] 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).

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied the Miner's prior claim for failure to establish any element of entitlement, Claimant must submit new evidence establishing at least one element to warrant a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

725.309. The ALJ further found Employer did not rebut the presumption and awarded benefits, commencing August 2014.[6]

Employer appealed the ALJ's rebuttal findings and raised an evidentiary challenge.[7] Claimant cross-appealed, challenging the ALJ's determination concerning the onset date of the Miner's total disability due to pneumoconiosis.[8] Considering Employer's appeal, the Board held the ALJ confused the burdens of proof, applied the wrong legal standard, and failed to consider all the relevant evidence in determining that Employer failed to rebut the Section 411(c)(4) presumption. *Holt v. Consolidation Coal Co.*, BRB No. 18-0351 BLA, slip op. at 3-6 (Jan. 16, 2020) (unpub.). The Board also held the ALJ erred in admitting two x-ray readings Claimant submitted less than twenty days before the hearing without determining whether Claimant established good cause for their late submission. *Id.* at 6-7. Thus, the Board vacated the award of benefits and remanded the case for further consideration. *Id.* at 5. The Board instructed the ALJ to determine on remand whether Claimant established good cause for the admission of her untimely submitted x-ray evidence and then reconsider whether Employer rebutted the Section 411(c)(4) presumption. *Id.* at 7-8.

On remand, the ALJ found Claimant established "good cause" for admitting her untimely submitted x-rays and that Employer did not rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.456(b)(3). He awarded benefits, commencing August 2014.[9]

On appeal, Employer argues the ALJ erred in admitting Claimant's untimely submitted x-ray evidence and in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. On cross-appeal,

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[6] On March 23, 2018, the Miner filed a motion for reconsideration requesting that benefits commence July 2009, which the ALJ denied. April 3, 2018 Order Denying [Claimant's] Motion for Reconsideration.

[7] The Board previously affirmed, as unchallenged, the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. *Holt v. Consolidation Coal Co.*, BRB No. 18-0351 BLA, slip op. at 3 n.5 (Jan. 16, 2020) (unpub.).

[8] Separately, the Board dismissed as untimely filed Claimant's cross-appeal of the ALJ's finding regarding the commencement date for benefits. *Holt v. Consolidation Coal Co.*, BRB Nos. 18-0351 BLA, 18-0351 BLA-A (Aug. 9, 2018) (Order).

[9] The ALJ denied Employer's motion for reconsideration challenging the ALJ's evidentiary ruling. May 4, 2021 Order Denying Employer's Motion for Reconsideration.

Claimant argues the ALJ erred in determining the commencement date for benefits.[10] Employer filed a combined response to Claimant's cross-appeal and brief, reiterating its prior positions and supporting the ALJ's commencement date finding. Claimant responded, reiterating her arguments. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief to either appeal.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance with applicable law.[11] 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).

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,[12] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis

[10] Employer has filed a motion requesting that the Board dismiss Claimant's cross-appeal. It argues that because the Board dismissed Claimant's prior cross-appeal on the onset date as untimely filed and did not address the issue in its prior decision, the ALJ's findings in his initial decision regarding the onset date constitute the law of the case. Employer's Motion to Strike and Dismiss Claimant's Cross-Appeal at 3. Claimant responds, urging the Board to deny Employer's motion and Employer responded in support of its motion. Claimant's Response to [Employer's] Motion to Strike and Dismiss Claimant's Cross-Appeal; Employer's Reply to Claimant's Response to Employer's Motion to Strike and Dismiss Claimant's Cross-Appeal.

[11] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20.

[12] "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).

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 either method of rebuttal. Decision and Order on Remand at 14-20.

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

Employer relies on Drs. Zaldivar's and Fino's opinions to disprove legal pneumoconiosis. It contends the ALJ improperly found their opinions not well-reasoned and insufficient to satisfy its burden of proof. Employer's Brief at 13-31; Employer's Reply Brief at 6-13. We disagree.

Dr. Zaldivar opined the Miner had both a fixed and reversible obstructive respiratory impairment which he described as "asthma-[Chronic obstructive pulmonary disease (COPD)] overlap syndrome" and that this condition also caused centriacinar emphysema. Employer's Exhibit 7 at 6-7. Ultimately, he attributed Claimant's respiratory disease to smoking. Employer's Exhibit 7 at 7; Employer's Exhibit 8 at 20. Specifically, Dr. Zaldivar testified that he excluded coal mine dust exposure as a causative factor for the Miner's emphysema because his x-rays and CT scans did not show any dust retention in the Miner's lungs. Employer's Exhibit 8 at 24. Dr. Zaldivar generally noted that when coal mine dust exposure causes emphysema, there should be evidence of coal mine dust burden in the lungs. Employer's Exhibit 8 at 24. The ALJ permissibly found Dr. Zaldivar's opinion inconsistent with the regulations and the Department of Labor's (DOL's) position in the preamble to the 2001 revised regulations that a miner may have legal pneumoconiosis independent of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,945 (Dec. 21, 2000); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012) (opinion that emphysema could not have been caused by coal mine dust exposure because insufficient dust retention was shown on the miner's x-rays permissibly discounted as counter to the studies underlying the preamble); Decision and Order on Remand at 17.

Dr. Fino opined the Miner had bullous emphysema due solely to smoking. Employer's Exhibits 4 at 4, 16, 5 at 7, 6 at 15. He excluded coal mine dust exposure as contributing to Claimant's respiratory disease based, in part, on his belief that bullous emphysema is not caused by coal mine dust inhalation unless the miner suffers from complicated pneumoconiosis. Employer's Exhibits 4 at 9, 6 at 13-15. The ALJ permissibly found Dr. Fino's opinion unpersuasive because it was unsupported by "reference or citation to a medical text, treatise, or other literature." Decision and Order on Remand at 16; *see Banks*, 690 F.3d at 489. Because the preamble does not make a distinction between types of emphysema and states that "chronic obstructive pulmonary disease includes . . . chronic bronchitis, emphysema and asthma," the ALJ permissibly found that Dr. Fino failed to adequately address why Claimant's emphysema is not significantly related to or substantially aggravated by coal mine dust exposure. *See* 65 Fed. Reg. at 79,939, 79,944; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014).

The ALJ has discretion, as fact finder, to weigh the evidence, draw inferences and determine credibility. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ provided valid reasons for discrediting the opinions of Drs. Zaldivar and Fino, the only medical opinions supportive of Employer's burden, we affirm his finding that Employer failed to disprove legal pneumoconiosis.[13] *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005). Therefore, we affirm his finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order on Remand at 17. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. [14] 20 C.F.R. §718.305(d)(1)(i).

[13] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Zaldivar and Fino, we need not address Employer's additional arguments as to why the ALJ erred in weighing their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 15-17; Employer's Brief at 18-31. Similarly, as Employer bears the burden of proof on rebuttal and having affirmed the ALJ's rejection of Employer's experts, we need not address Employer's argument that the ALJ erred in finding Dr. Lenkey's opinion reasoned and documented as it does not aid Employer on rebuttal. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *see* Decision and Order at 16; Employer's Brief at 13-17.

[14] Employer contends the ALJ erred in admitting Claimant's untimely submitted x-ray readings on remand and in finding the x-ray evidence insufficient to disprove clinical pneumoconiosis. Employer's Brief at 3-13; Employer's Reply Brief at 2-6. We need not

Disability Causation

The ALJ next considered whether Employer established "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); Decision and Order on Remand at 19. The ALJ permissibly discredited the opinions of Drs. Zaldivar and Fino on the cause of the Miner's pulmonary disability because they did not diagnose legal pneumoconiosis.[15] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order on Remand at 19. We therefore affirm the ALJ's finding that Employer failed to establish that no part of the Miner's pulmonary disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Commencement Date of Benefits

The date for the commencement of benefits is the month in which the Miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes the Miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim, benefits may not be paid for any period before the date on which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The ALJ found "none of the medical experts whose reports have been considered satisfactorily address a specific onset date of [the Miner's] total disability" and therefore awarded benefits commencing August 2014, the month in which the ALJ found the Miner filed his claim. Decision and Order on Remand at 19-20. Claimant contends the ALJ failed to sufficiently address her argument that the Miner was totally disabled as early as

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address Employer's contentions relevant to clinical pneumoconiosis, as we have affirmed the ALJ's findings on legal pneumoconiosis and his conclusion that Employer is unable to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. *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; Decision and Order on Remand at 13.

[15] Drs. Zaldivar and Fino did not address whether legal pneumoconiosis caused the Miner's total respiratory disability independent of their conclusion that the Miner did not have the disease.

August 2009, the month after the denial of his prior claim. Claimant's Brief at 24-29; Claimant's Reply Brief at 7-10; *see* Decision and Order on Remand at 19 n.14;[16] Claimant's Remand Brief at 20-24. Alternatively, Claimant contends the ALJ also failed to address her argument that he incorrectly identified the filing date of the Miner's claim as August 2014 because it was actually postmarked July 31, 2014. Claimant's Brief at 22-24, 29-31; *see* Claimant's Remand Brief at 24-25.

Employer contends the ALJ's finding in both his initial Decision and Order and his decision on remand that benefits commence as of August 2014 must be affirmed under the law of the case doctrine. It asserts that because the Board previously dismissed Claimant's cross-appeal regarding the commencement date, Claimant is now foreclosed in the current appeal from challenging the ALJ's remand determination as to the commencement date. Employer's Reply Brief at 15-20, 31; Employer's Motion to Strike and Dismiss Claimant's Cross-Appeal. In addition, it contends that if Claimant is awarded benefits as early as August 2009 based solely on invocation of the Section 411(c)(4) presumption,[17] it will be deprived of due process of law and that the ordinary rules of statutory construction will also be violated. *Id.* at 20-31. We reject Employer's contentions and agree with Claimant that the case must be remanded for further consideration of the commencement date issue.

Initially, there is no merit to Employer's contention that the law of the case doctrine requires affirmance of the ALJ's commencement date determination. Employer's Reply Brief at 15-20. The effect of the Board's vacating the ALJ's prior decision was to return the parties to the status quo ante, with all of the rights, benefits, or obligations they had prior to the issuance of that decision. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985); *Holt*, BRB No. 18-0351 BLA, slip op. at 8. Consequently, the ALJ was permitted to revisit and reconsider the proper commencement date for benefits in the miner's claim.

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[16] The entirety of the ALJ's analysis is as follows:

> On cross-appeal, Claimant argued that the undersigned erred in concluding that the Claimant's onset date is August 2014. The Board did not address this argument. Claimant argues the onset date should be August 2009 – when Claimant states that the evidence demonstrates when the [M]iner became disabled. The undersigned does not agree.

Decision and Order at 19 n.14.

[17] Employer asserts "Claimant does not argue that there were any medical opinions prior to February 19, 2015 that established that the [M]iner was total[ly] disabled *due to pneumoconiosis*." Employer's Reply Brief at 22.

We also note that in this subsequent claim, while the denial of the Miner's prior claim must be accepted as both final and correct, Claimant could still be found entitled to benefits any time after the date of the final denial of the Miner's prior claim. *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483 (6th Cir. 2009); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1360-62 (4th Cir. 1996) (en banc). Accordingly, we deny Employer's Motion to Strike and Dismiss Claimant's Cross-Appeal.

Claimant asserts the evidence establishes the Miner had a totally disabling respiratory impairment as early as July 2009 and therefore benefits should commence in August 2009, the month after the district director's June 12, 2009 denial of the Miner's prior claim became final on July 12, 2009. Claimant's Brief 24-29, n.3; Claimant's Reply Brief at 7-10; Director's Exhibit 1. Specifically, Claimant relies on the Sixth Circuit's reasoning in *Coleman v. Christen Coleman Trucking*, 784 F. App'x 431 (6th Cir. 2019) (unpub.). In *Coleman*, the Sixth Circuit affirmed that evidence of total disability from a miner's prior claim can be considered to find that the subsequently reinstated Section 411(c)(4) presumption of total disability due to pneumoconiosis was established in the miner's subsequent claim and also thereby established, by benefit of the presumption, the onset date of when the miner became totally disabled due to pneumoconiosis for purposes of determining the date for the commencement of benefits. Claimant's Brief at 25-29, *citing Coleman*, 784 F. App'x at 431; *Dalton v. OWCP*, 738 F.3d 779 (7th Cir. 2013).

In considering the onset date of a miner's total disability due to pneumoconiosis for determining the date for the commencement of benefits, the Sixth and Seventh Circuits have affirmed decisions where evidence of total disability that predated the 2010 reinstatement of the Section 411(c)(4) presumption was considered in determining that the Section 411(c)(4) presumption was established and the onset date of when the miner became totally disabled due to pneumoconiosis for purposes of determining the date for

the commencement of benefits.[18] *Coleman*, 784 F. App'x at 436;[19] *Dalton*, 738 F.3d at 785. Employer asserts that the current case before the Board is distinguishable from *Coleman*. Specifically, it notes there was no finding of total disability in the Miner's prior claim on which establishment of the Section 411(c)(4) presumption could be based to support the onset date of the Miner's total disability due to pneumoconiosis that Claimant argues should apply in determining the date for the commencement of benefits. Employer's Reply Brief at 26.

[18] In *Coleman*, the denial of a miner's prior claim because the evidence did not specifically establish that his totally disabling respiratory or pulmonary impairment was due to pneumoconiosis became final in October 2008. In the miner's subsequent claim filed after the 2010 reinstatement of the Section 411(c)(4) presumption, the Sixth Circuit affirmed the ALJ's determination that the miner was entitled to benefits beginning in November 2008 because the Section 411(c)(4) presumption was established based on evidence of total disability from the Miner's prior claim. *See Coleman*, 784 F. App'x at 436. Similarly, in *Dalton*, the ALJ determined a miner was entitled to benefits beginning in August 1991 because the 2010 reinstated Section 411(c)(4) presumption was established based on evidence of total disability dating back to 1991. The Seventh Circuit affirmed the ALJ's determination that the miner's total disability dating from 1991 was due to pneumoconiosis because the Section 411(c)(4) presumption of total disability due to pneumoconiosis was established and therefore benefits should commence in August 1991. *Dalton*, 738 F.3d at 779.

[19] Contrary to Employer's argument, Claimant is eligible to invoke the Section 411(c)(4) presumption as it applies to all claims filed after January 1, 2005, 20 C.F.R. §718.305(a), and the Miner's subsequent claim was filed on or around August 4, 2014. Director's Exhibit 3; Employer's Reply Brief at 23. Employer further contends that the applicability of *Coleman* is limited because statutory construction of the Act and interpretation of its implementing regulations was not at issue before the Sixth Circuit. Contrary to Employer's contention, the Director provided his interpretation of the regulations in *Coleman*, urging the Court to affirm the Board's decision to change the entitlement date to the month in which the claimant filed his subsequent claim, and asked that deference be given to his interpretation. Claimant's Reply Brief at 8, *citing* Brief for the Federal Respondent, *Coleman v. Christen Coleman Trucking*, (6th Cir. Oct. 4, 2018), *available at*: https://www.dol.gov/sites/dolgov/files/SOL/briefs/coleman_2018-10-04.pdf; Employer's Brief at 24. However, the Sixth Circuit disagreed with the Director's interpretation of the regulations and held that based on the facts in *Coleman*, the ALJ rationally determined the miner was entitled to benefits commencing in the month that the denial of his prior claim became final. *Coleman*, 784 F. App'x at 435-37.

However, in depositions submitted as evidence in the Miner's subsequent claim, Drs. Fino and Zaldivar reviewed both of the 2008 pulmonary function studies and opined that the Miner was totally disabled as of that time. Employer's Exhibit 6 at 22-23; Employer's Exhibit 8 at 19-20. Thus, Claimant contends that this testimony supports its assertion that the correct onset date of the Miner's total disability for determining the date for the commencement of benefits is August 2009.[20] Claimant's Brief at 26-27, n.3. Employer does not contest this testimony of its experts but notes their testimony does not specifically establish that the Miner's disability was "due to pneumoconiosis."[21] Employer's Reply Brief at 21.

[20] Again, the district director denied the Miner's prior claim on June 12, 2009, because the evidence did not establish any element of entitlement, including, in relevant part, total disability. Director's Exhibit 1 at 273. However, the summary of the medical evidence upon which that denial was based only lists the July 14, 2008 pulmonary function study administered in conjunction with Dr. Lenkey's DOL-sponsored complete pulmonary evaluation of the Miner and notes that it was invalid. Director's Exhibit 1 at 278. Although a subsequent qualifying pulmonary function study was administered on December 10, 2008, Director's Exhibit 1 at 316, the district director did not apparently consider that pulmonary function study in finding that total disability was not established, but only the invalid July 14, 2008 pulmonary function study.

Thus, the denial of the Miner's prior claim was based, in relevant part, only on the invalid pulmonary function study administered on July 14, 2008, but not the qualifying December 10, 2008 pulmonary function study, apparently administered because the original July 14, 2008 study was invalid. Because the December 10, 2008 pulmonary function study was qualifying and was not a basis for the prior denial, it has never been considered to determine if the Miner was disabled at least since the date of the denial of the Miner's prior claim became final in July 2009.

[21] Due process requires Employer be given notice and an opportunity to mount a meaningful defense. *See Hatfield*, 556 F.3d at 478 ("The basic elements of procedural due process are notice and opportunity to be heard."). Employer submitted the depositions of Drs. Fino and Zaldivar as evidence in support of its case in the Miner's subsequent claim and it had the opportunity to develop further or alternative evidence. Additionally, the Sixth Circuit has held that retroactive application of reinstated presumptions does not violate procedural or substantive due process. *See Vision Processing, LLC v. Groves*, 705 F.3d 551, 556-558 (6th Cir. 2013); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388 (4th Cir. 2011), *cert. denied*, 133 S.Ct. 127 (2012) (retroactive application of revived provision allowing derivative entitlement for surviving spouses does not violate

In his decision on remand, the ALJ did not address Claimant's arguments and did not consider the holdings in *Coleman* and *Dalton* when determining the date for the commencement of benefits in this case. Just as important, the ALJ did not consider the relevant testimony of Drs. Fino and Zaldivar.[22] *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); *see also Napier*, 301 F.3d at 713-14. Rather, he summarily stated that he disagreed with Claimant's contention that the onset date should be August 2009.[23] This

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substantive due process). Thus, we reject Employer's assertion that its right to due process has been violated.

[22] We note that when the case was initially before the ALJ, he found total disability established based on the stipulation of the parties and therefore did not consider any of the medical opinion evidence regarding total disability. 2018 Decision and Order at 12-13. He only considered the testimony of Drs. Fino and Zaldivar in regard to whether they "opined as to a specific date that [the Miner] became disabled due to coal workers' pneumoconiosis." April 3, 2018 Order Denying [Claimant's] Motion for Reconsideration at 2. Because neither doctor believed the Miner had pneumoconiosis, the ALJ found "their opinions cannot be used to establish a specific date in which Claimant became totally disabled due to coal workers' pneumoconiosis." *Id.* However, as the Section 411(c)(4) presumption of total disability due to pneumoconiosis was invoked and not rebutted, Claimant only needs to establish when the Miner became totally disabled to establish the onset date of the Miner's total disability due to pneumoconiosis. *See Coleman*, 784 F. App'x at 436; *Dalton*, 738 F.3d at 785.

[23] Our dissenting colleague conflates the standard for establishing entitlement to benefits in a subsequent claim at 20 C.F.R. §725.309(c)(4) with the standard for determining when those benefits commence at 20 C.F.R. §725.309(c)(6). While Section 725.309(c)(4) requires a change in an applicable condition of entitlement based on new evidence as a threshold finding, once that change is established – as was the case here – Claimant is entitled to a review of her claim on the merits based on all relevant evidence, including evidence submitted in the Miner's prior claim. *See* 20 C.F.R. §725.309(c)(2) (Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim). Thus, the ALJ should consider the evidence from the Miner's prior claim, which was made part of the record in the current claim, while also respecting the finality of the district director's denial of the Miner's prior claim by setting the date for commencement of benefits after the date that the denial became final, as the regulations expressly permit. 20 C.F.R. §725.309(c)(4) ("no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final").

falls short of what the Administrative Procedure Act (APA) requires.[24] We also agree that, if necessary, the ALJ should address Claimant's alternative argument, that the Miner filed his subsequent claim in July 2014.[25] Claimant's Brief at 29-31; *see* Claimant's Remand Brief at 24-25. We therefore vacate the ALJ's finding that August 2014, is the proper commencement date for benefits. Decision and Order on Remand at 20; *Wojtowicz*, 12 BLR at 1-165.

On remand, the ALJ must reconsider all of the relevant evidence and determine if it establishes the onset date of the Miner's total disability for purposes of determining the date for the commencement of benefits in accordance with the holdings in *Coleman* and *Dalton* and this Decision and Order. Further, in rendering his determinations on remand, the ALJ must explain his rationale and conclusions as the APA requires. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165.

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

[24] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[25] The regulation at 20 C.F.R. §725.303(b) provides:

> A claim submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark.

SO ORDERED.

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's decision to remand this case for the ALJ to consider Claimant's argument that the Miner filed his subsequent claim in July 2014 for the purpose of establishing a commencement date for benefits but respectfully dissent from the majority's remaining remand instructions as they are inconsistent with applicable law.

Benefits commence in the month the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes the Miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim, benefits may not be paid for any period before the date on which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The ALJ awarded benefits commencing in August 2014. Decision and Order on Remand at 19-20. The majority determined that the ALJ did not adequately address Claimant's assertions that the Miner was totally disabled as early as July 2009 and that benefits should commence in August 2009, nor Claimant's reliance on the holdings in *Coleman v. Christen Coleman Trucking*, 784 F. App'x 431 (6th Cir. 2019) (unpub.) and *Dalton v. OWCP*, 738 F.3d 779 (7th Cir. 2013). The majority also determined that the ALJ failed to address Claimant's alternative argument that the Miner filed his subsequent claim in July 2014.

Contrary to the majority's analysis, the present case is distinguishable from *Coleman* and *Dalton*.[26] *Coleman*, 784 F. App'x 431; *Dalton*, 738 F.3d 779. Unlike the facts in *Coleman*, there was no finding of total disability in the Miner's prior claim to which the presumption could be applied to support the onset date asserted by the Claimant. Director's Exhibit 1 at 276 (unpaginated). Here, the district director specifically determined the objective testing did not "meet the regulatory standards" and the physicians did not diagnose a totally disabling respiratory or pulmonary condition. *Id.* He consequently concluded that Claimant did not establish he was totally disabled. *Id*. As the district director's total disability determination was a predicate to his ultimate conclusion that Claimant was not entitled to benefits (it was necessary to, and part and parcel of, the district director's final denial), that determination that Claimant was not totally disabled must be accepted as "final and correct." *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483 (6th Cir. 2009) (quoting *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 616 (4th Cir. 2006)); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1361 (4th Cir. 1996) (en banc) (a prior final determination that a miner was not entitled to benefits, and "its necessary factual underpinning" at that time, must be accepted as legally correct); *see also Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 327 (6th Cir. 2014); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759-60 (6th Cir. 2013) ("A claimant is required to submit newly developed evidence to ensure that he is not merely relitigating the prior claim."); Director's Exhibit 1 at 276 (unpaginated).

Moreover, utilizing evidence pertaining to the Miner's physical condition prior to the previous (and final) determination denying benefits naturally results in contravention of the finality of the prior determination. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); *Hatfield*, 556 F.3d at 483; *Williams*, 453 F.3d at 615-16; *Rutter*, 86 F.3d at 1361; *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-14 (4th Cir. 2015); *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594 (6th Cir. 2013).

Thus, the evidence Claimant seeks to use to establish a July 2009 onset date cannot be employed for that purpose. More specifically, Claimant bases his argument on the following: in his deposition, Dr. Fino opined the Miner would have been totally disabled at any time after his July 14, 2008 pulmonary function study. Employer's Exhibit 6 at 16,

[26] In *Coleman*, the miner's prior claim was denied because the evidence did not specifically establish that his totally disabling respiratory or pulmonary impairment was *due to pneumoconiosis*. *Coleman*, 784 F. App'x at 436. *Dalton* is of limited value because it is not a subsequent claim and thus did not have a prior final determination regarding whether the miner was totally disabled. *See Dalton*, 738 F.3d 779.

23.[27] Similarly, at his deposition, Dr. Zaldivar opined the Miner would have been totally disabled since 2008 and referenced the Miner's December 10, 2008 pulmonary function study. Employer's Exhibit 8 at 19-20.[28] Claimant therefore contends his disability can be recognized as existing as of the month after the prior determination was rendered. However, Claimant's argument fails because the objective testing cited by Drs. Fino and Zaldivar, and on which their opinions are based, was part of the record for the district director's June 12, 2009 Proposed Decision and Order (PDO), which became a final decision because it was not appealed, and that decision specifically addressed whether Claimant was disabled and denied entitlement on the basis he was not. Consequently, employing that evidence to establish disability onset, and thus the entitlement date for this subsequent claim, would violate the finality of the district director's decision.

In light of the foregoing, I would remand this case for the ALJ to consider Claimant's argument that the Miner filed his subsequent claim in July 2014 for the purpose of establishing a commencement date.

Accordingly, I concur in part and dissent in part from the majority's opinion.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

[27] This study was entered into evidence and specifically considered in the prior final denial.

[28] This study was entered into the record of the prior final denial but was not specifically discussed by the district director.