U.S. Department of Labor

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

BRB Nos. 22-0343, 22-0417 BLA

BETTY J. DEEL (o/b/o and Widow of JESSEE J. DEEL) Claimant-Respondent v. CLINCHFIELD COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 9/22/2023 DECISION and ORDER

Appeal of the Decision and Order on Remand in Miner's Claim and Decision and Order in Survivor's Claim Awarding Benefits of Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Kendra Price (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer.

Before: BOGGS, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order on Remand in Miner's Claim and Decision and Order in Survivor's

Claim Awarding Benefits (2016-BLA-05279; 2019-BLA-06216) 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 November 7, 2013,[1] and a survivor's claim filed on May 29, 2019. The miner's claim is before the Benefits Review Board for the second time.

In a September 26, 2018 Decision and Order, the ALJ credited the Miner with 15.72 years of qualifying coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. She therefore found he established a change in an applicable condition of entitlement,[2] 20 C.F.R. §725.309(c), and was entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). She further found Employer failed to rebut the presumption and awarded benefits.

Employer appealed, and the Board affirmed the ALJ's finding the Miner established 15.72 years of qualifying coal mine employment. *Deel v. Clinchfield Coal Co.*, BRB No.

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[1] This is the Miner's tenth claim for benefits. Director's Exhibit 1. Each of the Miner's nine prior claims was withdrawn or denied by a deputy commissioner/district director. *Id.* On June 8, 2010, the district director denied the Miner's ninth claim, filed on November 30, 2009, because he did not establish any element of entitlement. *Id.* The Miner died on April 20, 2019. Survivor's Claim Director's Exhibits 1, 3. Claimant, the Miner's widow, is pursuing the miner's claim on his behalf.

[2] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, 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); *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 new evidence establishing at least one element of entitlement in order to obtain review of the current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[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).

19-0059 BLA, slip op. at 2 n.4 (Dec. 10, 2019) (unpub.). However, the Board vacated her finding the Miner established a totally disabling respiratory or pulmonary impairment. *Id.* at 4-5. The Board held the ALJ failed to consider the opinions of Drs. McSharry and Sargent that the Miner's arterial blood gas studies were qualifying but normal for his advanced age, and thus did not indicate any impairment. *Id.* The Board further held that the ALJ's consideration of the blood gas studies impacted her evaluation of the medical opinion evidence concerning total disability. *Id.* The Board therefore vacated the ALJ's determination that the Miner established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. *Id.* The Board declined to address Employer's challenge to the ALJ's finding it failed to rebut the presumption, as Employer could challenge that finding if the ALJ found the presumption invoked on remand. *Id.* at 5 n.11. Thus the Board remanded the case for further consideration of whether the Miner established total disability pursuant to 20 C.F.R. §718.204(b)(2) and invoked the Section 411(c)(4) presumption and, if so, whether Employer successfully rebutted the presumption pursuant to 20 C.F.R. §718.305(d)(1). *Id.* at 4-5.

On remand, the ALJ again found the Miner had a totally disabling respiratory or pulmonary impairment, and therefore invoked the Section 411(c)(4) presumption. She further found Employer failed to rebut the presumption and awarded benefits.

Employer appeals, arguing the ALJ erred in finding the Miner had a totally disabling impairment. Alternatively, it argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Board's scope of review is defined by statute. We must affirm the ALJ's decision if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(2), 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 - Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7.

§718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

On remand, the ALJ found Claimant established total disability based on the arterial blood gas studies and medical opinions.[5] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order on Remand at 5-6. Employer contends the ALJ erred. Employer's Brief at 4-14. We disagree.

Arterial Blood Gas Studies

The ALJ considered five arterial blood gas studies. The July 16, 2014 and July 6, 2016 studies produced non-qualifying values,[6] while the November 12, 2013 and August 12, 2016 studies produced qualifying values. Director's Exhibits 12, 14; Claimant's Exhibit 4; Employer's Exhibit 1. The June 10, 2016 study produced non-qualifying values at rest and qualifying values during exercise.[7] Claimant's Exhibit 1. The ALJ found the June 10, 2016 exercise study entitled to greater weight than the resting study conducted on the same date, and found the 2016 studies more relevant overall due to being more recent. Decision and Order on Remand at 3-4. She thus found that, considered in isolation, the arterial blood gas studies support a finding of total disability. *Id.*

The ALJ next considered the opinions of Drs. Sargent and McSharry that the qualifying values in the Miner's blood gas studies were the result of normal age-related decreases in pulmonary function, rather than a pulmonary disease or impairment.

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[5] The ALJ found the pulmonary function studies did not establish total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 3 n.2.

[6] A "qualifying" arterial blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[7] The June 10, 2016 study is the only study administered both at rest and during exercise; all the other studies were administered only at rest. Director's Exhibits 12, 14; Claimant's Exhibits 1, 4; Employer's Exhibit 1.

Employer's Exhibits 1 at 1-2; 3 at 15-17; 4 at 13, 15-17; 6 at 1; Decision and Order on Remand at 4-5.

Dr. Sargent opined none of the studies revealed a disabling pulmonary or respiratory impairment, regardless of their qualifying values. Employer's Exhibit 3 at 15. Rather, he asserted a "normal" partial pressure of oxygen (pO2) decreases with age, even in the absence of lung disease, and the Miner's pO2 was normal for a man his age. *Id.* at 16.

Likewise, Dr. McSharry stated that age affects arterial blood gas studies because lungs deteriorate with time. Employer's Exhibit 4 at 13. He further noted "the partial pressure of oxygen declines with age in a relatively predictable fashion." *Id.* Given these observations, he opined the results of the Miner's studies were "fairly normal" for a ninety-one-year-old man. *Id.* at 17.

The ALJ permissibly discredited both doctors' opinions because they relied on a general principle that pO2 values decrease over time due to aging without citation or explanation as to why, in the Miner's specific case, his qualifying studies reflected age-related decreases and not impairment.[8] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order on Remand at 4-5. As Employer raises no further argument concerning the ALJ's evaluation of the arterial blood gas studies, we affirm her finding they support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order on Remand at 5.

Medical Opinions

The ALJ considered the medical opinions of Drs. Johnson, Raj, and Shamma-Othman that the Miner was totally disabled, and the contrary opinions of Drs. Sargent and McSharry.[9] Director's Exhibits 12, 14, 17; Claimant's Exhibits 1, 4; Employer's Exhibits

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[8] The ALJ also noted, although both physicians explained the Miner's lower PO2 values were a consequence of aging and thus "normal" for an individual of his age, neither explained why they described the Miner's markedly higher PO2 values from arterial blood gas studies administered during the same time period as "normal." Decision and Order at 4. Thus, she found the physicians did not adequately explain the inconsistency in what they consider "normal" PO2 values, nor did they explain why some of the Miner's PO2 results were apparently affected by the aging process while others were not. *Id.*

[9] The ALJ considered the supplemental opinion of Dr. Sargent in her decision and order on remand, but otherwise incorporated her discussion of the other medical opinions by refence to her initial Decision and Order. Decision and Order on Remand at 5-6.

1, 6. She credited the opinions of Drs. Johnson and Raj as well-reasoned, and discredited the opinions of Drs. Sargent, McSharry, and Shamma-Othman. Decision and Order at 20-23. Employer argues the ALJ erred in weighing the opinions of Drs. Johnson, Raj, Sargent, and McSharry. Employer's Brief at 11-14. We disagree.

As an initial matter, we disagree with Employer's argument that the ALJ erred in crediting the opinions of Drs. Raj and Johnson. Employer's Brief at 13-14.

Dr. Johnson opined the Miner was totally disabled based on his resting hypoxemia, moderate obstructive abnormality seen on pulmonary function studies, and qualifying blood gas study results. Director's Exhibits 11 at 8; 17. In a supplemental opinion, Dr. Johnson reviewed additional objective testing results and opined that, while he could not explain the variability in the Miner's blood gas studies, he nevertheless believed the Miner was totally disabled. Director's Exhibit 17. Dr. Raj opined the Miner was totally disabled based on his hypoxemia and hypercapnia demonstrated by blood gas studies, moderate obstructive defect seen on pulmonary function studies, and symptoms of severe shortness of breath, cough, and wheezing. Claimant's Exhibit 1 at 4. He further opined the reduction in the Miner's physical capacity caused by his pulmonary impairment would render him unable to perform the exertional requirements of his last coal mine employment. *Id.*

The ALJ permissibly found both physicians' opinions reasoned, noting their findings of disabling hypoxemia based upon the blood gas studies were consistent with the Miner's symptoms of shortness of breath and her own findings concerning the arterial blood gas studies, which we affirm above.[10] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 20-22.

We also find no error in the ALJ's discrediting of the opinions of Drs. McSharry and Sargent. Dr. McSharry opined the Miner's decrease in pulmonary function was due to his age, and that he had no impairment or disability as his objective testing was normal

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[10] To the extent Employer argues the ALJ should have discredited the opinions of Drs. Raj and Johnson because they did not consider additional objective testing of record, we disagree. Employer's Brief at 13-14. A medical opinion need not be discounted because the physician did not review additional medical evidence of record. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986) (ALJ properly considered whether the objective data offered as documentation adequately supported the opinion). Moreover, because the ALJ permissibly found the arterial blood gas evidence supports finding disability, any error in not taking into account the fact Drs. Raj and Johnson did not consider the other blood gas testing is harmless.

when accounting for age. Director's Exhibit 14 at 2; Employer's Exhibit 4 at 18-21. Similarly, Dr. Sargent opined the Miner demonstrated no disabling respiratory or pulmonary impairment as his objective testing was normal considering his age. Employer's Exhibit 1 at 1-2; 3 at 16-17; 6 at 1. As discussed above, we affirm the ALJ's discrediting of their opinions that the qualifying arterial blood gas studies of record demonstrate only age-related decrements. Thus, the ALJ permissibly found their opinions were not adequately reasoned as they did not explain their determination the Miner's qualifying blood gases were the result of age and not impairment. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 21-23.

We therefore affirm the ALJ's finding Claimant established total disability based upon the preponderance of the medical opinion evidence, and the record as a whole. 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 23; Decision and Order on Remand at 6. We further affirm her finding Claimant invoked the Section 411(c)(4) presumption, 20 C.F.R. §718.305(b)(1)(iii), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order on Remand at 6.

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

Because the ALJ found Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[11] 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.

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).

Employer relies on the medical opinions of Drs. McSharry and Sargent that the Miner did not have legal pneumoconiosis. Director's Exhibit 14; Employer's Exhibits 1, 3, 4, 6. Both doctors opined the Miner was disabled due to his age but had no lung disease

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[11] "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). "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).

or impairment, and thus did not have legal pneumoconiosis. Director's Exhibit 14 at 2; Employer's Exhibit 1 at 2. The ALJ found neither of their opinions adequately reasoned. Decision and Order at 27-28; Decision and Order on Remand at 6.

Employer argues the ALJ erred in discrediting their opinions. Employer's Brief at 20-24. We disagree.

Dr. McSharry opined the Miner did not have a lung disease or impairment which could constitute pneumoconiosis. Director's Exhibit 14 at 2. However, he also acknowledged that "a tendency toward emphysema may be present[,]" and listed "exacerbations of [chronic obstructive pulmonary disease]" as a potential cause of the Miner's variable blood gas study results. *Id.* The ALJ noted that, despite explicitly acknowledging these diseases as potential explanations for the Miner's condition, Dr. McSharry attributed the Miner's condition solely to age and did not explain how they were not significantly related to or substantially aggravated by coal dust exposure, and thus permissibly discredited his opinion as inadequately reasoned. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 27.

Dr. Sargent opined the Miner was disabled due to his age but did not have any respiratory disease or impairment that could constitute legal pneumoconiosis based on his "normal" objective testing results. Employer's Exhibits 1 at 1-2; 3 at 15-18; 6 at 1. The ALJ permissibly discredited his opinion because it was premised on a belief the Miner's blood gas studies were "normal" for his age, contrary to the ALJ finding the studies qualifying and demonstrative of a disabling respiratory impairment. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 28. Neither physician proffered an explanation independent of the assumption that Claimant's test results were normal.

Because the ALJ permissibly discredited the opinions of Drs. Sargent and McSharry, the only opinions supporting Employer's burden on rebuttal, we affirm her finding Employer did not disprove legal pneumoconiosis.[12] 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). We therefore need not address Employer's

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[12] We need not address Employer's argument the ALJ erred in crediting the opinions of Drs. Raj, Johnson, and Shamma-Othman that the Miner had legal pneumoconiosis, as their opinions would not assist Employer in satisfying its burden on rebuttal. *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 v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 23-24.

arguments on clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15-17.

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed whether Employer established "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 rationally discounted the opinions of Drs. Sargent and McSharry regarding the cause of the Miner's disability because they failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the Miner had the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 30. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Decision and Order on Remand in Miner's Claim and Decision and Order in Survivor's Claim Awarding Benefits are affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge