

U.S. Department of Labor

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



BRB Nos. 21-0499 BLA  
and 21-0500 BLA

EVELEE RHODES )  
(o/b/o and Widow of RALPH V. RHODES) )

Claimant-Respondent )

v. )

CLINCHFIELD COAL COMPANY )

and )

DATE ISSUED: 9/30/2022

PITTSTON COMPANY )

Employer/Carrier- )  
Petitioners )

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

Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Susan Hoffman,  
Administrative Law Judge, United States Department of Labor.

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

Kendra Prince (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer  
and its Carrier.

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

## PER CURIAM

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Awarding Benefits (2019-BLA-05861, 2019-BLA-06335) rendered on claims 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 filed on September 26, 2017,<sup>1</sup> and a survivor's claim filed on February 6, 2018.

The ALJ accepted the parties' stipulation that the Miner had at least fifteen years of qualifying coal mine employment. In considering the Miner's claim, she found Claimant established the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant<sup>2</sup> invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis<sup>3</sup> and established a change in an applicable condition of entitlement in the Miner's claim.<sup>4</sup> She further found Employer did not rebut the presumption and therefore awarded benefits in the Miner's claim. In the

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<sup>1</sup> The Miner filed two prior claims for benefits. Miner's Claim (MC) Director's Exhibit 1. His most recent prior claim, filed on February 9, 1987, was finally denied by the district director for failure to establish any element of entitlement. Decision and Order at 5; Director's Exhibit 1.

<sup>2</sup> Claimant is the widow of the Miner, who died on January 14, 2018. MC Director's Exhibits 10, 11. She is pursuing the Miner's claim on his behalf, along with her own survivor's claim. Survivor's Claim (SC) Director's Exhibit 2.

<sup>3</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that the Miner's total disability or 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

<sup>4</sup> Where a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must also deny the subsequent claim unless she 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)(1); *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 Miner did not establish any element of entitlement in his prior claim, Claimant had to submit evidence establishing at least one element to obtain review of the merits of Miner's current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

survivor's claim, the ALJ found Claimant is entitled to derivative benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l).<sup>5</sup>

On appeal, Employer argues the ALJ erred in finding the Section 411(c)(4) presumption un rebutted.<sup>6</sup> Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.<sup>7</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

### **The Miner's Claim**

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,<sup>8</sup> or "no part

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<sup>5</sup> Section 422(l) of the Act provides that the 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 without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

<sup>6</sup> We affirm, as unchallenged on appeal, the ALJ's determinations that Claimant invoked the Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 5, 20.

<sup>7</sup> 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 3.

<sup>8</sup> "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). "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).

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.

### **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)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Perper, Green, and Caffrey. Decision and Order at 22-25. Dr. Perper diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/severe emphysema due in part to coal mine dust exposure. Claimant’s Exhibit 6. Similarly, Dr. Green diagnosed legal pneumoconiosis in the form of COPD due to coal mine dust exposure and cigarette smoking. MC Director’s Exhibit 19. Dr. Caffrey did not address whether the Miner’s COPD and emphysema were related to coal mine dust exposure. Based on a review of the Miner’s autopsy slides, he opined the Miner had idiopathic pulmonary fibrosis due to usual interstitial pneumonia from an unknown cause.<sup>9</sup> Employer’s Exhibit 2.

The ALJ credited as well-reasoned and documented Dr. Perper’s uncontradicted opinion that the Miner’s COPD/emphysema constituted legal pneumoconiosis. Decision and Order at 24-25. Moreover, as Dr. Caffrey did not address whether the Miner had COPD or emphysema, and thus whether those conditions constituted legal pneumoconiosis, she found Employer did not rebut the existence of the disease. *Id.*

Employer contends the ALJ erred in her analysis of the medical opinion evidence. Employer’s Brief at 7-14. We disagree.

The ALJ accurately noted that Dr. Caffrey did not adequately address the issue of legal pneumoconiosis, as he did not address the cause of Claimant’s emphysema or COPD and did not address the cause of the Miner’s respiratory impairment. Decision and Order at 24; Employer’s Exhibit 2; Employer’s Brief at 10-13. Rather, the physician stated only that the Miner’s lung fibrosis was not clinical pneumoconiosis, that the cause of his fibrosis is unknown, and that coal workers’ pneumoconiosis did not contribute to his death. Employer’s Exhibit 2. The ALJ therefore rationally found that Dr. Caffrey’s opinion was

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<sup>9</sup> Dr. Perper responded that the diffuse fibrosis Dr. Caffrey described was a form of clinical pneumoconiosis. Claimant’s Exhibit 10.

not sufficient to rebut the presumption that the Miner's COPD/emphysema was legal pneumoconiosis. *Minich.*, 25 BLR at 1-155 n.8; 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 19. As the only remaining medical opinions from Drs. Perper and Green diagnosed the Miner with COPD due in part to coal mine dust exposure, the ALJ rationally found Employer failed to rebut the presumption of legal pneumoconiosis.<sup>10</sup> *Minich.*, 25 BLR at 1-155 n.8; 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 19.

As Employer did not rebut legal pneumoconiosis, we need not address its arguments that the ALJ erred in finding it did not rebut clinical pneumoconiosis with Dr. Caffrey's opinion that the Miner had idiopathic pulmonary fibrosis of an unknown origin. 20 C.F.R. §718.305(d)(1)(i)(B); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 3-7. Accordingly, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

### **Disability Causation**

The ALJ next considered whether Employer established that "no part of the Miner'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 at 26. Drs. Perper and Green opined the Miner was totally disabled due to pneumoconiosis. MC Director's Exhibit 19; Claimant's Exhibit 6. No other physician addressed the cause of his disabling impairment.

The ALJ accurately noted that Dr. Caffrey did not address the extent or cause of the Miner's impairment, opining only that coal workers' pneumoconiosis did not contribute to his death. Decision and Order 14-15, 26; Employer's Exhibit 2. Consequently, the ALJ accurately found that Dr. Caffrey failed to explain why pneumoconiosis did not contribute to the Miner's total disability. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27. Moreover, to the extent Dr. Caffrey's opinion suggested any pulmonary disorder was unrelated to coal worker's pneumoconiosis, the ALJ permissibly discredited it, since Dr. Caffrey did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 26; Employer's Brief at 15-16.

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<sup>10</sup> Contrary to Employer's argument, Claimant was not required to establish the Miner's emphysema was legal pneumoconiosis. Employer's Brief at 12. Employer had to rebut the presumption that the Miner had legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A).

We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory or pulmonary disability was caused by legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26. We further affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and thus affirm the award of benefits in the Miner's claim. 30 U.S.C. §921(c)(4) (2018).

### **Survivor's Claim**

The ALJ found Claimant entitled to survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l) (2018), based on the award in the Miner's claim. Decision and Order at 26. Employer raises no specific error regarding this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Having affirmed the ALJ's award of benefits in the miner's claim, we affirm her 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); Decision and Order at 26.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge