**U.S. Department of Labor**

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

BRB Nos. 22-0302 BLA
and 22-0303 BLA

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| DIANE TILLER<br>(o/b/o and Widow of LAWRENCE TILLER)<br><br>Claimant-Respondent<br><br>v.<br><br>ISLAND CREEK COAL COMPANY<br><br>Employer-Petitioner<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 9/28/2023<br><br>DECISION and ORDER |

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

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2020-BLA-05284 and 2020-BLA-05298) 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 claim filed on July 19, 2018, and a survivor's claim filed on January 14, 2019.[1]

The ALJ credited the Miner with 17.5 years of qualifying coal mine employment and accepted Employer's concession that he was totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found Claimant[2] invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] She further found Employer failed to rebut the presumption and awarded benefits. Based on the award of benefits in the miner's claim, she found Claimant derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[4]

On appeal, Employer contends the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.[5] Neither Claimant nor the Director, Office of Workers' Compensation Programs, 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

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[1] The appeal in the miner's claim was assigned BRB No. 22-0302 BLA and the appeal in the survivor's claim was assigned BRB No. 22-0303 BLA. The Benefits Review Board consolidated these appeals for purposes of decision. *Tiller v. Island Creek Coal Co.*, BRB Nos. 22-0302 BLA and 22-0303 BLA (May 25, 2022) (unpub. Order).

[2] Claimant is the widow of the Miner, who died on December 13, 2018. Survivor's Claim Director's Exhibit 8. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a 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.

[4] 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).

[5] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

**Miner's Claim--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,[7] 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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ found Employer failed to establish rebuttal by either method.[8] Decision and Order at 5-14.

**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*, 25 BLR at 1-159.

Employer relies on the opinions of Drs. Fino and Rosenberg that the Miner did not have legal pneumoconiosis, but instead suffered from heart disease and chronic obstructive

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim Director's Exhibit 4; Hearing Transcript at 15.

[7] "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).

[8] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 7.

pulmonary disease (COPD) and emphysema due to smoking.[9] Miner's Claim Director's Exhibits 20, 21; Employer's Exhibits 54-57. The ALJ found neither physician adequately addressed whether the Miner's coal mine dust exposure contributed to, or substantially aggravated, his COPD and emphysema. She therefore found Employer did not rebut legal pneumoconiosis.

Employer initially contends that none of the Miner's pulmonary impairments constituted legal pneumoconiosis absent proof that they were significantly related to, or substantially aggravated by, coal mine dust exposure. Employer's Brief at 5-6 (unpaginated). Contrary to Employer's contention, "[o]nce the presumption is invoked, there is no need for the claimant to prove the existence of pneumoconiosis; instead, pneumoconiosis arising out of coal mine employment is presumed, subject only to rebuttal by the employer." *W.Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018).

Employer next argues the ALJ failed to consider all relevant evidence because she ignored Drs. Fino's and Rosenberg's opinions that the Miner's heart disease affected his pulmonary condition. Employer's Brief at 6, 14 (unpaginated). But the ALJ considered that Drs. Fino and Rosenberg diagnosed the Miner with a heart condition that contributed to his pulmonary impairment. Decision and Order at 9, 11. Moreover, Drs. Fino and Rosenberg diagnosed the Miner with lung disease, namely, COPD. Director's Exhibits 20 at 7-8; 21 at 5-7. Because Employer has the burden to establish the Miner's COPD was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," 20 C.F.R. §718.201(b), the ALJ properly focused on its experts' opinions regarding the etiology of that disease. *See Smith*, 880 F.3d at 695.

The ALJ gave little weight to Drs. Fino's and Rosenberg's opinions that the Miner's COPD was due solely to smoking because she found neither physician adequately explained why his years of coal mine dust exposure did not contribute, along with smoking, to his COPD and emphysema. Decision and Order at 12. She found their reasoning for attributing the Miner's COPD and emphysema solely to smoking unpersuasive because neither physician addressed the potential additive effect of coal mine dust exposure with that of smoking. *Id.* Additionally, she was not persuaded by Dr. Rosenberg's exclusion of coal mine dust exposure as a cause of the COPD based on his opinion that cigarette smoke is more harmful than coal mine dust exposure in causing obstructive lung disease. *Id.* She also found Dr. Fino's reliance on the fact that the Miner's coal mine dust exposure was

[9] The ALJ also considered Dr. Raj's opinion that the Miner had legal pneumoconiosis, but his opinion does not support rebuttal. Director's Exhibits 15, 22.

remote in time to be contrary to the regulation recognizing pneumoconiosis as a latent and progressive disease. *Id.* at 12; *see* 20 C.F.R §718.201(c).

Employer does not address the ALJ's credibility determinations, but instead argues Drs. Fino and Rosenberg gave well-reasoned opinions that should have received "dispositive weight." Employer's Brief at 12 (unpaginated). Its argument, however, is 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). We therefore affirm the ALJ's otherwise unchallenged credibility determinations. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, we affirm her determination that Employer failed to establish the Miner did not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 12. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

**Disability Causation**

To disprove disability causation, Employer must establish "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). The ALJ found Drs. Fino's and Rosenberg's opinions do not meet Employer's burden for the same reasons she gave when discrediting their opinions on legal pneumoconiosis. Decision and Order at 13. Employer argues the ALJ erred in finding it failed to rebut the presumed fact of disability causation, but raises no arguments independent of those we have already rejected. Employer's Brief at 15-16 (unpaginated). Moreover, it was rational for the ALJ to discredit Drs. Fino's and Rosenberg's disability causation opinions when neither physician diagnosed legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015). We therefore affirm the ALJ's determination that Employer failed to establish no part of the Miner's respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 12-14.

**Survivor's Claim**

The ALJ determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(*l*) (2018); Decision and Order at 14. Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 14.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge